

September 15, 2015

DELIVERED BY EMAIL TO johnbennett.communications@gmail.com

PRIVILEGED AND CONFIDENTIAL

Green Party of Canada
116 Albert Street
Suite 812
Ottawa, ON K1P 5G3

Attention: Ms Elizabeth May, Leader

Dear Ms May,

Re: Green Party of Canada (the **Party**): Federal Election Debate on Foreign Policy
Our File B8364

This is further to your request for our opinion on the question of whether your exclusion from the upcoming federal leaders' debate on foreign policy issues (the **Debate**), scheduled for September 28, 2015, is contrary to the provisions under the *Income Tax Act* (Canada) (the **ITA**) regulating the involvement of registered charities in political activities.

BACKGROUND

Briefly, the circumstances surrounding the holding of the Debate are as follows:

1. The Debate is being organized and sponsored by the Munk Debate, which is a program of the Aurea Foundation.¹
2. The Aurea Foundation is a public charitable foundation that is a registered charity under the *ITA*. According to the Aurea Foundation's record on the Canada Revenue Agency's (**CRA**) website, the Aurea Foundation is "... registered to receive and maintain a fund or funds and to pay or apply all or part of the principal and income therefrom, from time to time, to qualified donees under the [*ITA*] and to advance education by developing, organizing or presenting non-partisan public debates, discussion, workshops, seminars or conferences relating to public policy issues of national and international significance."²
3. The Debate is being financially subsidized by the Aurea Foundation.³

¹ <http://www.munkdebates.com/debates/federal-election-debate> (Accessed on September 13, 2015).

² <http://www.cra-arc.gc.ca/ebci/haip/srch/t3010form22quickview-eng.action?r=http%3A%2F%2Fwww.cra-arc.gc.ca%3A80%2Febci%2Fhaip%2Fsrch%2Fbasicsearchresult-eng.action%3Fk%3Daurea%26amp%3Bs%3Dregistered%26amp%3Bp%3D1%26amp%3Bb%3Dtrue&fpe=2014-06-30&b=845833565RR0001&n=AUREAFOUNDATION> (Accessed on September 13, 2015).

³ <http://www.munkdebates.com/MediaStorage/Debates/ElectionDebate/Docs/Munk-Debate-Election-Debate-September-9-statement-03.pdf?ext=.pdf> (Accessed on September 13, 2015).

4. Only the leaders of the Conservative Party of Canada, the New Democratic Party of Canada and the Liberal Party of Canada are being permitted to participate in the Debate. Specifically, you, as leader of the Party, were not invited to participate in the Debate, and when you requested that you be included, your request was refused by the organizers of the Debate.
5. The basis for limiting participation in the Debate to Mr. Harper, Mr. Mulcair and Mr. Trudeau is that the organizers of the Debate decided that only the leaders of "... parties recognized by the *Parliament of Canada Act* in the House of Commons would be invited to participate."⁴
6. The Debate will be broadcast in French and English on the Cable Public Affairs Channel (CPAC). A broadcast-quality feed of the Debate will be made available for other television networks to broadcast the Debate.⁵
7. The Debate is being advertised widely and as the first ever federal election debate on foreign policy issues.

ISSUES

In light of the foregoing, you have asked the following questions:

1. Does the Aurea Foundation's exclusion of you from the Debate constitute a political activity that is prohibited under the *ITA*, given its status as a registered charity?
2. If the Aurea Foundation's exclusion of you from the Debate is a political activity that is prohibited under the *ITA*, then what recourse is there available to the Party?

SUMMARY OF OPINION

1. There is nothing about subsection 149.1(6.1) of the *ITA* that justifies reading words of limitation into the term "political party," for example, that only political parties with 12 or more members in the House of Commons are a political party, as the Aurea Foundation has done for the purpose of justifying the invitation of only the leaders of the Conservative Party of Canada, the New Democratic Party of Canada and the Liberal Party of Canada.
2. The effect (if not the intent) of not including you in the Debate could be to diminish the standing of the Party in the mind of the electorate, which arguably amounts to an indirect opposition to the Party at least as regards foreign policy matters. To the extent that the Aurea Foundation provides resources to support the Debate, and the Debate is a partisan political activity, then the Aurea Foundation will not be operating exclusively for a charitable purpose, which means that it will cease to comply with the requirements of the *ITA* for its registration.
3. The Party could file a complaint about the Aurea Foundation with the Charities Directorate at the CRA.

⁴ <http://www.newswire.ca/news-releases/federal-election-debate-announcement---first-ever-federal-election-debate-on-foreign-policy-proposed-517736231.html> (Accessed on September 13, 2015).

⁵ <http://www.munkdebates.com/MediaStorage/Debates/ElectionDebate/Docs/Munk-Debate-Election-Debate-September-9-statement-03.pdf?ext=.pdf> (Accessed on September 13, 2015).

DISCUSSION

A. Legal Framework

Political Activities and Charities

As noted above, the Aurea Foundation is a registered charity under the *ITA*, and is designated as a public foundation.⁶ The rules governing the involvement of registered charities in political activities are set out in the *ITA* and administrative policies and guidance issued by the CRA.⁷ Put in summary terms, the *ITA* expressly allows charities to conduct "political activities," which are considered to be charitable activities or charitable purposes, only if they are of an ancillary and incidental nature to their purposes or activities, and if they do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.

