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On the Mend

Putting the Spark Back Into the Government-Charitable Sector Relationship

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MOVING BEYOND “THE CHILL”

In the months leading up to the 2015 federal election, charities and their political activities became a hot-button issue. Widespread attention from media outlets and party leaders focused on the perception that the federal government was engaging in political harassment of the charitable sector using the audit process of the Canada Revenue Agency (CRA). The audits seemed to focus on the political activities of environmental groups and other charities perceived to be inconsistent with the ideology of the government.¹ The concerns fed fears that the government was trying to suppress the advocacy efforts of charities, resulting in the perception of an “advocacy chill” in the sector.² Despite reports of the potential political bias and punitive nature of the audits, the CRA stood by the integrity of their process, stating that audits are conducted free of any political interference.

Some would argue, however, that the debates over political activity and advocacy efforts are a symptom of a larger issue. The discussion reveals more systemic problems in the relationship between the government and sector – including how unwieldy the legislative frameworks governing the charitable sector have become.

The newly elected federal government has responded to public concerns by committing to increased transparency and fairness in the CRA’s practices. These commitments have opened the door to policy change on two fronts: in relation to the specific rules on political activity and advocacy, as well as to the regulatory structure governing the sector more broadly.

The government has given the CRA and the Department of Finance the mandate to clarify the rules governing political activity and develop a new legislative framework to “strengthen the sector.” But mending the sector-government relationship will require transformational shifts that go beyond legislative changes and CRA rules. Partnership and the ability to work collaboratively across government departments and with outside partners will be crucial.

So how can the sector and government work together to advance these promises? What information is required to guide their efforts over the coming months?



WHY IT MATTERS

Under the federal *Income Tax Act*, charities are permitted to devote 10 per cent of their resources to non-partisan political activities. However, the rules have been criticized for being vague and unclear, leaving too much room for misunderstanding and misinterpretation. There is considerable confusion in the sector about what constitutes political activity and when it may be considered ‘political’ to engage in the policy process. This feeds a perception among some charities that they are not truly permitted to engage in the policy process when, historically, charities have played a crucial role in arguing for policies that reflect the needs of the communities they serve.

This confusion highlights the need for clarification of the rules charities operate under, the sector’s legitimate role in the public policy process, and the need for a new legislative framework – one that supports the sector and enables it to maximize social impact.

While broader reform will take some time, there are steps that the government can take in the short term to reduce the tensions and improve relations with the sector.

THAWING “THE CHILL” IN THE SHORT TERM

The sector and government can begin by changing their conceptual approach to solving the sector’s policy issues. A shared vision of the sector’s purpose and clarity about what constitutes an effective partnership are necessary to develop coherent policies for the sector. Taking a solutions-focused approach, issues can be tackled through the lens of enabling success, grounded in principles of collaboration, trust, transparency, and fairness and a shared goal of improving social impact.

Before undertaking any legislative change, the sector and government can work together to:

1] Create user-focused education and disseminate broadly

Education and outreach tools should be designed by working closely with the sector to think about the needs of charities as they strive to comply with CRA rules. This could include developing a proactive approach to capture learnings through the audit process and jointly creating resources to share and educate in advance of compliance issues. For example, in 2014, the UK Charities Commission engaged extensively with charities, both online and in person, to revamp its guidance and public outreach tools.³

2] Improve the clarity of guidance

The government can also take interim steps to offer charities clearer guidance, in plain language, on what types of activities are allowed and expected by the CRA and what types are banned or discouraged. The CRA already offers guidance on this front, but as many have noted, the examples

given may not be applicable to the realities that charities face in carrying out their work.⁴ The Australian Charities and Not-for-profits Commission (ACNC) guidance on advocacy to charities is a good example that uses simple language and a user-friendly interface to briefly illustrate what is allowed, backed up with examples to illustrate the limitations on charities.⁵

3] Increase the transparency of the audit process

Due to confidentiality provisions of the *Income Tax Act*, the CRA cannot disclose the names of charities targeted for audits. But there may be room to improve the transparency of the process for explaining how, when and why charities are selected for audit.

These actions can be the first steps to re-establish a sense of fairness and trust and allow time for the government and sector to develop new frameworks that consider the broader policy context the sector is operating in and the new realities facing the sector in Canada.

A timely example: CRA and the Syrian refugee crisis

Many Canadians are looking for opportunities to provide donations to specific Syrian refugee families they, or their friends, have sponsored through Canadian charities. However, current policies do not recognize these types of donations as ‘gifts’ to a charity. Unless pooled for broader support, the contributions do not qualify for charitable tax deductions. This ruling could act as a barrier to charities, their fundraising efforts and their ability to support refugee families. It is worth examining policies like this one and their impact on charities in the broader review of the sector-government partnership.⁸

OLD HABITS DIE HARD – THE NEED FOR BROADER REFORM

In recent years, both federal and provincial governments have taken action to reduce regulatory irritants for business sectors while the regulatory frameworks that govern charities have languished.

