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**CHARITIES AND POLITICS:
WHERE HAVE WE BEEN AND
WHERE ARE WE GOING**

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**25th Annual
Church & Charity Law
Seminar™
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and Where Are We Going**

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A. OVERVIEW OF TOPICS

- Timeline of Previous Legislation and CRA Policies
- Brief Overview of Existing Legislative Rules and Political Activities Audits
- Review of Recent Initiatives to Modernize the Rules
- Current Legislative Amendments Applying to Registered Charities and the Conduct of Political Activities and What's on the Horizon

See *Charity & NFP Law Bulletins* on this topic at www.carters.ca

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B. TIMELINE OF PREVIOUS LEGISLATION AND CRA POLICIES

1. 1986 Amendments to the *Income Tax Act* (Canada)

- The *Income Tax Act* (Canada) was first amended in 1986 following the Federal Court of Appeal decision in *Scarborough Community Legal Services v. The Queen* in 1985
 - Case dealt with an appeal from a decision by CRA to refuse to register Scarborough Community Legal Services because it was participating in activities of a political nature
 - Court upheld the decision

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- In response, the *Income Tax Act* (Canada) was amended in 1986 to permit charities to engage in a limited amount of political activities
- Explanatory notes indicated that:
 - "... it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals..."; and
 - That "... a charity may, without restriction, provide information and express its views in briefs to government to change laws or policies."

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2. Administrative Policy Changes in Response to New Legislation

- Prior to *Scarborough Community Legal Services*, CRA's administrative policy concerning political activities by registered charities was *Information Circular 78-3*, which was withdrawn after protest
- 2 years after the 1986 *Income Tax Act* (Canada) amendments, CRA issued *Information Circular 87-1* "Registered Charities – Ancillary and Incidental Political Activities", which was not replaced until 2003

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- *Policy Statement* CPS-011 "Political Activities" was released on September 2, 2003 (the "Policy Statement")
 - Release followed 2 years of collaborative dialogue between the Government of Canada and charitable sector
 - The Policy Statement recognized that:
 - "Canadians benefit from the efforts of charities and the practical, innovative ways they use to resolve complex issues related to delivering social services. Beyond service delivery, their expertise is also a vital source of information for governments to help guide policy decisions. It is therefore essential that charities continue to offer their direct knowledge of social issues to public policy debates"

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C. BRIEF OVERVIEW OF EXISTING LEGISLATIVE RULES AND POLITICAL ACTIVITIES AUDITS

1. Pre-2012 Legislative Provisions and Administrative Policies

- Subsections 149.1(6.1) and (6.2) of the *Income Tax Act* ("ITA") currently provides that where a charitable organization devotes **substantially all** of its resources to charitable activities carried on by it and
 - It devotes part of its resources to political activities,
 - Those political activities are ancillary and incidental to its charitable activities, and
 - 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 as devoting that part of its resources to charitable activities carried on by it

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- Issues with pre-2012 legislative provisions and administrative policies
 - ITA never defined "political activities", "substantially all" or "resources"
 - How to calculate the "resource" limit?
 - How to track volunteer and donated "resources"?
- "Substantially all" means 90% or more
 - Therefore, subject to certain exceptions, 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
 - Conversely, a charity that devotes more than the allowable limit may be considered by CRA to be operating to achieve a political objective

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- Policy Statement clarified activities undertaken by a registered charity can be separated into three categories:
 - Charitable activities (permitted without limits)
 - Political activities (permitted up to prescribed limits)
 - Prohibited activities (never permitted)
- An activity is presumed a "political activity" if a charity:
 - Explicitly communicates a call to political action
 - 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 the government to retain, oppose or change the law, policy or decision of any level of government in Canada or another country

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- A charity may engage in political activities provided that:
 - The activities are non-partisan (as discussed below)
 - 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
 - The activities fall within expenditure limits under the ITA
- According to subsections 149.1(6.1) and (6.2) of the ITA "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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2. Post-2012 Legislative Provisions Policies

- Starting with the May 29, 2012 Federal Government budget ("Budget 2012"), various amendments were made to the ITA and new resources were allocated to CRA
 - Budget 2012 stated
 - "Concerns have been raised that some charities may be exceeding these limitations and that there is currently no requirement for a charity to disclose the extent to which it receives funding from foreign sources for political activities"
 - Comments were in reference to media coverage concerning the debate in the Senate around alleged donations to Canadian charities by foreign donors purportedly for political activities

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- The 2012 ITA amendments did not make significant changes to the rules permitting political activities
- Moreover, no changes were made to Policy Statement
- Budget 2012 amendments included, e.g., new definition of "political activities" to stop gifts for political purpose, suspend registered charities for failing to file for excessive political activities
- Budget 2012 allocated \$8 million (which was expanded to \$13.1 million) to CRA to "enhance its education and compliance activities with respect to political activities by charities"
 - As a result, CRA stated it would conduct 60 audits related to the political activities of charities over a four year period

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D. REVIEW OF RECENT INITIATIVES TO MODERNIZE THE RULES

1. Winding Down of the Political Activities Audit Program for Charity and Consultation with Sector

- On January 20, 2016, Minister of National Revenue, Diane Lebouthillier, announced the winding down of CRA's review of registered charities' political activities
 - A news release from the Government of Canada stated the political activities audit program showed substantial compliance with the rules regarding charities' involvement in political activities and that of the 30 completed audits, only 5 resulted in revocation, the determination of which "were primarily based on factors beyond their involvement in political activities"

