



Towards a reform in the legal framework regulating the political activities of registered charities Four reactions from the philanthropic sector on the abolition of the 10% limitation

By David Grant-Poitras and Diane Alalouf-Hall, PhiLab
With the help of Katherine Mac Donald, PhiLab

Since 1985, article 149.1 of the Income Tax Act (ITA) limited to 10% the portion of financial resources a charity, registered through the Canada Revenue Agency, could be legally attributed to activities said to be political¹. It is important to note that this legal restriction of charitable organizations' political activities had many consequences. First of all, it favoured an apolitical conception of charity, limiting the mission of charities to the provision of direct services to the population. This being the case, any popular education action with political content was to be considered suspicious. Furthermore, any action that aimed at transforming public policy to benefit the needy could be considered a violation of the Law. Second of all, the ITA article stated that random political audits would be made, given that the Agency has to make sure registered charities were apolitical. The great difficulty in circumscribing the notion of political activities made an audit using the information collected annually by the Agency difficult. Third of all, the lack of a clear definition made it so the conception of political activities could change depending on the political position of the government in power. In illustration, under Harper's Conservative government, a more conservative interpretation was adopted in order to silence registered charities who protested the political orientations adopted by the government. Ultimately, this verification process resulted in the revocation of the charitable status of at least five organizations, and, in consequence, rendering their financial situation more fragile by depriving them of revenue generated by the fiscal advantages of their status².

Naturally, this measure was upsetting and caused much uproar in the social sphere. It was Canada Without Poverty)an organization who was at risk of losing their charitable status, that was the first to contest the constitutionality of the article in front of the Ontario Superior court. The organization emphasized that the limit constituted an “arbitrary and unjustified attack of the freedom of expression guaranteed by Article 2 of the Charter of Rights and Freedoms”³. Without going into the details of the legal saga that would follow, let

¹ Before its abolition in 2018, the regulations framing the political activities of charities were included in article 149.1 (6.1 and 6.2) of the ITA. For more details on this article of the law, consult point 9 of the policy statement CPS-022: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html#toc14>

² In total, the conservative government targeted 52 registered charities which were audited in order to determine if they respected the 10% rule; at least five organizations had their status revoked: <https://ici.radio-canada.ca/nouvelle/760709/gouvernement-trudeau-arrete-verifications-agence-revenu-canada-activites-politiques-organismes-bienfaisance>

³ Our translation: <https://ici.radio-canada.ca/nouvelle/1113280/juge-ontarien-decision-agence-revenu-statut-organismes-charite-liberte-expression>

us mentions that they pressured the Liberal government in power to put an end to all verification processes undertaken by the Conservatives as of 2012⁴. This is how the revision process of the ITA began as well as the forming of the "Consultation Panel on the Political Activities of Charities"⁵. Up until now, the government has received the report emitted by the Consultation Panel favourably and affirms the desire to put into application their recommendations, including that of "*erasing the reference to political activities from the Law*," which necessarily implies ending the limitation of non-partisan political activities of registered charities.

If the Law is amended, in the sense of a lifting of the restraints on the political activities of registered charities, it will be interesting to observe how the reintroduction of 'politics' will unfurl. Will it be timid, given a mistrust that will persist towards the Canadian legislator? Will it be audacious, given the need to increase the capacity of registered charities to have their voices heard, to make known the emergency to act concerning the many injustices: social, cultural, economic or environmental? Can we expect the apparition of new organizations, more political and less focused on the offering of services? Are we witnessing the beginning of the end of a Canadian charity regulatory system where taxation acts simultaneously as an economic incentive for generosity and as an instrument of political control?⁶

Mark Blumberg, a lawyer specialized in the legal framework of charitable organizations, favours this latter view. According to him, the abolition of this limit will have the same effect as a bomb as the political activism of a minority of organizations could undermine the credibility of the charitable sector in the eyes of the public that supports it⁷. Instead of envisioning similar catastrophic scenarios, as well as to have a more clear and nuanced idea of what this change in the legal regulation of charity could represent, we interviewed representatives of the philanthropic sector with the aim of collecting their reactions. We were curious to know how they welcomed the transformations to come and what their predictions were concerning the effects that these revisions of the ITA would have on their organizations, but also, on the charitable sector and civil society overall. Below, you will find the reactions of four representatives of four philanthropic organizations: Fondation Béati, Vigilance OGM, Association professionnels en philanthropie (AFP) et Réseau québécois de l'action communautaire autonome (RQ-ACA).

