



## Beware of Operating Contrary to Public Policy

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News that Canada will legalize physician assisted death has prompted many publicly funded hospitals with Catholic ties to publicly state that they will not allow the practice in their hospitals. Their position is similar to the one they hold on abortion. The whole discussion is reminiscent of the stance many Catholic (and non-Catholic) organizations took when same-sex marriage was legalized in Canada. From a charity law perspective, however, these positions raise the concern of whether the hospitals are operating contrary to Canadian public policy.

It is not new law that a charity cannot operate contrary to public policy. Indeed as recently as 2002 the CRA in the *Canadian Magen David Adom for Israel* case attempted to revoke the charity for (amongst other reasons) operating contrary to public policy. The actual policy is not relevant and in the end the CRA lost, not because it was not right in principle, but because the Court held that the CRA did not have enough evidence to

show what Canada's public policy was in that circumstance. Nevertheless, the idea that operating contrary to Canadian public policy is grounds for revocation was confirmed. Indeed this is one of the reasons Catholic churches insisted that the *Income Tax Act* be amended to specifically state that a religious organization would not be revoked for failing or refusing to allow same-sex marriage.

This makes the Parliamentary practice of passing otherwise meaningless private members' bills of some interest to the charity sector. At times, these bills ask the House of Commons to either approve or condemn some policy or action somewhere in the world. They are usually meaningless because they do not carry the force of law and are just an expression of Canada's position on an issue.

One recent and public example is Parliament's approval of a bill which states as follows:

*That, given Canada and Israel share a long history of friendship as well as economic and diplomatic relations, the House reject the Boycott, Divestment and Sanctions (BDS) movement, which promotes the demonization and delegitimization of the State of Israel, and call upon the government to condemn any and all attempts by Canadian organizations, groups or individuals to promote the BDS movement, both here at home and abroad.*

Unlike most private members' bills this statement was passed and approved by Parliament. Arguably an unequivocal Parliamentary

statement on a policy topic such as this is the purest statement of Canadian public policy. Further, it is not diluted by the necessity of interpreting UN agreements or by contradictory laws which make it difficult for courts to determine public policy.

For this reason the CRA could take the position that a charity which promotes the BDS movement is operating contrary to public policy. There is no legal allowance for conducting such activities as there is for political advocacy (i.e. the 10 percent rule). Consequently the CRA could take the position that any charity supporting in any way the BDS movement is operating contrary to public policy and is liable to revocation.

For most organizations engaged in uncontroversial activities there will be no question about Canadian public policy. Those organizations though that wish to make a political statement but use less than 10 percent of their resources may be open to attack simply on the position they take. As it stands charities that are operating in controversial areas should pay close attention to any statements which may be construed as contrary to Canadian public policy or simply abandon that position.

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