

	<b>THE 19<sup>TH</sup> ANNUAL CHURCH &amp; CHARITY LAW™ SEMINAR</b> Toronto – November 15, 2012
	<b>Playing by the Rules: Political Activities Fair Game for Charities</b>  By Karen J. Cooper, LL.B., LL.L., TEP kcooper@carters.ca 1-866-388-9596  © 2012 Carters Professional Corporation
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<b>OVERVIEW</b>	
<ul style="list-style-type: none"><li>• Putting the 2012 Federal Budget into Context</li><li>• Key CRA Policies, <i>Income Tax Act</i> ("ITA") Provisions, and Resource Materials</li><li>• Political Purpose vs. Charitable Purpose</li><li>• Three Categories of Activities</li><li>• Federal Budget 2012 Changes Affecting Political Activities</li><li>• Practical Implications for Charities</li></ul>	
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<b>A. PUTTING THE 2012 FEDERAL BUDGET IN CONTEXT</b>	
<ul style="list-style-type: none"><li>• In the last year, there have been numerous allegations made against environmental charities, including:<ul style="list-style-type: none"><li>– Politicians questioning the appropriateness of foreign funding of environmental charities</li><li>– Government "Strategy on Counter-Terrorism" equating environmentalism with white supremacy and the terrorist activities in Oklahoma City in 1995 and Norway in 2011</li></ul></li></ul>	
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- This has had the unfortunate effect of creating a chill effect on charities becoming involved in political activities
- Notwithstanding these concerns, the 2012 Federal Budget ("Budget 2012") could have been worse for charities concerning political activities
- No significant changes to rules permitting political activities under the *Income Tax Act* (ITA)
- No changes to the current CRA Policy on Political Activities

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- Budget 2012 changes do not stop charities from becoming involved in political activities
- However, charities will need to carefully understand the rules that do apply and be careful in documenting their involvement in political activities
- It is therefore essential to first understand what the rules are concerning political activities before discussing the impact of Budget 2012

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**B. KEY CRA POLICIES, INCOME TAX ACT ("ITA") PROVISIONS, AND RESOURCE MATERIALS**

- CRA Policy Statement (CPS – 022) "Political Activities" effective date: September 2, 2003
- CRA Advisory on Partisan Political Activities
- CRA Policy Commentary, Political Party Use of Charity Premises (CPC-0070)
- Speech by the Director General of the Charities Directorate on May 4, 2012

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- These documents are available on the CRA website <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcv/menu-eng.html> and provide information for registered charities on political activity and allowable limits under the ITA, as well as the common law
- CRA policies are general guidelines only and do not have the force of law
- Subsection 149.1(6.1) and (6.2) of the ITA provides that where a charitable organization devotes substantially all of its resources to charitable activities carried on by it and

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- a) It devotes part of its resources to political activities,
- b) Those political activities are ancillary and incidental to its charitable activities, and
- c) Those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to devoting that part of its resources to charitable activities carried on by it

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- Resources from [www.carters.ca](http://www.carters.ca):
  - Charity Law Bulletin No. 206 -The Parameters of Political Activities for Registered Charities (<http://www.carters.ca/pub/bulletin/charity/2010/chylb206.pdf>)
  - Charity Law Bulletin No. 280 - 2012 Federal Budget: Including New Rules and Sanctions for Charities Conducting Political Activities and Bulletin #286 (<http://www.carters.ca/pub/bulletin/charity/2012/chylb280.htm>)
  - Anti-terrorism & Charity Law Alert No. 31 - Canada's Counter-Terrorism Strategy Singles Out Environmentalism (<http://www.carters.ca/pub/alert/ATCLA/ATCLA31.pdf>)

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**C. POLITICAL PURPOSE vs. CHARITABLE PURPOSE**

- All registered charities are required by law to have exclusively charitable purposes (relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community)
- An organization established for a political purpose does not meet the definition of what a charity is at common law
- The courts have determined political purposes to be those that seek to:
  - Further the interest of a political party or support a political party or candidate for public office, or

