

Innovation and Problem Solving: a Bolder, More Active Role For Community Foundations

An Overview of Canada's Legislative and Regulatory Environment
as it Relates to Social Justice Philanthropy

by Richard Bridge, B.A., LL.B.

Legal Advisor, IMPACS - Institute for Media, Policy and Civil Society

JANUARY 2004



*Community
Foundations
of Canada*

*Fondations
communautaires
du Canada*

301-75 rue Albert Street
Ottawa ON
Canada K1P 5E7
www.community-fdn.ca

Introduction

Canada's community foundations have tremendous potential to help identify and solve social and community problems. Rather than merely treating the symptoms, community foundations are uniquely positioned to advance "social justice" by tackling the causes of recurring problems such as poverty, environmental degradation and violations of human rights. This potential stems from:

- the dedication, knowledge, and wisdom of community foundation boards, volunteers, and professional staff who understand their communities and the issues they face;
- the credibility of community foundations as voices for the public interest;
- the collaborative relationships and networks that community foundations build with charitable organizations and other community groups -- relationships that give community foundations exposure to frontline charitable service delivery and needs, and enable community foundations to identify trends and set priorities;
- the long-term perspective that community foundations bring to their work;
- the ability to collaborate, share lessons and experiences with other community foundations; and
- the substantial financial resources that community foundations must expend for public benefit.

This paper provides guidance and a checklist of questions for community foundations interested in more fully realizing this potential. It is intended to help community foundations understand and comply with the legal and administrative requirements that govern this field. As part of Community Foundations of Canada's Social Justice Initiative, it is intended to increase the capacity and commitment of community foundations to undertake their philanthropic work from a bolder, broader social justice perspective.

Charities and "Social Justice"

There is an important ongoing debate in Canada, and other countries, on the fundamental question of the appropriate role of charities in public policy development. Some argue that charities should be confined to the role of service deliverers. Those who express this view argue in favour of significant limits to the type and amount of participation by charities in public policy discussions.

Others welcome the full participation of charities in public policy development. These individuals believe that charities have front-line experience, wisdom, and insights to bring to public policy discussions that increase the quality of the discussions and improve the decisions that flow from them. They argue that charities are important sources of public interest innovation and problem solving that makes them particularly well-suited to contribute to the discussion of the impacts of legislation and government policies on communities. They argue further that current restrictions on charities are incompatible with the modern concept of participatory democracy and that the restrictions should be relaxed so that charities can speak out and voice their perspectives on public policies in their areas of expertise without fear of adverse repercussions from government.

Those who promote this broader role for charities see them as instruments for the advancement of social justice. Charitable work to advance social justice is **"directed at social change, seeking solutions to social, economic and political injustice by addressing root causes, not just symptoms."**¹

There is scope under Canadian law and the administrative policies of the Canada Customs and Revenue Agency (CCRA) for community foundations to lead this broader type of work, but care must be taken to avoid running afoul of the limitations. This handbook will illustrate how community foundations can make progress without overstepping the limits.

A Summary of the Relevant Law and Administrative Policy

Many board and staff members of charities, including community foundations, find the law governing charities in Canada confusing and restrictive. Most charity law experts agree. The relevant federal *Income Tax Act* provisions are difficult to decipher, the guidance from the courts is incomplete, and the relevant administrative guidelines from the CCRA have been inadequate.

Three elements are central to understanding the law and administrative guidelines: a) partisan politics, b) charitable purposes, and c) "political activities."

Partisan Politics

There is clarity and virtually unanimous support for the idea that charity and partisan politics are, and should remain, absolutely separate. The law is clear that charities must not provide direct or indirect support or opposition to any political party or candidate for public office. This separation of partisan politics and charity is based on a sound principle – preservation of the independence of charities. This "independence from government or any particular political grouping is an important feature of their ability to serve their beneficiaries and to contribute more broadly to the public good."²

Charitable Purposes

A charity's "purposes" are the key phrases in its incorporating or other constitutional documents that describe its mandate. To register as a charity, the purposes must be charitable, and not political. This means that the purposes must fall within the four common law categories of charity enunciated by the English House of Lords in 1891 (*Pemsel's Case*), drawn, from earlier case law and the *Statute of Elizabeth, 1601*, and still applicable in Canada today: relief of poverty; advancement of education; advancement of religion; and other purposes beneficial to the community.

