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## PLAYING BY THE RULES: POLITICAL ACTIVITIES FAIR GAME FOR CHARITIES

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*By Terrance S. Carter and Karen J. Cooper\**

### A. INTRODUCTION

With the recent spotlight by the federal government on foreign funding of political activities by Canadian charities in the 2012 Budget, registered charities may be reluctant to become or stay involved in political activities. While Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*<sup>1</sup> (“Budget 2012”), does somewhat affect the rules regarding political activity, the basic regime for political activities by charities remains largely unchanged. When enacted, Bill C-38 will add a revised definition of “political activity” to the *Income Tax Act*<sup>2</sup> (“ITA”) and create new sanctions, both of which are discussed in this *Charity Law Bulletin*. The remaining rules, and therefore current Canada Revenue Agency (“CRA”) policy, related to the conduct of political activities by registered charities remain the same.

Registered charities should not let the changes arising from Budget 2012 deter them from engaging in political activities if they wish to. Charities may become involved in or continue to be involved in political activities as long as they carefully study and follow the applicable rules, as well as carefully documenting all

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<sup>1</sup> Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5686008&file=4>> [“Bill C-38”]. Bill C-38 passed Third Reading in the House of Senate on June 27, 2012. Royal Assent of the bill is still pending.

<sup>2</sup> R.S.C., 1985, c. 1 (5th Supp.).

of their involvement in political activities. This Bulletin summarizes the rules that apply to political activities and explains the changes proposed by Bill C-38.

## B. PUTTING THE 2012 FEDERAL BUDGET INTO CONTEXT

In the last six months, there have been numerous allegations made against environmental charities regarding the use of donations claimed to have been received from foreign sources. Specifically, various politicians have questioned the appropriateness of foreign funding of environmental charities in Canada if those funds are going to be used to lobby the government. Of particular significance is the Senate inquiry that was initiated by Senator Nicole Eaton on February 28, 2012 to study the foreign funding of charities in Canada, based upon claims by Senator Eaton that such funding was improperly influencing policy discussion in Canada, presumably with regards to certain projects by the government, such as the Northern Gateway Pipeline.<sup>3</sup> Of course, such accusations lack credibility given the fact that there are many other segments of the charitable sector in Canada that receive large scale funding from foreign sources each year (such as universities, hospitals and religious organizations) for which the government has not made any allegations that this funding might be used for political activities.

It is also important to note that the federal government's "Strategy on Counter-Terrorism" released in February 2012 equated environmentalism with white supremacy and the terrorist activities in Oklahoma City in 1995 and Norway in 2011.<sup>4</sup> As a result of these and other attacks on environmental charities, an unfortunate chill effect has been created for charities wanting to become engaged in political activities.<sup>5</sup> However, Budget 2012, through its implementing legislation, Bill C-38, does not significantly impact the ability of charities to become involved in political activities.

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<sup>3</sup> For Senator Eaton's statement in the Senate see [http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db\\_2012-02-28-e.htm#70](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db_2012-02-28-e.htm#70). For a discussion about the launch of the inquiry, see [http://www.huffingtonpost.ca/2012/02/28/nicole-eaton-green-charity-oil-sands-canada\\_n\\_1307440.html?view=print&comm\\_ref=false](http://www.huffingtonpost.ca/2012/02/28/nicole-eaton-green-charity-oil-sands-canada_n_1307440.html?view=print&comm_ref=false).

<sup>4</sup> For more information see, Terrance S. Carter and Nancy E. Claridge, "Canada's Counter-Terrorism Strategy Targets Environmentalism" *Anti-Terrorism & Charity Law Alert* No. 31 (30 May 2012), online: Carters Professional Corporation <<http://www.carters.ca/pub/alert/ATCLA/ATCLA31.pdf>>.

<sup>5</sup> While the federal government might claim that an attack was not intended, it has certainly been perceived as such by environmental charities, see for example the Black Out/Speak Out campaign: <http://www.blackoutspeakout.ca/>.

### C. SUMMARY OF THE CURRENT RULES

Prior to discussing the amendments proposed by Bill C-38 and related matters articulated in Budget 2012, it is necessary to first briefly summarize the current rules that apply to political activities<sup>6</sup>. However, what follows is not intended to be a comprehensive explanation of the rules that apply, but rather to provide only a basic framework for understanding the changes introduced by Budget 2012. As such, it is very important that any charity that would like to become involved or continues to be involved in political activities conduct the necessary due diligence by reading all of the relevant materials on the CRA website concerning political activities, which are listed below, and as well as consulting with their legal counsel:

- ◆ CRA Policy Statement (CPS-022) “Political Activities”<sup>7</sup>
- ◆ CRA Advisory on Partisan Political Activities<sup>8</sup>
- ◆ CRA Policy Commentary, Political Party’s Use of Charity’s Premises (CPC-0070)<sup>9</sup>
- ◆ Speech by the Director General of the Charities Directorate on May 4, 2012<sup>10</sup>

According to CPS-022, all registered charities are required by law to have exclusively charitable purposes (e.g. relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community). An organization that is 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 retain, oppose, or change the law, policy or decision of any level of government in Canada or a foreign country.