Although the *ITA* contains a definition of "political activity," it is not relevant for the purpose of this opinion. What is clear is that the *ITA* expressly prohibits a registered charity from engaging in political activities that involve "... the direct or indirect support of, or opposition to, any political party or candidate for political office..."⁸

Under the *ITA*, to maintain its registration a charitable foundation must continue to comply with the requirements of the *ITA* for being registered in the first place. This means, among other things, that a charitable foundation must continue to satisfy the definition of being a charitable foundation, which includes that it be "constituted and operated exclusively for charitable purposes."⁹ A charitable foundation that directly or indirectly supports or opposes any political party or candidate for political office will not be considered to be operating exclusively for a charitable purpose, which means that it will cease to comply with the requirements of the *ITA* for its registration.

As noted, above, in footnote 8, there has not been occasion for courts in Canada to clarify what it means for a charity to support (or oppose), directly or indirectly, a political party or candidate for political office. In its various published policies and guidelines,¹⁰ however, the CRA has set forth various scenarios and indicated whether the scenario involves a charity in the support of (or opposition to) a political party or candidate for political office. Of relevance to this opinion, CRA has stated that, "Partisan political activity may include, but not be limited to, organizing an all-candidates meeting or public forum in a way

⁶ See the Aurea Foundation's record on the CRA website, at <http://www.cra-arc.gc.ca/ebci/haip/srch/t3010form22quickview-eng.action?r=http%3A%2F%2Fwww.cra-arc.gc.ca%3A80%2Febci%2Fhaip%2Fsrch%2Fbasicsearchresult-eng.action%3Fk%3Daurea%26amp%3B%3Dregistered%26amp%3Bp%3D1%26amp%3Bb%3Dtrue&fpe=2014-06-30&b=845833565RR0001&n=AUREAFOUNDATION> (Accessed on September 13, 2015).

⁷ See subsection 149.1(6.1) of the *Income Tax Act* (Canada); "Advisory on partisan political activities" issued by the CRA and published on its website at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/dvsry-eng.html> (Accessed on September 13, 2015); "Partisan political activities" issued by the CRA and published on its website at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/prtsnctvts-eng.html> (Accessed on September 13, 2015); *Political Activities – Policy Statement CPS-022*, dated September 2, 2003 (updated following the 2012 Budget) <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html> (Accessed on September 13, 2015) (**CPS-022**).

⁸ Para. 149.1(6.1)(c). We note that there is no Canadian court decision that has interpreted and applied this paragraph, and specifically, what might comprise "direct or indirect support of, or opposition to..." a political party or candidate.

⁹ Definition of "charitable foundation" in subsection 149.1(1).

¹⁰ CRA's policies do not have the force of law, but simply set out CRA's interpretation of the meaning and its approach for administering the provisions of the *ITA*.

that could be seen to favour a political party or candidate... [or] inviting candidates to speak at different dates or different events in a way that favours a candidate or political party.”¹¹

Political Party

For the purpose of subsection 149.1(6.1), what does “political party” mean? The *ITA* does not contain a definition of “political party” generally. The expression “political party” is found in the *ITA* only in subsections 149.1(6.1), (6.2) and (6.201), and these subsections address the political activities of charitable foundations, charitable organizations and Canadian amateur athletic associations, respectively.

Elsewhere in the *ITA*, there is reference to “registered party” in the context of the provisions that permit tax credits for political contributions that are made to a “registered party.” In this part of the *ITA*, registered party has the same meaning as the term is defined in the *Canada Elections Act* (the *CEA*). The *CEA* defines “registered party” to mean “a political party that is registered in the registry of political parties referred to in section 394 [of the *CEA*] as a registered party.” In turn, “political party” as used in the *CEA* (including in the definition of “registered party”) is defined to mean “an organization one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election.”

While the *ITA* incorporates, by reference, the definition of “political party” in the *CEA* (for the purpose of the provisions dealing with tax credits for political contributions), nowhere in the *ITA* is there mention of the *Parliament of Canada Act*.

In reviewing CRA’s policy statements on charities and political activities, there is no discernable distinction that CRA makes between political parties broadly understood and either political parties that are registered parties within the meaning of the *CEA* or parties having a minimum of 12 members in the House of Commons.

In summary, then, for the purpose of understanding the term “political party” in subsection 149.1(6.1) (which is the subsection of the *ITA* applicable to charitable foundations), there is nothing in the *ITA*, its regulations or in CRA’s administrative policies that limits the meaning of that term to an organization with membership in either a provincial parliament or legislative assembly or in the House of Commons. In other words, there is no basis in the *ITA*, its regulations or in CRA’s administrative policies to define “political party” by reference to the composition of a provincial parliament or legislative assembly or the House of Commons.