Charities cannot have political purposes. The leading authority on this issue is a 1981 English case³ that held that charitable status will be denied to an organization with purposes that include to **procure changes in the laws, government policy or decisions of government authorities of this country or a foreign country**. Canada's Federal Court of Appeal has added that "sway[ing] public opinion on important social issues" can also be a political purpose.⁴

"Political Activities" – the 10 Percent Rule

This is the root of most of the practical problems and controversy around civic engagement or advocacy by charities. The CCRA's interpretation of the *Income Tax Act* and court decisions on this issue is that charities are limited but not prohibited from engaging in non-partisan "political activities." The *Income Tax Act* states that **charities must devote "substantially all" of their resources to charitable activities**. The CCRA takes the view that "substantially all" means 90 percent. This leaves charities able to devote up to 10 percent of their resources to "political activities" that are "ancillary and incidental" to (in other words, activities that support) their charitable purposes.

A fundamental problem has been the uncertainty about which activities fall within the 10 percent limit, and which activities are unlimited charitable work. Several attempts by the CCRA to bring sense and clarity to this topic were unsuccessful.⁵ Another important question is whether the 10 percent limit is too restrictive.

In the English common law dealing with charities, the focus is on the purposes of charitable organizations. Unfortunately, in Canada, the *Income Tax Act* brings regulatory focus to the activities of charitable organizations. This greater level of regulatory intrusion has had the effect of discouraging charities from undertaking advocacy work and participating in discussions of public policies.

The 2003 Administrative Guidelines

On September 16, 2003, in response to concerns raised by charities, the CCRA published new administrative guidelines entitled "Registered Charities - Political Activities" (the "New Guidelines") which contain some changes and improvements over earlier guidelines. The New Guidelines are essential to understanding the scope for innovation by community foundations. This section outlines the key features of the New Guidelines.

Political Activity Defined

The CCRA now views a charity to be engaging in "political activity" if it:

- a) explicitly communicates a **call to political action** (i.e., encourages the public to contact an elected representative or public official and urge them to retain, oppose, or change the law, policy or decision of any level of government in Canada or a foreign country);
- b) explicitly communicates to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed, or changed; or
- c) explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country. (section 6.2)

This description leaves no doubt as to the perceived problem the New Guidelines attempt to address – the problem of charities communicating with elected or non-elected officials or with the public about possible changes to laws, public policies or government decisions. For many Canadians, this is not a problem at all, but a valuable part of the democratic process. ⁶

Community foundations are able to fund activities of this type, for they are limited, not prohibited activities. The key is to ensure that the resources dedicated to activities of this kind do not exceed the quantitative limits imposed by the CCRA (see below).

Public Awareness Campaigns

In the New Guidelines, the CCRA explains that it will allow charities to engage in public awareness campaigns that are intended to "give useful knowledge to the public to enable them to make decisions about the work a charity does or an issue related to that work." (section 7.1) The CCRA will treat these efforts as charitable activities, so they need not be included within the 10 percent limit that applies to political activities.

In order to qualify as a "public awareness" activity, the activities:

- must be connected and subordinate to the charity's purpose;
- should be based on a position that is well-reasoned, rather than information the charity knows or ought to know is false, inaccurate, or misleading; and
- should avoid the use of merely emotive messages. (section 7.1)

As with the new description of political activity, this new treatment of public awareness campaigns increases the clarity as to the CCRA's objectives and provides greater latitude for charities than was the case previously. Again, activities that fall within this category are not limited by the 10 percent rule, but are considered to be charitable activities. This means that a community foundation could fund a public awareness campaign by a charity and would not need to report it as a political activity on its annual T3010A filing.

Note that the CCRA will continue to scrutinize charities in remarkable detail when attempting to distinguish between public awareness campaigns and calls to political action. The type of language and images used by charities will be examined to ensure that they are not too emotive. This continued subjectivity and focus on detail has not been well-received by many charities.

Representations to Government

The New Guidelines provide charities with more clarity and scope than they had previously in relation to communications with elected and non-elected public officials. The CCRA now states that communications of this type will be deemed to be charitable and not political, even if they are initiated by a charity, and "[e]ven if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed or changed..." (section 7.3) To qualify as charitable, efforts of this type must involve an issue that is connected to the charity's purposes, must be well-reasoned, and must not contain false, inaccurate or misleading information.