⁴https://www.canada.ca/en/revenue-agency/news/2017/05/minister_lebouthillierwelcomesthepanelreportontheconsultat.html

⁵ The Panel summarizes the nature of their recommendations: "Our recommendations are intended to break the cycle of ambiguity, confusion and uncertainty, and to support the ability of charities to more fully participate in public policy dialogue and development. We believe that implementing these recommendations will improve the quality of public policy dialogue and development in Canada while reducing administrative complexity and cost for both the sector and its regulator." (2017) To consult the full report: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html>

⁶ For a perspective on the beginnings of the "doctrine" which gave the Canadian charity regulation system the shape it has today, read: Adam Parachin (2015). « Charitable Foundations and Advocacy. Reimagining the Doctrine of Political Purposes », PhiLab, Cahier de recherche #4, URL: https://philab.uqam.ca/wp-content/uploads/2018/01/Parachin_Charitable_Foundations_Advocacy_-_Draft_Discussion_Paper.pdf ; and Peter R. Elson (2010). « The Origin of the Species: Why Charity Regulations in Canada and England Continue to Reflect Their Origins, » Volume 12, Issue 3, URL: http://www.icnl.org/research/journal/vol12iss3/art_3.htm.

⁷ See: https://www.globalphilanthropy.ca/images/uploads/Finance_Changes_to_Political_Activities_and_Canadian_charities.pdf

Jacques Bordeleau, Executive Director of the Fondation Béati

Of the opinion that we must recognize "the role of civil society as a political actor in the noble sense of the term," Jacques Bordeleau welcomes the changes made to the legal framework. "*All we need to do is adopt it; we must hope that it will surpass the commitment stage and will come through at the legislative level!*" Concerning his analysis of the situation, he interprets the abolition of the 10% limit as being a symptom of a paradigm shift. The Fondation Béati hopes that this change is in fact but the first step in a more profound change of the law. While the question of the limitation of political action was a significant issue, Mr. Bordeleau feels "*that there are other aspects of the law that deserve to be revised.*" According to him, it is the definition of "charitable activity" itself that is a problem and limits a large part of civil society organizations. "*All organizations for the defence of rights which are excluded for example,*" he remarks. This restrictive framework around charity stops organizations from qualifying as registered charities when their voices could contribute to the "advancement of democracy."

Thus, the means of intervention have evolved, and the law has become somewhat obsolete. The fact that religion remains one of charity's three fields of intervention, on the same level as the fight against poverty and education is proof. Without detracting from the importance of religion in society, it remains that this "is proof of entrenchment in another era" he believes. A full revision of the law will need to take place if the objective is to support civic action in the public arena around the issue of the common good.

Thibault Rehnn, Coordinator of Vigilance OGM

At Vigilance OGM, the announcement of this law is welcomed with open arms. For Mr. Rehnn, it is essential that organizations can choose their mission according to what their board of directors has established or according to what is needed in civil society, not according to the political criteria of the CRA. He explains that these restrictions represent, for many groups, a hindrance in their registration as charities, which is essential to receive funding from foundations.

The Law has directly affected Vigilance OGM. Their registration process did not go as planned: the organization's application for charitable status was refused, amongst other reasons, due to their mission judged as being "too political." Mr. Rehnn highlights the importance of having a counter-discourse in a society that awards much space and importance to lobbyists. He also sees a paradox between the obligation of registered charities to represent the interests of the population and the fact that the government prescribes the definition itself of a registered charity. Is it possible to have a plurality of voices in this context? Thibault Rehnn questions the possibility of having their eligibility to the charitable status re-evaluated once the law is abolished.

Lisa Davey, Vice President, AFP Canada

AFP welcomes the announcement that this rule will be abolished. In fact, according to Lisa Davey, the current regulations are not clear to many of the sector's professionals. *"What is meant by the term political activity? It isn't clear!"* This question is at the root of many discussions between AFP's members over the past few years. The result is that many charities choose not to engage in political activity so as not to possibly put their charitable status in jeopardy.

Lisa Davey illustrates this situation with the statistics of political activities in registered charities. *"There are an estimated 86,000 registered charities in Canada with approximately 240 billion dollars in expenditures per year. However, only 25 million dollars are dedicated to political activities. This is a small amount of funding being reported on political activities. Charities could play a much larger role in helping to address critical issues facing our sector. They are drivers of change who have skills and expertise and they bring an important perspective!"* An initial step towards clarification was made in 2018 by replacing "political activities" with "public policy dialogue and development activities by charities." While this change was not enough, it opened the door to a revision of the Law.

In anticipation of the legal changes to come, AFP is considering how best to educate its members about this change. This explains why AFP raises awareness about the impact of these changes through discussions and articles in its newsletters. The possibility of an informative webinar has also been considered. Lisa Davey's position is clear: *"we will continue to clarify what organizations can do. They have the right to and must participate in public policy dialogue and development activities; it is an incredible opportunity to make a difference in society. First, they must know that it is possible!"* AFP is committed, as are other organizations, in the reading of informative government guides for professionals of charities. Their objective is to participate in the improvement of the understanding of these guides. The government is accepting feedback on the draft guidelines until April 23rd, 2019 and AFP plans to comment.

