

**Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association
and the Special Rapporteur on the situation of human rights defenders**

REFERENCE: AL
CAN 2/2015:

29 June 2015

Dear Ms. Godin,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the situation of human rights defenders pursuant to Human Rights Council resolutions 24/5 and 25/18.

In this connection, we would like to bring to the attention of your Government information we have received concerning **protracted undue interference in the form of intrusive audits and threat of revocation of charitable status for registered charities.**

According to information received:

For several years now, a number of associations have been subjected to undue interference by the Canada Revenue Agency (CRA), the body responsible for administering tax law in Canada. Canada Revenue Agency has been exercising its power under section 149.1(6.2) of the Income Tax Act of Canada, subjecting registered charities to intrusive audits and the threat of revocation of charitable status. Some 52 audits are reportedly underway or have been concluded, with eight more expected to be launched by 2016.

Background on Charitable Activities and Audits:

Under the Income Tax Act, a “registered charity” (1) is exempt from being taxed, and (2) donors to the charity receive a deduction from their income tax for their donations. To attain this status, the applicant must meet the definition of “charity” and must register with the CRA.

According to the CRA, “a registered charity is an organization established and operated for charitable purposes, and must devote its resources to charitable activities. The charity must be resident in Canada, and cannot use its income to benefit its members. A charity also has to have as its object a charitable purpose defined as: relief of poverty, advancement of education, advancement of religion, or certain other purposes beneficial to the community”.

The Income Tax Act also provides for limits on “political activities” carried out by registered charities, indicating that such activities must be “ancillary and incidental” to its charitable activities. As the CRA explains:

“When a charity takes part in political activities, the Act requires that substantially all of its resources must be devoted to charitable activities. The term resources is not defined in the Act, but we consider it to include the total of a charity's financial assets, as well as everything the charity can use to further its purposes, such as its staff, volunteers, directors, and its premises and equipment. We usually consider substantially all to mean 90% or more. Any charity using at least this amount of its various resources for charitable work can be assured that we will not revoke its registration on the basis that it is not devoting enough of its resources to charitable activities. Therefore, as a general rule, we consider a charity that devotes no more than 10% of its total resources a year to political activities to be operating within the substantially all provision.”

Allowances are made for associations with more limited resources, whereby the cap for “political activities” is set at approximately 20 per cent.

The CRA indicates that an activity is political if it:

- explicitly communicates a call to political action (that is, encourages the public to contact an elected representative or public official to call him or her to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
- explicitly calls publicly for a change in law, policy, or decision of any level of government in Canada or a foreign country;
- explicitly indicates in any of its materials (internal or external) that the intention of any of its activities 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; or
- creates an atmosphere whereby people are encouraged to call for a change in law, policy or other decision.
- a charitable organizations makes a gift to another qualified donee to support the political activities of the recipient;

It appears that activities aimed at implementing international human rights law with a particular focus on civil and political rights may have been accepted as non-political activity, however, it is unclear whether this approach will be applied to activities aimed at implementing international human rights law as it relates to economic, social and cultural rights, especially where the implementation of international obligations related to economic and social rights would require a change to a law or policy.

For example it appears possible that an association whose charitable goal is the relief of poverty, could have its charitable status revoked if more than 10 per cent of its resources support activities aimed at implementing United Nations treaty monitoring body recommendations regarding the right to an adequate standard of living where those recommendations suggest legislative, policy or programmatic change. It has also been suggested by the CRA that human rights training and education might fall into the political activities category.

Registered charities may be audited for a number of reasons including:

- i. to ensure that they are in line with their legal requirements under the Income Tax Act;
- ii. the CRA deeming an organization non-compliant; or
- iii. following up on complaints it has received.

Audits may examine whether registered charities spend more than the allowed percentage of their resources on “political activities”; whether their activities align with their charitable purposes as previously approved by the Government; whether the associations’ charitable purposes themselves are acceptable, and whether appropriate records are kept in one of the two official languages

While registered charities generally agree with the principle of random audits, it has been alleged that those carried out recently seem selective as a number of the registered charities under audit are engaged in work focused on the implementation of human rights obligations, the defence of the environment, addressing social and economic disadvantage, and poverty.

Impact of Audits

These audits, carried out under the auspices of the Income Tax Act, have had severe consequences with respect to the rights to freedom of association and expression for charities.

Registered charities have reported that they feel compelled to water-down their external communications to ensure they are not openly critical of government policy. They feel like they are being monitored and are under surveillance and therefore some have reduced their public profiles with the hopes of avoiding an audit.

A number of registered charities under audit also feel constrained in speaking out against the audits they are undergoing: they want to keep the fact of their audit out of the public domain to preserve their reputation and their donor base, who might otherwise not donate for fear of being targeted for a personal audit.

Moreover, registered charities under audit have reported that these audits have impacted their ability to carry out their core functions. Audits are distracting and take up a great deal of time and resources to satisfy the administrative requirements. We received information from charities that they had received long,

dense legal briefs from the CRA outlining the basis upon which the charity under audit has breached the provisions of the Income Tax Act. Charities are required to respond to these legal allegations in a timely manner to defend their charitable status. In most cases, this means charities have had to spend valuable resources to hire lawyers to act in their defence. Charities reported that these audits represent a significant drain on their limited resources.