Charities are now allowed to publicly release the text of representations of this type so long as it releases the entire text and "there is no explicit call to political action either in the text or in reference to the text..." (section 7.3)

New Limits

In addition to providing more clarity as to what the CCRA means by "political activity," the New Guidelines provide incremental increases to the amounts permitted. The 10% rule has become a formula based on the annual income of charities. Charities with lower incomes are permitted to use higher percentages for political activities. (section 9)

- For charities with less than \$50,000 annual income in the previous year, the new limit on "political activity" is 20 percent of the charity's resources.
- If the charity's annual income is between \$50,000 and \$100,000, the limit is 15 percent.
- Charities with income between \$100,000 and \$200,000 have a limit of 12 percent.
- Charities with annual incomes greater than \$200,000 are still limited to 10 percent.

The CCRA will allow charities to average their expenditures on political activities over two preceding years so that "short-term one-of-a-kind political activities" will not necessarily amount to a violation of the new limits. (section 9.1) This new formula provides more latitude for small charities to engage in public

policy debate, and also highlights the arbitrary nature of these limitations. It appears that the CCRA takes the view that the words "substantially all" in the legislation prevent it from going farther with its administrative policies.

Checklist when considering funding proposals involving political activity

The following questions are intended to help community foundations assess funding proposals that are in part or in whole "political activity." It assumes that the proposal is of interest to the community foundation and that it warrants a closer look.

1. Does the charity have the legal capacity to undertake the proposed project?

Charities are only able to engage in activities that advance their charitable purpose or purposes. The New Guidelines state that activities must be "connected" to the charitable purposes. For example, a charity with the purpose of advancing education in the arts for inner city children would not have the legal capacity to engage in political activity relating to other, unrelated matters.

2. Does the proposed project involve charitable activity, political activity or a combination of the two?

It is essential to examine the proposed activities carefully against the New Guidelines in order to accurately categorize them. With the New Guidelines this can be done with more confidence that was previously possible.

What may at first appear to be "political," may on closer consideration prove to be charitable. For example, a charity may make a proposal that has as its goal identifying and

advancing improvements to the way a provincial government assists people with disabilities. It may be that the vast majority of the proposed work is research and analysis of practices in other jurisdictions to identify best practices, delivery of educational seminars to members of the public, and presentation of findings to the Minister responsible. These are all charitable activities.

3. How much political activity is proposed?

Quantifying the political activities is essential to ensure compliance with the New Guidelines. On close scrutiny, it may become evident that the "political" component of a proposed project is small.

4. Can the charity undertake the proposed political activities without exceeding its limit?

To answer this, it is essential to know the charity's annual income for the previous year in order to determine which limit will apply to the charity – 10, 12, 15 or 20 percent. It is also important to know whether some of that capacity may have already been or will be consumed by other political activities carried on by the charity during the year. If the limit will be exceeded in one year, it may be possible for the charity to average the expenditure by going back two years.

Community foundations should put the onus on applicants to explain these facts and their plans in detail as part of the application process.

5. Does the community foundation have the legal capacity to fund the project?

This question should be asked with every funding decision to ensure that the community foundation remains true to its purposes. As with charitable organizations, foundations are only able to advance works that are consistent with the purposes language in their constitutional documents.

6. Can the community foundation fund the project within its expenditure limits?

To answer this, the community foundation needs to know: a) what its limit is, and b) how much of its limit has already been used or committed. In some circumstances, the community foundation may be able to average the expenditure by claiming unused capacity for political activities from the previous two years. The New Guidelines state that, as with charitable organizations, where there are "unique, one-time conditions" it will be possible for foundations to overspend in one year if they under-spent on political activities in up to the two previous years. As the New Guidelines suggest, careful and complete recording and reporting of expenditures of this type will be needed to utilize this option safely.

7. Will the community foundation and the charity still meet their disbursement quotas?

In addition to the percentage limits described above, care must be taken by charitable organizations and community foundations not to violate their disbursement quotas. This is a technical but important issue.

The "disbursement quotas" in the *Income Tax Act* require charities to spend a minimum amount each year on direct charitable activities or on gifts to "qualified donees." In summary, charitable organizations must spend 80 percent of their receipted donations received in the preceding year, while foundations must also spend 4.5 percent of the value of their investment assets.⁷

If a charitable organization or foundation spends resources on "political activity" by directly undertaking its own political activities, or by contracting with another entity for the delivery of political services, those expenditures are not disbursements as part of the quota.

