WEST COAST Environmental Law

200-2006 West 10th Avenue, Vancouver, BC V6J 2B3 | Coast Salish Territories
xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish) & sə̓lilwətaʔɬ (Tsleil-Waututh)
T 604.684.7378 | 1.800.330.WCEL | F 604.684.1312 | admin@wcel.org
@WCELaw | wcel.org

Email: consultation-policy-politique@cra-arc.gc.ca

Submissions of the West Coast Environmental Law Research Foundation

Re: Draft Legislative Proposals Relating to the Income Tax Act

West Coast Environmental Law agrees that amendments to the *Income Tax Act* (ITA) are essential to fully enable charities to engage in public policy dialogue and development, and to allow our society to realize the benefits of this charitable work. However, the Minister of Finance's **September 2018 legislative proposals** fundamentally fail to achieve this goal, and may worsen rather than improve the situation for charities like ours.

Shortcomings of the legislative proposals

We submit that legislative amendments to the ITA should be consistent with Recommendation No. 3 of the ***Consultation Panel on the Political Activities of Charities***, which urged amendments to the ITA "to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes".

Guidance released with the September 2018 legislative proposals make it clear that proposed legislative changes are inconsistent with this recommendation, in that under the new proposals, organizations that undertake too much public policy advocacy may still have their status revoked or may not be registered on the basis that they have a "political purpose". Further, deletion of existing remedial provisions (i.e., s. 149.1 (6.1) and (6.2)) *without other necessary legislative changes* risks placing us in the pre-1985 scenario when arguably no political activity at all was permitted by charities (or at best that charities must stay within an ambiguous and undefined limit beyond which they will be held to have a collateral political purpose).

At the root of this problem is the proposed retention of an ITA requirement that charities devote all of their resources to "charitable activities" rather than simply to furthering their "charitable purposes".

This is fundamentally at odds with the Honourable Justice Morgan's decision in ***Canada Without Poverty v Canada***, (CWP) which found that there was no valid distinction between non-partisan "political activities" and "charitable activities". Indeed, it is now widely understood that achieving charitable purposes such as relief of poverty or protection of the environment may only be possible at all through systemic policy shifts (CWP at para 42). As Morgan J. notes: "a key principle with respect to charitable activities is that public advocacy and charitable works go hand-in-hand in a modem democracy" (at para 25).

In our submission the government's proposed amendments fail to achieve the intention of Honourable Justice Morgan's decision in CWP, which was that charities should be free to engage non-partisan political activities "without quantum limitation, in furtherance of the organization's charitable purposes" (CWP at para 71), nor are they consistent with Recommendation No. 3 of the Consultation Panel.

Furthermore, contrary to Recommendation 3 (c) from the Consultation Panel, which recommended ending

problematic restrictions on so-called "indirect" support for political parties or candidates for public office, the federal government is proposing to entrench this problematic language in a new proposed subsections 149.1(6.1) and (6.2).

Like the Consultation Panel, West Coast supports restrictions on partisan activity by charities, in the sense of direct support for a party or candidate. However, in our experience interpretations of the "indirect" support restriction are inconsistent, confusing and silencing for charities engaged in public policy dialogue. For example, this restriction is currently interpreted by the CRA and many charities lawyers to prevent groups from even referring to named elected representatives or their party at any time, and certainly to prevent groups from critiquing or celebrating commitments made or steps taken by parties or politicians in relation to the charitable purposes of an organization. We submit that existing requirements and limitations around election advertising are more than sufficient to address any concerns the "indirect" restriction is intended to address. In particular, the *Canada Elections Act* regulates communications by charities and others which "promote or oppose a registered party or the election of a candidate."[1]

We note that unlike limitations on charities' public policy work, which were recently held to be an unjustifiable infringement of Charter rights, the courts have found that the infringement of free speech represented by third party election advertising limits is justified in a free and democratic society. In so finding, the Supreme Court of Canada put weight on the fact that the limitations applied only during the election period itself, the relatively generous nationwide $150,000 spending limit during this short period, and that the limitations applied to all types of third parties.[2] Unfortunately, the otherwise level playing field the *Canada Elections Act* attempts to create is distorted by the differential tax treatment charities currently receive as compared to corporations. While charities risk revocation of their registration for even referencing named politicians or political parties *at any time*, corporations are free to deduct most advertising expenses in Canadian newspapers, television or radio stations from income regardless of whether they have directly political or partisan content.[3]

Because the stakes are so high for charities if bona fide efforts to communicate about issues they work on are deemed to be partisan activity, the current rules can have an immobilizing and silencing effect. In the result, citizens may not have access to important information relevant to the public debate and public policy development. Or perhaps even more significantly, they may hear disproportionately from large-scale economic interests who don't face the same limitations on their speech, which raises the same public policy concerns as Parliament sought to rectify with election spending limits. In the result, all Canadians lose out.

In our submission, the ambiguity and silencing effect of both the current law and the proposed legislative provisions could be greatly reduced if the ITA prohibition was limited to direct support for candidates or parties, or what is referred to in the US legislation as "direct participation" in an election campaign. The concept of "indirect support", depending on its interpretation by auditors, has the potential to capture far too broad an array of activities, messages and communications, and to deny citizens cogent, reasoned information

[1] *Canada Elections Act*, SC 2000, c 9, s 319.

[2] *Harper v Canada (Attorney General),* [2004] SCC 33.

