

 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2020 Ottawa Region Charity & Not-for-Profit Law Seminar February 13, 2020</p>
<p>From PPDDAs to Lobbying: The New Reality of Public Policy Advocacy by Charities</p> <p>By Ryan M. Prendergast, B.A., LL.B. rprendergast@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p>OVERVIEW OF TOPICS</p> <ul style="list-style-type: none">• Refresher on Public Policy Dialogue and Development Activities (“PPDDAs”) by Charities• Overlap of Laws Concerning PPDDAs• When do PPDDAs Become Lobbying?• Who is a Lobbyist?• Compliance Issues for Charities and Not-for-profit Corporations (“NFPs”)• Areas where Charities and NFPs may be Impacted <p>www.charitylaw.ca www.carters.ca</p>

A. REFRESHER ON PUBLIC POLICY DIALOGUE AND DEVELOPMENT ACTIVITIES (“PPDDAS”) BY CHARITIES

1. Amendments to *Income Tax Act (Canada)* (“ITA”)

- ITA was amended by Bill C-86 which received Royal Assent on December 13, 2018
- Amendments to the ITA in Bill C-86:
 - Subsections 149.1(6.1), (6.2) and (6.201) amended to remove the former “substantially all” test concerning political activities that had restricted registered charities from devoting no more than 10% of their resources on permitted political activities
 - Added a new definition of charitable activities that “includes public policy dialogue and development activities carried on in furtherance of a charitable purpose”

- Also adds a new definition of “public policy activities” as section 149.1(10.1) that provides that
 - “Subject to subsections (6.1) and (6.2), public policy dialogue and development activities carried on by an organization, corporation, or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose”
- Amendments to the ITA did not define “public policy dialogue and development activities”
 - The explanatory notes state that they “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”

- Bill C-86 retained the prohibition on charities from devoting their resources to the “direct or indirect support of, or opposition to, any political party or candidate for public office”, which “shall not be considered to be constituted and operated exclusively charitable purposes”
- ITA amendments also permit suspension for devotion of resources to partisan activities

2. CRA Guidance Concerning PPDDAs

- On January 21, 2019, CRA released CG-027 *Public policy dialogue and development activities by charities* (the “PPDDA Guidance”) together with a new Q&A webpage on PPDDAs by charities
- PPDDA Guidance defines PPDDA as including “seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country”
- The PPDDA Guidance confirms that the ITA places **no limits** on the quantum of PPDDA
- As such, charities may devote up to 100% of their total resources to PPDDA, provided that the PPDDA furthers the charity’s stated charitable purpose

- PPDDAs must be a means to achieve a charitable purpose and **cannot become the purpose itself**
 - E.g., “charitable purpose” cannot “refer to influencing the laws, policies, or decision of a government”
 - Rather, the purpose has to be a charitable purpose at common law, but PPDDA can be utilized to achieve that purpose
- In addition, PPDDA, when considered together with the charity’s stated purpose, must provide a public benefit

- Charities are still prohibited from “directly or indirectly supporting or opposing a political party or candidate for public office,” examples of which are provided in the PPDDA Guidance
- Examples of **direct** support or opposition, includes for example:
 - “Endorsing a candidate over social media”
 - “Telling people on a charity’s website not to vote for a political party”
- Examples of **indirect** support or opposition, includes for example:
 - “The internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election...”

B. OVERLAP OF LAWS CONCERNING PPDDAS

- The PPDDA Guidance notes that while the ITA permits PPDDAs without restriction, registered charities need to be aware of the intersection of other legal requirements such as:
 - Federal and provincial lobbying and election legislation
 - The common law in different provinces, as applicable
- The focus of this presentation is on lobbying activities conducted by registered charities as PPDDAs, or lobbying activity that may be carried out by an NFP federally or in Ontario
- However, before and during federal and provincial elections charities and NFPs should consider whether election legislation is applicable

- In addition to being governed by the ITA with respect to PPDDAs, there are also requirements imposed on charities by other legislation, such as the *Lobbying Act* (Canada), *Canada Elections Act*, and the various provincial and municipal elections and lobbying legislation
- Lobbying legislation requires registration of certain lobbying activities, but there are variations in the thresholds required for registration by various organizations, types of communications that fall within the ambit of registrable activities (i.e. lobbying activities that, if conducted by a lobbyist or organization, must be registered), and the public office holders captured by each act

C. WHEN DO PPDDAS BECOME LOBBYING?

- The PPDDA Guidance includes a list of what PPDDAs may include, for example:
 - **Advocacy** - “charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country”
 - **Mobilizing others** – “charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country”
- NFPs are not governed by PPDDAs and are therefore free to conduct lobbying or other activities subject to compliance with those laws

- The *Lobbying Act* (Canada) does not contain a definition for “lobbying” *per se*, though the Office of the Commissioner of Lobbying of Canada provides:
 - “Lobbying is **communicating**, with **public office holders**, for **payment with regard to**:
 - The making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs;
 - The awarding of federal grants, contributions or other financial benefits; and
 - In the case of consultant lobbyists, the awarding of a federal government contract and arranging a meeting between their client and a public office holder.”

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- The *Lobbyists Registration Act, 1998* (Ontario) contains a definition of “lobby” in subsection 1(1), which includes communication “with a public office holder in an attempt to influence” matters similar to those outlined in the *Lobbying Act* (Canada)
- Other provincial lobbying legislation contains similar definitions for lobbying
- Charities and NFPs should also be aware that, many provinces also include “grass-roots communication” as a type of activity
 - “Any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion”

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- Exemptions are contained within different lobbying statutes
 - Some communications that may otherwise be considered lobbying activities are exempt, such as:
 - Submissions, whether oral or written, to parliamentary or legislative committees that are public record;
 - Submissions, whether oral or written, concerning the enforcement, interpretation or application of the law; or
 - Making inquiries or requests for information;

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D. WHO IS DOING THE LOBBYING?