However, if a community foundation or charity makes a gift to another charity to help support the other charity's political activity, "the paying charity can use the amount gifted to meet its disbursement quota (as a gift to a qualified donee)." (section 11) However, the recipient charity would not be able to apply this amount to its own quota.

8. Does the proposed project need to be redesigned to comply with the expenditure limits?

If a proposed project exceeds the expenditure limits of the applicant charity or the community foundation, it may be possible to redesign it to comply with the CCRA's policies. It may be possible to achieve the desired goals by undertaking a public awareness campaign or making a submission on a policy issue to an appropriate Parliamentary Committee instead of engaging in political activity. Alternatively, the amount of political activity associated with a project could be reduced or phased over several years.

9. Will the project enrich and strengthen the community?

Once a community foundation has determined it can fund a proposal containing political activities without breaching the CCRA's requirements, the obvious next step is to assess the merits of the proposal relative to others to determine what impact it will have on the community. Community foundations should give serious consideration to whether a project may help solve a problem rather than just treat the symptoms.

Conclusions

Charities will inevitably continue to identify ways to improve legislation and government policies and decisions that relate to their fields of endeavour. They will also continue to seek the support of community foundations to help them advance those improvements.

The CCRA's New Guidelines, though based on a faulty policy premise and inadequate legislation, do provide incremental improvements and increased clarity for community foundations as they establish their funding priorities.

There is scope for community foundations to move beyond the narrow service provision view of charity and philanthropy and to pursue the bolder projects that will help solve community problems, advance social justice, increase the quality and breadth of public policy debate, improve the quality of public policy decisions, and strengthen Canadian democracy. Indeed, community foundations have the potential to be extremely powerful instruments of social change in this way. Their knowledge and concern for their communities combined with their financial resources give them tremendous capacity to help bring about innovations of this type. With care and attention to the CCRA's New Guidelines, much good work can be accomplished.

With an enlightened decision from government in the form of a legislative amendment to allow greater latitude for charities, more will be possible in the future to advance the cause of social justice.

Footnotes

¹ *Moving Beyond the Traditional Charitable Roles*, a consultation paper produced by Community Foundations of Canada in 2003.

² This principled explanation of the separation of charity and partisan politics was confirmed in the report of the Australian "Inquiry into the Definition of Charities and Related Organizations," published in August 2001, and available at www.cdi.gov.au

³ *McGovern v. Attorney General*, [1981] 3 All ER 493

⁴ See *Action By Christians For The Abolition of Torture (A.C.A.T.) v. Her Majesty The Queen and Maureen Kidd in Her Capacity as Director General of the Charities Directorate of the Canada Customs and Revenue Agency, 2002*, FCA 499, at paragraph 38.

⁵ Prior to September 2003, Information Circular 87-1, "Registered Charities – Ancillary and Incidental Political Activities," dated February 25, 1987, was applied by the CCRA. Two subsequent CCRA brochures were made public in draft form, but appear to have never been formally adopted. They were RC4107 "Registered Charities: Education, Advocacy and Political Activities," produced in 1998, and Draft 2 of the same document made public in April 2000.

⁶ A anomaly in charity law is that it can be charitable to operate a legal aid clinic that provides legal services, including litigation, to people in poverty. Work of this kind can be charitable under the first or fourth heads of charity (relief of poverty or "other purposes beneficial to the community"). It can also be a practical way to remedy unconstitutional or otherwise unlawful government legislation, policy or decisions.

⁷ For a more detailed description of the disbursement quota, see the CCRA publication RC 4108(E) "Registered Charities and the *Income Tax Act*" available www.ccr-aadrc.gc.ca/E/pub/tq/rc4108/rc4108eq.html

Richard Bridge is lawyer based in Qualicum Beach, British Columbia, who works primarily with charities and non-profit organizations, including IMPACS, a Vancouver-based charitable organization committed to the protection and expansion of democracy and to strengthening civil society. Since 1999, IMPACS, in partnership with the Canadian Centre for Philanthropy, has led efforts to increase the scope for Canada's charities to contribute to public policy debate. More details about the Charities and Democracy Project are available at www.impacs.org



*Community
Foundations
of Canada*
*Fondations
communautaires
du Canada*

301-75 rue Albert Street
Ottawa ON
Canada K1P 5E7
www.community-fdn.ca