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- Retain, oppose, or change the law, policy or decision of any level of government in Canada or a foreign country
- To determine whether a charity is constituted exclusively for charitable purposes, CRA will look at:
  - The stated purpose of an organization; and
  - The organization's current activities to determine whether it has adopted political purposes
- A political purpose that is not in a charity's governing document but that the charity still pursues can become an "unstated political purpose", which is not acceptable

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**D. THREE CATEGORIES OF ACTIVITIES**

- Activities undertaken by a registered charity can be separated into three categories:
  - a) Charitable activities (permitted without limits)
  - b) Political activities (permitted up to prescribed limits)
  - c) Prohibited activities (never permitted)

**1. Charitable activities (permitted without limits)**

- A charitable activity is an activity undertaken to achieve a charitable purpose

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- If an activity is considered by CRA to be charitable, then it is permitted without limits
- The CRA policy provides that communication with the public or a public official is a charitable activity in the following circumstances:
  - Public awareness campaign about the work of a charity or an issue related to that work, so long as the activity is connected and subordinate to the charity's purpose

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- Communicating with an elected representative or public official, even if the charity advocates that the law, policy or decision of any level of government in Canada or abroad be retained, opposed, or changed, provided that such activity is subordinate to the charity's purpose and all representations should:
  - Relate to an issue that is connected to the charity's purpose;
  - Be well reasoned; and
  - Not contain information that is false, inaccurate or misleading

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- Releasing the text of a representation before or after delivering it to the elected representative or public official, provided that the entire text is released and there is no explicit "call to political action"
- "Call to political action" means encouraging the public to contact an elected representative or public official to urge them to retain, oppose, or change a law, policy or decision

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- Other examples of charitable activities given in the CRA Policy Statement
  - Distributing the charity’s research, including distributing it to all election candidates
  - Publishing a research report online
  - Presenting a research report to a Parliamentary Committee
  - Giving an interview about a research report
  - Distributing a research report to all Members of Parliament

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## 2. Political Activities (Permitted Up To Prescribed Limits)

### a) What is a Political Activity?

- The ITA does not contain a definition of “political activity”
- According to Policy Statement CPS-022, an activity is presumed to be a political activity if a charity:
  - Explicitly communicates a call to political action (i.e. encourages the public to contact elected representatives or a public official and urges them to retain, oppose, or change the law, policy, or a decision of government);

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- Explicitly communicates to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed or changed; or
- Explicitly indicates in its material that the intention of the activity is to incite, organize or put pressure on government to retain, oppose or change the law, policy or decision of any level of government in Canada or another country
- A charity may engage in political activities provided that:
  - The activities are non-partisan (as discussed below);

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- The issue in question is connected (ancillary) to the charity's purposes;
- The activities are subordinate (incidental) to the charity's purposes;
- The charity's views are based on a well reasoned position; and
- The activities fall within expenditure limits under the ITA (described below)

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- "Subordinate" means a minor focus of the charity
  - Need to consider it in relation to the charity's entire program of activity
  - If it becomes the main way of furthering the charity purposes, it may have become an end or unstated purpose of the charity
- "Connected" and "Subordinate" flows from subsection 149.1(6.2) of the ITA, which provides that political activities must be ancillary and incidental to the charitable activities of the charity

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- Examples given in the CRA Policy Statement of permitted political activities:
  - Buying a newspaper advertisement to pressure the government concerning a law
  - Organizing a march or a rally on Parliament Hill
  - Organizing a conference in support of the charity's opinion on a given matter
  - Hiring a communications specialist to arrange a media campaign
  - Using a mail campaign to urge supporters to contact the government

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**b) Limits on Expenditures on Permitted Political Activities**

- Where a charity takes part in political activities, it must devote “substantially all” of its “resources” to charitable activities
- “Resources” is not defined in the ITA but administratively CRA considers “resources” to include
  - The total of a charity’s financial assets
  - Physical resources (e.g. buildings, office, equipment)
  - Human resources (e.g. staff, volunteers, and directors)

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- “Substantially all” usually means 90% or more
- Therefore, subject to certain exceptions described below, a charity that devotes no more than 10% of its total “resources” in a year to political activities will be operating within the “substantially all” requirement