1. Lobbyists In Charities And NFPs

- The *Lobbying Act* (Canada) imposes registration and reporting obligations concerning “in-house lobbyists” and “consultant lobbyists”
 - Consultant lobbyists are those who are hired to communicate with public office holders on behalf of a client. They may be professional lobbyists or those who, in the course of their work, communicate or arrange meetings with a public office holder
 - Examples of consultant lobbyists include government relations professionals, lawyers, notaries, engineers, accountants or other professional advisors who provide lobbying services

- Organizations may also employ “in-house lobbyists,” who are individuals employed by the organization, any part of whose duties it is to communicate with public office holders on the organization’s behalf in respect of lobbying
 - Under the *Lobbying Act* (Canada), charities and NFPs are only required to register with the Office of the Commissioner of Lobbying of Canada if the lobbying activities of in-house lobbyists “constitute a significant part of the duties”
 - The 20% Rule = if the cumulative lobbying activities of all employees of the charity or NFP exceed 20% of one person’s duty over a month, then the organization needs to register

- Who doesn't have to register?
 - Charities and NFPs that don't meet the threshold, e.g., 20% under federal law or 50 hours, cumulative of all directors, officers, and employees in Ontario
 - Volunteers
 - Individuals on their own behalf
 - PPDDA Guidance clarifies the application of the ITA to representatives of a charity involved in politics during "personal time" and that registered charities cannot "use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual's personal political involvement"

2. Who Is Being Lobbied?

- Under the *Lobbying Act* (Canada), "public office holders" are:
 - Members of the Senate or the House of Commons and their staff
 - Appointees to any office or body by or with the approval of the Governor in Council or a minister
 - Officers, directors or employees of any federal board, commission or tribunal
 - Members of the Canadian Armed Forces
 - Members of the RCMP
- Similar definitions in provincial lobbying legislation, but generally includes all elected officials, e.g., MPPs, MLAs, appointees, government employees, or employees of public bodies

E. COMPLIANCE ISSUES FOR CHARITIES AND NFPs

- A charity or NFP under the *Lobbying Act (Canada)* with in-house lobbyists that meet the threshold must register and file returns
 - Returns are to be filed by the “employee who holds the most senior office in a corporation or organization and is compensated for the performance of their duties”
 - The general requirement to file a return for in-house lobbyists is within two months of meeting the threshold of having engaged in lobbying activities
- Consultant lobbyists are responsible for their own registration

- Commissioners under lobbying legislation have broad investigative powers, and may find the senior officer or lobbyist of a charity or NFP to be personally liable, and impose penalties for non-compliance of the reporting or registering requirements
 - Penalties may involve, for example, monetary fines ranging from \$25,000 to \$200,000, prohibitions on lobbying for a number of years, or in the case of the federal lobbying legislation, even imprisonment

F. AREAS WHERE CHARITIES AND NFPS MAY BE IMPACTED

- Applying for Grants
 - Applying for a grant or other funding is not generally lobbying; using lobbyist to speak to public office holders about grants is lobbying
- Court of Appeal decision, *R v Carson*, 2019 ONCA 396
 - Former federal employee, i.e., “designated public office holder” under *Lobbying Act* (Canada) and so subject to a statutory five-year prohibition from carrying out lobbying activities
 - After leaving federal government and becoming ED of not-for-profit, public office holders contacted not-for-profit about change to funding agreement
 - Communications to alter terms of grant considered lobbying

- Having directors or officers involved in lobbying
 - Office of the Commissioner of Lobbying of Canada has noted that “[i]f the chairperson or member of the board ... receives remuneration beyond reimbursement of expenses, the requirement for registration as a consultant lobbyist applies...
 - What is remuneration?
 - Federal Court decision of *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388
 - Dealt with receipt of gift to the Prime Minister and family from the Aga Khan of a vacation on the Aga Khan’s private island
 - On judicial review, Federal Court determined “remuneration” should be broadly interpreted and not strictly limited to monetary payment

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- Mobilizing others – “charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country”
 - PPDDA? Yes
 - Lobbying?
 - Taking out an advertisement in a newspaper or with a broadcaster to encourage the public to contact their MP
 - Mailing residents of an MP’s riding to contact their MP
 - Encouraging supporters to contact their MP on social media

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- Other laws to be aware of:
 - In Ontario - Brampton, Hamilton, Ottawa, Peel Region, Toronto and Vaughan have adopted their own lobbying laws
 - Need to be aware of whether a municipal by-law is also applicable to any lobbying activities
 - *Canada Elections Act*
 - Charities and NFPs may fall under the broad definition of “third parties”
 - Reporting requirements apply to third parties that engage in “partisan activities, partisan advertising, and election surveys” and “election advertising”
 - Applies during the “pre-election period” as well

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CONCLUSION

- Lobbying legislation is complex, and can be a trap for unwary charities and NFPs
- Charities and NFPs need to be aware, if engaging in any lobbying activities, in addition to lobbying legislation, the requirements imposed by the ITA on charities
- ITA permits charities to engage in PPDDAs, so long as they are in furtherance of their charitable purposes, and do not directly or indirectly support or oppose a political party or candidate for public office (with no similar restriction on activities for NFPs)
- Charities and NFPs planning to become involved in these areas should seek legal advice before doing so

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