B. Discussion of the Law and the Debate

1. **Does the Aurea Foundation’s exclusion of you from the Debate constitute a political activity that is prohibited under the *ITA*, given its status as a registered charity?**

The answer to this question will turn, in our opinion, on the meaning of “political party” in subsection 149.1(6.1) of the *ITA*, which is not a defined term in the *ITA*.

¹¹ <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/dvsry-eng.html> (Accessed on September 13, 2015). See also CPS-022, at para. 14.2.4, where the Policy Statement states, “... a charity must ensure that in such circumstances, [the charity invites] all the candidates in an election to speak at the same time. Furthermore, the charity must give the candidates an equal amount of time to speak on their general platform” (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>, accessed on September 13, 2015).

If “political party” has the limited meaning that the Aurea Foundation has given to it for the purpose of organizing the Debate, then your exclusion from the Debate would not constitute either an opposition, even if only indirectly, to the Party or support for the parties whose leaders have been invited to participate in the Debate.

As mentioned, above, under “Background,” the Aurea Foundation has decided to restrict the meaning of “political party” to a party with 12 or more members in the House of Commons. We see no basis, though, for so limiting the meaning of “political party” in subsection 149.1(6.1) of the *ITA*, all the more so in the context of an election campaign, where political parties are competing with each other in the democratic process for selecting elected representatives in the House of Commons.

Although the meaning of “political party” in subsection 149.1(6.1) of the *ITA* has not been interpreted by the courts in Canada, there is nothing about the subsection that would justify construing the term “political party” as a term of art that is to be understood in a way that is different from the common, every day understanding of the term. Moreover, there is nothing about the subsection that justifies reading words of limitation into the term “political party,” for example, that only political parties with 12 or more members in the House of Commons are a political party.

According to the general rule of statutory interpretation, words are to be interpreted as they are understood in common language. Therefore, “political party” in subsection 149.1(6.1) means, in our opinion, an entity that is organized for participation in the political process by endorsing and supporting candidates for election to a legislative body (whether at the municipal, provincial, territorial, federal level, and whether in Canada or in another country).

Paragraph 149.1(6.1)(c) prohibits a charitable foundation from participating in activities that, directly or indirectly, support or oppose *any* political party or candidate for election. Certainly, based on various CRA policy statements, including its most recent “Advisory on partisan political activities,” which it issued in anticipation of the current federal election, organizing and holding a debate at which only some candidates or parties are invited to participate is considered to be a partisan political activity.

Applying paragraph 149.1(6.1)(c) and CRA’s administrative views on partisan political activities to the Debate, in particular in the context of the current electoral period and in the specific circumstance of the sole public debate for party leaders that is devoted exclusively to foreign policy issues, the effect (if not the intent) of not including you could be to diminish the standing of the Party in the mind of the electorate, which arguably amounts to an indirect opposition to the Party at least as regards foreign policy matters. In addition, vis-à-vis the Party’s standing in the mind of the electorate, your exclusion from the Debate arguably constitutes support for the political parties whose leaders are being permitted to participate in the Debate by giving those leaders a public platform to address the electorate (while denying the Party that same platform).

To the extent that the Aurea Foundation provides resources to support the Debate, and the Debate is, at least indirectly, a partisan political activity, then the Aurea Foundation will not be operating exclusively for a charitable purpose, which means that it will cease to comply with the requirements of the *ITA* for its registration.

2. If the Aurea Foundation’s exclusion of you from the Debate is a political activity that is prohibited under the *ITA*, then what recourse is there available to the Party?

Anyone who is concerned about a charity’s compliance with the *ITA* can lodge a complaint with the Compliance Division of the Charities Directorate at the CRA either by phone or email. In your case,

therefore, the Party could file a complaint about the Aurea Foundation with the Charities Directorate at the CRA by email at CharitiesComplianceDivisi.LPRA@cra-arc.gc.ca.

To file a complaint, you would need to include the name of the charity (the Aurea Foundation) and, if available, its registration number (845833565 RR0001) and explain the details of the alleged non-compliance. The CRA would investigate the claim and, if the Aurea Foundation is found to be non-compliant, impose a penalty such as a fine, suspension or revocation of the Aurea Foundation's charitable registration.

Given the date of the Debate, however, sending a letter to the Aurea Foundation expressing concern about its partisan political activity, and demanding your inclusion in the Debate to avoid that breach of their obligations as a registered charity, is indicated. Failure to agree in a timely manner to your inclusion should then result in public release of that letter in an effort to put public pressure on the Aurea Foundation to remedy its impending breach.

CONCLUSION

The opinion in this letter is based on assumptions and facts that are outlined, above, under "Background." If we have omitted a fact or erred in a fact or assumption, please advise us immediately, as such omission or error may have a material effect on our opinion.

This opinion is delivered to you solely in connection with the matters set out in it and is not to be relied upon in connection with any other matters. It is for your reliance and may not be quoted from or relied upon by, nor may copies be delivered to, any other person or used for any other purpose without our prior written consent.

We would be pleased to discuss this opinion with you or answer any questions at your convenience.

Yours truly,

ILER CAMPBELL LLP

A handwritten signature in blue ink, appearing to read "Brian Iler", enclosed in a thin blue rectangular border.

Brian Iler

E-mail: biler@ilercampbell.com

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