As they stand, current frameworks represent a significant governance challenge for the sector. Responsibility for charities and not-for-profits (NFPs) is split between the federal and provincial governments. Provinces hold primary regulatory control over charities, while tax-exempt status flows from the federal government through the *Income Tax Act*.

Because provinces have generally been absent from actively regulating the sector, the CRA has become the default regulator. The problem is that the primary role of the CRA, with respect to charities, is not to support and enable charitable activities, but rather to monitor and enforce tax compliance.

Ultimately what this means is that the federal regulatory system has been “forced to do a job for which it was not designed, resulting in regulatory choices and federal and provincial-territorial level responsibilities that are not guided by any unifying national vision for the sector.”⁶ This has led to a charitable sector governed by a “uniquely ‘frozen’ and restrictive definition of charity” and a regulatory landscape that is both confusing and rigid.⁷

USING EVIDENCE TO FIND COMMON GROUND

It is important that reforms are grounded in an understanding of what was done before, what worked and what didn't. As the new government gets ready to begin the process of regulation and legislative review, policymakers don't need to reinvent the wheel. There are lessons from past and current reform work that can help guide us. Canada also stands to benefit from closely examining the recent choices that other countries have made in relation to the structure and content of regulations for their voluntary sectors.

Lessons from home

Some provinces, such as Ontario and BC, have started reform efforts that can serve as a testing ground and provide insight into Canadian developments on funding reform, not-for-profit legislation and social enterprise. There is also the legacy of past federal reform efforts to consider – the most prominent being the Voluntary Sector Initiative (VSI). While the VSI resulted in many smaller regulatory changes for the sector, it did not result in wholesale regulatory change. Many felt that it fell short of its potential. These efforts can provide insight about priority-setting, managing partnerships and creating the right conditions for cross-sector engagement.

Additionally, the models researched through the joint regulatory process can act as a starting point for new research and discussion on what a healthy charitable sector should be. For example, the 2003 report from the Joint Regulatory Table examined four institutional models in relation to the Canadian system:

- 1] an enhanced Charities Directorate that would continue to operate within the CRA,
- 2] a complementary voluntary sector agency that works with the CRA,
- 3] an independent charities commission,
- 4] a hybrid charities commission that works with the CRA.⁹

However, since then many countries have made changes to their regulatory systems and it is worth examining these new developments for success factors, potential challenges and emerging best practices.

Lessons from abroad

Comparatively, Canada is an outlier among its international peers by not having charity-specific regulation, such as a *Charities Act*. In recent years, the UK, Australia and New Zealand have all enacted or updated legislation that governs the definition of charity beyond common law interpretations and outlines principles for a charity's public benefit.

In addition, many of these jurisdictions have also created statutory regulatory agencies for the charitable sector, set up within government or as independent, arms-length bodies with varying accountability frameworks. For example, Australia and the UK both have independent charity commissions. In contrast, New Zealand's *Charities Act 2005* is administered by the Charities Services body within the Department of Internal Affairs. This body oversees the New Zealand Charities Register and an independent Registration Board that makes registration and de-registration decisions in accordance with the Act.

Many countries have also changed the rules governing the public policy work that charities can do. In the UK, charities are permitted to engage in political activity as long as it is “part of a wider range of activities aimed at furthering the organization’s charitable purposes.” In 2014, a court ruling in New Zealand expanded the definition of charitable purpose to include political activity, provided the organization “still demonstrate[s] that its purposes and all its activities provide benefits to the public or a sufficient section of the public, not just to an individual, organization or closed group, as well as being charitable.”¹⁰

For Canada, any changes to the sector’s oversight mechanisms or new charity legislation will undoubtedly be shaped by the shared federal-provincial jurisdiction over charities. While there is no perfect model for charity regulation, updated research and an understanding of what has and hasn’t worked elsewhere are important steps in knowing how to effectively approach sector regulation here in Canada.

THE WAY FORWARD

The sector is ready for, and in need of, change. At the same time there is a new government with a mandate to modernize the sector’s legislative frameworks. Now is the time to work collaboratively to ensure that changes both empower and protect the sector, while strengthening its ability to work for the public benefit.

Over the coming months, Mowat NFP will undertake collaborative research to provide insight into the key decisions needed to help the government and the charitable sector take action to clarify roles and responsibilities in the sector-government relationship, enable innovation, and strengthen and modernize public policy frameworks. Good evidence-based research will help the government deliver on its promises and ultimately guide the process of partnership building towards a shared goal of enabling social impact.

A window of opportunity – the role of the sector in reconciliation

The newly elected government has committed to reset Canada’s relationship with aboriginal communities and has prioritized implementing all 94 recommendations made by the 2015 Truth and Reconciliation Commission. The sector has the potential to be a meaningful vehicle in advancing the reconciliation process, but is it empowered to support real change? As the government embarks on its work in strengthening the sector, reform efforts should include an aboriginal focus – one that examines unique challenges faced by aboriginal not-for-profits, charities, and social enterprises; current policies that are acting as barriers to social change; and opportunities for the government to support innovation.

Endnotes

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