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- CRA’s administrative discretion concerning the limits on expenditures on political activities has been extended in certain situations (e.g. smaller charities) by its Policy Statement:
  - A charity with annual income of less than \$50,000 (previous year) can devote up to 20% of resources in a given year
  - A charity with annual income of between \$50,000 and \$100,000 (previous year) can devote up to 15% of resources in a given year

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- A charity with annual income of between \$100,000 and \$200,000 (previous year) can devote up to 12% of resources in a given year
- Issues involving “resources” that remain unclear:
  - When to calculate the “resource” limit?
    - Presumably at the fiscal year end of the charity
  - How to calculate the “resource” limit?
    - Presumably on a global basis, averaging all types of “resources”, but it is not clear what this would involve

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- How to monetize volunteer “resources”?
  - Possibly by comparable fair market value, but again this is not clear
- In limited circumstances, expenditures on political activities might be permitted by CRA to be averaged over a number of years (e.g. “infrequent, short-term, one-of-a-kind political activities”)
  - CRA will look to see if there were unique one-time conditions that led the charity to overspend on political activities in one year

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- If so, CRA might allow the charity to use the unclaimed portion of resources that it did not spend on political activities for up to two preceding years
- Resources used towards permitted political activities do not count toward meeting a charity’s disbursement quota (i.e. 3.5% D.Q.)
- A charity that is involved in political activities will need to keep careful books and records in order to demonstrate that substantially all of its resources have been devoted to charitable activities in order to prepare for a CRA audit

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- Where an expenditure relates to both political and charitable activities, a reasonable allocation can be made
- Where substantially all (90%) or more of the activity is charitable, then the whole expenditure can be considered charitable
- See CRA's Guidance on Fundraising concerning how to allocate expenditures
- The onus is on the charity to explain and justify its allocation

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### 3. Prohibited Activities

- Prohibited activities are activities that are either illegal or involve partisan political activities and therefore are not permitted at all
- According to subsections 149.1(6.1) and (6.2) of the ITA, and the CRA Advisory on Partisan Political Activities, "partisan political activity" involves the "direct or indirect support of, or opposition to, any political party or candidate for public office"

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- When a political party or candidate for public office supports a policy that is also supported by a charity, the charity may promote this policy but it cannot directly or indirectly support the political party or candidate for public office
- Examples of prohibited partisan political activity:
  - A gift of charity funds to a political party that supports the charity's views on a given matter
  - Inviting an MP who is a member of a church and who is running for re-election to speak at a church without giving an equal opportunity to all other candidates seeking election for the same office

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- Single out the voting pattern on an issue of any one elected representative or political party
- Other examples of prohibited partisan activities in the CRA Advisory include the following:
  - Making public statements (written or oral) that endorse or denounce a candidate or political party
  - Hosting an all candidates meeting or public forum in a partisan manner
  - Inviting candidates to speak at different dates or events so as to favour a candidate or political party

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- Publishing the voting records of selected candidates or parties on an issue
- Posting signs in support of, or in opposition to, a particular candidate or political party
- Distributing literature or voter guides that promote or oppose a candidate or political party explicitly or by implication
- Explicitly connects its position on an issue to the position taken on the same issue by a candidate or political party

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- Examples of activities in the CRA Advisory that would be permissible during an election
  - Employees, members and leaders of a charity may assist any candidate or political party in their personal capacity
  - They should not, however, make partisan comments in speeches at charity functions or in charity publications; and in other situations, are encouraged to indicate that their comments do not represent the views of the charity

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- Posting information on a charity's website about candidates and political parties is allowable, provided that:
  - It is connected and subordinate to the charity's purpose
  - It reflects the position taken with regard to all political parties or candidates
  - No political party or candidate is singled out favourably or unfavourably
    - There is no explicit direction to support or oppose a political party or candidate

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- Charging fair market value rent to a political party for occasional meetings held at a charity's facilities is permitted so long as equal access and opportunity is given to all political parties
- However, this remains a grey area, as prolonged association with one party may lead to conclusion the charity favours that party, thereby constituting a prohibited political activity – analysis is fact specific (CRA Policy Commentary, *Political party's use of Charity's premises*, CPC -007, available online at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-007-eng.html>)