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- On September 27, 2016, the Minister of National Revenue announced, "the start of public consultations on the rules regarding the involvement of registered charities in political activities" and that a consultation panel had been established consisting of 5 experts
 - Consultation began with the sector in September, 2016 and concluded in December, 2016
- On May 4, 2017, CRA published the Report of the Consultation Panel on the Political Activities of Charities (the "Consultation Report"), prepared after the consultation with the charitable sector, and recommended:
 - Define "political activities" to mean "public policy dialogue and development" and to permit charities to engage in public dialogue

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- Changes to CRA compliance and appeals, audits, communication and collaboration
- Removal of legislative reference to non-partisan political activities and "political activities"
- A modern legislative framework that focuses on charitable purposes rather than activities
- In conjunction with the release of the Consultation Report, the Minister of National Revenue announced that the government would suspend the remaining audits of charities for political activities initiated in Budget 2012 pending the implementation
- On February 27, 2018, the Liberal Federal Government tabled the 2018 Budget, which indicated the government's commitment to provide a response to the Consultation Report on political activities by charities

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2. ITA Provisions Concerning Political Activities Struck Down as Unconstitutional

- On July 16, 2018, Ontario Superior Court of Justice struck down provisions of the ITA restricting the amount of non-partisan political activities that registered charities may undertake in the decision of *Canada Without Poverty vs AG Canada* (the "CWP Decision")
 - Provisions infringed the charity's right to freedom of expression under 2(b) of the *Canadian Charter of Rights and Freedoms*
 - Court found that there is "no justification of s.149.1(6.2), that draws a distinction between charitable activities and non-partisan 'political activities' in the nature of public policy advocacy"

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- On August 15, 2018, the Minister of National Revenue announced that the Government of Canada had appealed the decision, citing errors of law
 - The Minister also stated that the CWP Decision would "not change the policy direction the Government intends to take with respect to the removal of quantitative limits on political activities"
 - The government also signaled its intention to amend the ITA to implement recommendation #3 of the Consultation Report to "allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy"

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E. CURRENT LEGISLATIVE AMENDMENTS

1. September Release of Proposed Legislative Amendments for Public Consultation

- On September 14, 2018, the Department of Finance Canada released a draft proposal of legislative amendments for public consultation (the "September Proposed Amendments")
 - The September Proposed Amendments proposed to remove from the ITA the reference to the "substantially all" test concerning the ability of registered charities to engage in political activities

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- Explanatory notes to the September Proposed Amendments stated that CRA would need to make the determination of permitted political activities by reference to the common law
 - Without reference to the “substantially all” test, this meant that CRA’s interpretation of “incidental” would be critical given there was relatively little case law in this area after 1985
- On October 2, 2018, CRA released draft guidance *Charities and public policy advocacy* for public consultation, but this was subsequently withdrawn

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2. Bill C-86, Budget Implementation Act, No. 2 Introduced

- On October 25, 2018, the Department of Finance Canada tabled a Notice of Ways and Means motion which set out various amendments to the ITA, including those relating to political activities from the September Proposed Amendments, which had been revised as a result of public consultation
- On October 29, 2018, Bill C-86 received first reading
- Important to note many of these amendments are retroactive to 2008 or 2012 as applicable, and therefore will impact suspended audits

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- Amendments to the ITA in Bill C-86
 - Bill C-86 includes the amendments to subsections 149.1(6.1), (6.2) and (6.201) to remove the “substantially all” test
 - Keeps 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”
 - Removes suspension for non-compliance with the “substantially all” test but permits suspension for devotion of resources to partisan activities
 - Largely undoes the 2012 ITA amendments

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- Adds a new definition of charitable activities that “includes public policy dialogue and development activities carried on in furtherance of a charitable purpose”
 - Explanatory notes clarify that charities’ participation in “public policy dialogue and development activities” is “without limitation”
- 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”

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- The explanatory notes explain that new section 149.1(10.1) “ensures that, where some or all of the activities of a charity are public policy dialogue and development activities carried on in support of its stated purpose, those activities will not be considered to reflect a separate political purpose.” [emphasis added]

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- Amendments to the ITA do 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”
 - The Consultation Report recommended use of the term “public policy dialogue and development” and recommended that it mean “providing information, research, opinions, advocacy mobilizing others, representation, providing forums and convening discussions”
- On October 31, 2018, the press release stated, “These changes are consistent with Recommendation no. 3” of the Consultation Report”

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- Issues to Consider with Bill C-86
 - While removal of the quantitative limits on non-partisan political activities is welcome, there are factors under the new regime that will need to be clarified in a guidance from CRA
 - The new definition of “charitable activities” requiring that public policy dialogue and development activities be **“carried on in furtherance of a charitable purpose”**
 - This means that public policy dialogue and development activities must still be connected to a charitable purpose, *i.e.*, they cannot be a purpose in and of themselves

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- An administrative policy will be needed to provide a definition for “public policy dialogue and development activities”
- It will still not be possible for a charity to have a political purpose
- 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
 - Retain, oppose, or change the law, policy, or decision of any level of government in Canada as well as/or any foreign country
- As a separate matter, charities that engage in “public policy dialogue and development activities” may be required to register under lobbying legislation


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CONCLUDING THOUGHTS

- Bill C-86 is a very good development for the charitable sector in Canada
- Important to remember though that recommendation no. 3 of the Consultation Report was described as an “interim legislative step” necessary with respect to political activities
- The Consultation Report contained other recommendations, including the modernization of the charitable framework in Canada which is “urgent and needed”, beyond changes dealing with political activities

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