[3] I.e., Currently corporations may deduct unlimited amounts of lobbying and advocacy expenses to advance their private interests: *ITA,* s 20(1)(cc), as well as most advertising expenses in Canadian newspapers, television and radio stations, ss 19(1), 19.01, 19.1. By way of contrast, under the current proposal charities working for the public benefit will remain limited in the amount of resources they may devote to public policy work or risk deregistration.

about issues of importance to them. As noted, to the extent that special rules should apply during the election period, the *Canada Elections Act* already covers this and further restrictions in the ITA are unnecessary.

Proposed Solutions

We propose that the following language replace the related September 2018 draft legislative proposals:

Definition of charitable organization:

1 (1) Paragraph (a) of the definition charitable organization in subsection 149.1(1) of the Income Tax Act is replaced by the following:

(a) constituted and operated exclusively for charitable purposes,

(a.1) all the resources of which are devoted to activities to further its charitable purposes.[4]

Charitable purposes – *delete "or indirect" as follows*

(6.1) For the purposes of the definition charitable foundation in subsection (1), a corporation or trust that devotes any part of its resources to the direct ~~or indirect~~ support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes.

(6.2) For the purposes of the definition charitable organization in subsection (1), an organization that devotes any part of its resources to the direct ~~or indirect~~ support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes

Free Speech of Charities

For greater clarify consider adding the following subsection to 149.1:

The Minister may not deny registration, impose penalties or revoke the registration of a charity on the basis that the charitable organization:

(a) advocates for a particular perspective or approach to achieving charitable purposes, or

(b) participates in public policy dialogue and development, including without limitation research, analysis, awareness-raising, calls-to-action or advocacy on issues of public debate related to its charitable purposes, regardless of whether the position taken by the charity requires a change in a government decision, policy or law.

Conclusion

Canadians have long moved beyond the narrow, moralistic view of charity that characterized the Victorian period. Unfortunately, our laws have not. Without legislative reform, Canadian charities law will remain

[4] We concur with the submission of Imagine Canada that the provisions in subsections 149.1 (2), (3) and (4) are sufficient to control any leakage of funds to inappropriate recipients of tax assisted funds, and that any reference to "charitable activities carried on by the organization itself" is superfluous, especially since no such requirement exists in the definition of a public foundation or a private foundation.

constrained by an antiquated view that charity is limited to alleviating societal problems after they arise – whether it be pollution or poverty –but not preventing or enabling systemic solutions to the same problems.

Limiting charities' involvement in public debate and public policy development silences the voices of the millions of Canadians who rely on the charities they support to advance solutions they could not achieve alone. Furthermore, it exacerbates an already very uneven playing field between the individuals and the charities they support on one hand and powerful economic interests on the other.

The current Legislative Proposals Relating to the Income Tax Act fall short of what is required to free Canadian charities to engage fully in non-partisan public policy work. We thus urge the Minister of Finance and the Tax Policy Branch to consider and implement the ITA amendments proposed above.

Doing so would be consistent with judicial commentary rejecting the premise that otherwise lawful activities aimed at achieving an organization's charitable purposes can be inherently uncharitable. In particular, the courts have held that "it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature"[5]. Despite this, the Legislative Proposals continue to focus on "charitable activities".

As Mr. Justice Gonthier, concurring on this point in *Vancouver Society for Immigrant and Visible Minority Women* noted under the heading "The Distinction Between Charitable Purposes and Charitable Activities" at paras 52 and 54:

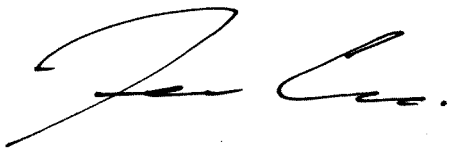
> In the law of charity, the courts' primary concern is to determine whether the purposes being pursued are charitable. It is these purposes which are essential, not the activities engaged in, although the activities must, of course, bear a coherent relationship to the purposes sought to be achieved. (I pause to emphasize that motive and purpose are not synonymous. The courts are not, in general, concerned with the motive of a donor or volunteer, only with the purpose being pursued.) A common source of confusion in this area is that judges and commentators alike often conflate the concept of "charitable purposes" and "charitable activities". The former is a long-established concept in the common law of charitable trusts. The latter is a much more recent innovation: it is contained in the **ITA** , but has no history in the common law….
>
> In the Law Reporting case, supra, at p. 86, Russell L.J. illustrated this point by supposing the example of a company which published the Bible for profit, and compared it to one which published the Bible without a view to profit, but with the purpose of distributing copies of it to the public. In each case, the activity engaged in — publishing the Bible — is identical. But the purposes being pursued are very different, and consequently the status of each company also differs. Although the former company clearly would not be pursuing a charitable purpose, the latter almost certainly would be. This example demonstrates that an activity, taken in the abstract, can rarely be deemed charitable or non-charitable. Rather, it is the purpose underlying the activity to which the courts must look initially in assessing whether the activity is charitable. It must then be determined whether there is a sufficient degree of connection between the activity engaged in and the purpose being pursued, but this is a distinct inquiry

[5] *Vancouver Society of Immigrant and Visible Minority Women v MNR,* [1999] 1 SCR 10 at online: <**http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1676/index.do**> at para 152, see also paras 45, 177, 201.

> involving separate considerations. Purposes are the ends to be achieved: activities are the means by which to accomplish those ends. Purposes must be evaluated substantively. Activities are assessed by determining the degree to which they actually are instrumental in achieving the organization's goals.

Despite these challenges, Canadian courts have deferred to the legislature to undertake necessary reforms.[6] The time to do so is now.

Respectfully submitted,
WEST COAST ENVIRONMENTAL LAW



Jessica Clogg,
Executive Director & Senior Counsel

[6] *Ibid.* at para 150.