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- The CRA Advisory reminds charities that “during election campaigns the CRA steps up monitoring of activities of registered charities and will take appropriate measures if a registered charity undertakes partisan political activities...Charities engaging in partisan political activities risk being deregistered”

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**E. FEDERAL BUDGET 2012 AFFECTING POLITICAL ACTIVITIES**

- Budget 2012 was introduced on March 29, 2012, online at <http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html>
- Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* received Royal Assent on June 29, 2012, online at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697420>

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- Budget 2012 impacts charities and RCAAs in 3 ways.
- First, Budget 2012 expands the definition of political activities to include certain gifts by them to qualified donees
  - Specifically, Budget 2012 expands the definition of “political activities” under subsection 149.1(1), to “include the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee” (“QDs”)

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- The focus is on the intent of the donor charity, not the intent of the recipient QD
- This change will result in a double count of political activities, once by the donor charity and once by the recipient QD
- Three possible scenarios in determining “can reasonably be considered”:
  - Written designation to use the gift for the political activities of the QD

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- Written designation to not use the gift for the political activities of the QD
- No written designation, then look at other circumstances to see if there was "a purpose"
- Likely best to avoid multi-purpose gifts, because Budget 2012 simply refers to "a purpose" so any political purpose for any part of the gift may taint the whole gift

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- Funding charities that are caught by the new inclusion rules will have to track and report political activities the same way as charities directly involved in political activities
- As a result, funding charities that do not want to have to track political activities in their T3010 should designate in writing those gifts that are not to be used for political activities by the recipient QD

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- Second, Budget 2012 introduces new intermediate sanctions :
  - Where a registered charity exceeds the limits in the ITA for political contributions (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges (in addition to revocation); and
  - Where a registered charity fails to report any information (not just political activities) that is required to be included on a T3010 annual return, CRA can suspend its tax receipting privileges until CRA notifies the charity that it has received the required information

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- This second sanction emphasizes the importance of having the board, as well as having legal and accounting professionals review and approve the T3010 annual return before filing it with CRA
- \$8 million committed to enforcement by CRA in Budget 2012, including educational initiatives and webinars

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- Third, Budget 2012 states there will be more disclosure required concerning political activities
  - More information about political activities will be required in the T3010, (including foreign donors) although details of what that involves were not addressed in Budget 2012
  - Focus is on disclosure of funding of political activities by foreign donor
  - Such funding, though, does not have to be counted towards the 10% resource limit until it is actually expended on political activities

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- Director General's Speech in May 2012 explores the type of disclosure about political activities that will be required in the T3010 in the future
- In this regard, charities involved in political activities will need to complete a new political activities schedule (revised from the 2002 version)
  - Will need to indicate the type of political activity that a charity has devoted resources (financial, property or human) to (i.e., media ads, demonstrations, calls to action, social media campaigns)

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- Charity will need to explain the relationship between such political activities and its charitable purpose
- Charities will need to indicate the amount received from foreign sources for political activities, specifically:
  - The amount that it received
  - The nature of the political activity
  - The country of origin of the donor (using the existing country codes in the T3010)

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- However, there will be no need to identify the name of the foreign donor
- The revised T3010 should be available in early 2013
- Charities that do not want to disclose that they receive funding from foreign sources for political activities in their T3010 could consider utilizing a Canadian resident (individual, for-profit corporation, or not-for-profit corporation) to receive such funding from foreign sources which could then gift such funding to the charity

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**F. PRACTICAL IMPLICATIONS FOR CHARITIES**

- Know the rules before becoming involved in political activities
- Ensure that activities are either “charitable activities” or are “permitted political activities”
- The decision to become involved in permitted political activities should be authorized by the board of directors of the charity
- Ensure that any permitted political activities undertaken fall within expenditure limit (i.e., generally within the 10% resource limit)

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- It is essential to keep careful books and records and do appropriate allocations of all expenditures with respect to permitted political activities
- Avoid any prohibited partisan political activities
- Gifts to QDs should generally include a written designation which states that the gift should not be used for the political activities of the recipient QD
- Have the board of directors, as well as accounting and legal professionals, review and approve the T3010 prior to filing, due to the imposition of new intermediate sanctions and greater public scrutiny

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