The allegations contained in these legal briefs have a debilitating and self-censoring effect as well. Associations report second-guessing every activity for its “political” content, which renders it virtually impossible to speak freely and carry out their activities. A number of associations have suffered these constraining conditions whilst under audit for more than three or four years.

The overall effect of the implementation of s. 149.1(6.2) of the Income Tax Act has been to create confusion regarding what constitutes charitable versus political activity, undermining an association’s ability to fully engage in democratic debate and discussions, for fear of contravening this Act. Sanctions for contravening this Act may include revocation of the charitable status which may result in the loss of these associations’ only source of funding and consequently the closing or considerable scaling back of operations.

Concern is expressed at the provision of the Income Tax Act limiting “political activities” for registered charities, which has permitted the application of a very broad definition of what constitutes political activity. Concern is also expressed at the fact that the enforcement of this provision has contributed to an environment of excessive interference by the CRA in monitoring and reviewing the objectives and activities of registered charitable associations thus unduly limiting their rights to freedom of association and freedom of expression. Such interference appears to be in contravention of international human rights law and standards as it does not seem to be necessary in a democratic society and to be proportionate to the aim pursued. As in some instances charitable associations are the only vehicle through which disadvantaged groups can participate in public life, it is of concern that, should these associations’ charitable status be revoked, these disadvantaged groups would be deprived of the means through which they can express themselves and make their voices heard in public life.

Furthermore, the experts are concerned at the inequitable treatment of businesses and associations as for-profit organizations seem to be able to take political action in support of commercial and private interests, for example, through advertising, without any imposed statutory restrictions and with full deductibility as business costs.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please kindly provide the exact numbers of audits completed, still underway and planned, which of these constitute audits on the limitations of “political activities”, and the focus of the work being undertaken by each registered charity under audit (eg: environmental protection, human rights, poverty, etc.) and the budget set aside to pay for these.
3. Please provide clarification on the criteria that the CRA has adopted in selecting registered charitable associations for auditing purposes including the criteria for initiating audits following specific complaints.
4. Please respond to concerns that the restrictions provided for in the Income Tax Act, unduly restrict the ability of charities from substantially promoting the implementation of Canada’s international human rights obligations, particularly with respect to economic, social and cultural rights and United Nations treaty monitoring body recommendations in this regard.
5. Please explain how alleged restrictions on non-partisan political activity by registered charities are compatible with the obligation to ensure the right of those affected by key decisions to participate in relevant decision-making processes.

We are intending to publicly express our concerns in the near future as we are of the view that the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting public attention. The press release will indicate that we have been in contact with your Government to clarify the issues in question.

Your Government’s response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Ms. Godin, the assurances of our highest consideration.

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with the concerns mentioned in this letter, the experts wish to recall the relevant articles of the International Covenant on Civil and Political Rights, which Canada acceded on 19 May 1976, in particular Article 19 which guarantees the right to freedom of expression and Article 22 which stipulates the right to freedom of association. They also reiterate that, according to this same Covenant, only a very limited number of restrictions to these rights may apply, which should be prescribed by law and necessary in a democratic society.

In communication No. 1274/2004, the Human Rights Committee observed that “the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association [...]”

Moreover, Human Rights Council resolution 24/5 is of relevance in this context, and in particular operative paragraph 2 that “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.”

Human Rights Council resolution 22/6 is also pertinent in that it calls upon States to, inter alia, ensure “(a) that reporting requirements placed on individuals, groups and organs of society do not inhibit functional autonomy”.

It is also relevant to recall Human Rights Council Resolution 12/16 which states that “While noting that article 19, paragraph 3, of the International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of opinion and expression carries with it special duties and responsibilities, to refrain from imposing restrictions that are not consistent with paragraph 3 of that article, including on: (i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups”.

In addition, the experts take this opportunity to echo the recommendations made by the Special Rapporteur on the rights to freedom of peaceful assembly and association in his thematic report on best practices (A/HRC/20/27). This report indicates that the right to freedom of association obliges States to take, on one hand, positive measures to establish and maintain an enabling environment and on the other, negative measures not

to obstruct the exercise of the right to freedom of association, which includes guaranteeing that association can freely carry out their activities, without discrimination. The experts stress that it is therefore crucial that individuals exercising this right are able to operate freely. Although independent bodies may have the authority to examine the associations' records as a mechanism to ensure transparency and accountability, such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.

Finally the experts recall the following observations of the Special Rapporteur on the situation of human rights defenders contained in her report on the right to freedom of association: "Human rights organizations that are independent and whose objectives and activities are not in violation of the International Covenant on Civil and Political Rights should have the right to engage in activities for the benefit of their members and for the public; and should be free to participate in public policy debates, including debates about and criticism of existing or proposed State policies or actions. Any limitations, within these parameters, including lists of permitted and prohibited activities, are incompatible with the right to freedom of association" (A/64/226, para. 122).