A summary of RQ-ACA's position

RQ-ACA is extremely sensitive to the regulation of political activities issue and *"rejects a cosmetic reform of the directives framing charities and recommends the elaboration of a new legal framework"*⁸. To support the 4 000 organizations represented by the RQ-ACA in their right to contribute to the public debate, the Network took part in the Law's revision process. Furthermore, taking advantage of the period of public consultation organized by the government, at the end of 2016, a memoir was prepared for the CRA in order to shed light on the problematic elements of the Law framing the political activities of charities and to make recommendations aimed at orienting the current legal framework reform. We present three of the critiques mentioned in the memoir regarding the legal framework in place⁹.

⁸ Our translation. To consult the original document: http://www.rq-aca.org/wp-content/uploads/me%CC%81moirerq-aca-consultationarc_organismesbienfaisancedec2016_vf.pdf

⁹ *ibid*

- According to RQ-ACA, a discrepancy exists between the legal characterization of charity on the federal level and how, on the provincial level, Quebec's government decided to recognize the political role of independent community action. Quebecois organizations who are both registered charities and community action associations find themselves in a position where they are subject to contradictory injunctions stemming from two different government levels. On one hand, the Canadian government explicitly prohibits charities from engaging in activities that are political in nature whereas, on the other hand, the Quebec government, through their Policy on the Recognition and Support of Community Action adopted in 2001, formally recognizes that “non-partisan political activities are at the heart of autonomous community organizations in Quebec”¹⁰.
- RQ-ACA criticizes the definition itself of “political activity” as it is written in the Income Tax Law, judged to be “*restrictive and arbitrary*.” A fundamental problem stems from the ambiguity around the definition, which leaves “*a large power of interpretation to the CRA*” and allows them to apply controls on a discretionary basis. In sum, the indetermination of the Law, concerning the definition of political activity has as a result to hinder freedom of expression, to impede on the right of association and finally, opens the door to political harassment.
- RQ-ACA considers that the CRA goes too far in labelling as partisan every action that “*that involves direct or indirect support of, or opposition to, any political party or candidate for public office*”¹¹. Once again, we find a divergence from the Quebec government who considers that political action can be said to be non-partisan on the condition that it “*takes place outside of the political parties recognized as such*”¹². The characterization of partisanship by the CRA is thus much more limiting, as it automatically qualifies as partisan all actions that take place within the debates around public policies and which, by doing so, interfere indirectly on the election process.

The government finally adopted a new Law on December 13th, 2018. In summary, in light of article 149.1 as modified in December 2018, several clarifications were made to the Law, but some questions are left unanswered:

- The concept of political activity was replaced by that of activities related to public policy dialogues or to their elaboration, which helps in understanding the content of authorized activities as Lisa Davey of AFP specifies.
- The 10% limit is no longer applied, but partisan political activities remain prohibited. As activities said to be partisan are still not clearly defined, a significant uncertainty on what charities can and cannot do will persist, notably in Quebec’s context where the community sector is called upon to

¹⁰ Our translation. https://www.mess.gouv.qc.ca/sacais/action-communautaire/politique-reconnaissance-soutien_en.asp

¹¹ Definition taken from the policy indicated at point 6.1, 2003, online <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html#toc6>

¹² Our translation of a position taken by the Quebec government as seen in the definition of non-partisan political action taken from the *Cadre de référence en matière d'action communautaire* (2004, p. 29). http://www.mess.gouv.qc.ca/telecharger.asp?fichier=/publications/pdf/SACA_cadre_reference_action_communautaire.pdf

play a political role. For example, Vigilance OGM can hardly predict their future as long as this legal question remains unresolved.

- The activities of charities that concern the elaboration of public policies are not charitable activities in and of themselves but must support or help in the advancement of one or several of the other charitable purposes put forth by the charity. One question remains concerning the demonstration of the impact an organization can have on its mission through political involvement. Can we truly measure what helps to advance or not an organization's cause regarding the common good? As Jacques Bordeleau aptly reminds us, this is hardly feasible for organizations who do not work in the provision of direct services, but who instead work on the defence of people's rights for instance.

According to the individuals interviewed, the precisions brought to the Law represent a win for the sector. Unanimously, respondents position themselves favourably towards the extension of charities' rights regarding political activities. For them, the main difficulty of this legislative process comes down to work surrounding definitions. The frontier between political and partisan action is thin. It is sometimes difficult to grasp. Better defining a political activity is for some a crucial financial issue. How to obtain charitable status when the definition of political activities is unclear or, even worse, when the definition of charity itself does not coincide with the mission and approach that organization has given itself in serving the common good? For others, who have already obtained the recognition of being a charitable organization, it could mean reconnecting with political involvement. How to approach it given the well-integrated conditions stemming from the fact that the practice was repressed until just recently? Hence the importance of education and of the appropriation of the space that has opened up for political action. In sum, far from ending the debate, this reform of the legal framework around the regulation of charities' political activities only opens yet another chapter in which we are collectively called upon to rethink and redefine the space that "politically-inclined charity" must occupy in our society.