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<sup>6</sup> For more information see, Terrance S. Carter and Theresa L.M. Man, “Charities Speaking Out: The Evolution of Advocacy and Political Activities By Charities In Canada” The New York University School of Law National Centre on Philanthropy and the Law Annual Conference (29 October 2010), online: Carters Professional Corporation

<<http://www.carters.ca/pub/article/charity/2010/tsc1029.pdf>>; Jennifer M. Leddy, “The Parameters of Political Activities for Registered Charities” Charity Law Bulletin No. 206 (28 April 2010), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb206.pdf>>; and reference can also be made to a webinar by Terrance Carter, hosted by Imagine Canada at its Charity Tax Tools website on “The Impact of the 2012 Federal Budget on Political Activities by Charities,” online: Imagine Canada <<http://charitytax.imaginecanada.ca/demand-webinars>>.

<sup>7</sup> Canada Revenue Agency, Policy Statement, CPS-022, “Political Activities”, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>>.

<sup>8</sup> Canada Revenue Agency, Advisory on Partisan Political Activities, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/dvsry-eng.html>>.

<sup>9</sup> Canada Revenue Agency, Policy Commentary, CPC-007, “Political Party’s Use of Charity’s Premises”, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-007-eng.html>>.

<sup>10</sup> Canada Revenue Agency, “Director General’s Speech at the National Charity Law symposium”, presented at the National Charity Law Symposium (4 May 2010) online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdgt/2012/dgspch-eng.html>>.

In order to determine whether a charity is constituted exclusively for charitable purposes, the CRA will look at the stated purpose of an organization and the organization's current activities. A political purpose that is not in a charity's governing document but that the charity still pursues can become an unacceptable "unstated political purpose."

According to CPS-022, activities undertaken by a registered charity can be categorized as charitable activities, political activities, or prohibited activities. A charitable activity is an activity undertaken to achieve a charitable purpose. If a particular activity is considered by CRA to be charitable, then it is permitted without limits. For example, communication with a public official or the public by a charity regarding an issue related to the charity's purposes can be a charitable activity under certain circumstances. The communication would need to satisfy the following requirements: (1) it would need to relate to and be subordinate to the charity's charitable purpose; (2) be well reasoned; and (3) not contain information that is false, inaccurate or misleading.

With regard to political activities, there is currently no definition in the ITA of "political activity". However, CPS-022 provides that 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);
- ◆ 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 governments 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);
- ◆ The issue in question is connected to the charity's purposes;
- ◆ The activities are subordinate 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.

With regard to the expenditure limit, where a charity takes part in political activities, in general it must devote substantially all (i.e. 90% or more) of its resources to charitable activities. Since the 10% rule may have a negative impact on smaller charities with few resources, CRA indicates in CPS-022 that it will exercise its discretion to not revoke the registration of a small charity that exceeds the expenditure limit. According to CRA's administrative guidelines:

- ◆ Registered charities with less than \$50,000 annual income in the previous year may spend up to 20% of its resources on political activities in the current year;
- ◆ Registered charities whose annual income in the previous year was between \$50,000 and \$100,000 can devote up to 15% of their resources to political activities in the current year; and
- ◆ Registered charities whose annual income in the previous year was between \$100,000 and \$200,000 can devote up to 12% of their resources to political activities in the current year.

There is no definition of “resources” in the ITA, although the CRA considers “resources” to include the total of a charity’s financial assets, physical resources, and human resources, which includes staff and volunteers as well. Notwithstanding the CRA’s generous administrative position, several ambiguities still remain concerning the method of calculating resources each year. For example, there is no stated point in time at which the resource limit is calculated. Taking a practical approach, the calculation would presumably be done at the fiscal year end of the charity, although there is clarity on this issue by CRA. Another issue involves the difficulty of monetizing the contributions of volunteers in calculating resources. It may be possible to designate a value based on the fair market value of comparable services, though once again, there is no guidance from CRA on this issue.

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 so as to be prepared for a possible audit by the CRA. The onus is on the charity to explain and justify the amount of resources that have been allocated to political activities. It should be noted that where an expenditure relates to both political and charitable activities, a reasonable allocation can be made. As well, where substantially all (90%) or more of the activity is charitable, then the whole expenditure can be considered charitable. In this regard, reference can be made to CRA’s recent Guidance on Fundraising<sup>11</sup> concerning the manner in which expenditures in general can be allocated.

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<sup>11</sup> Canada Revenue Agency, Guidance, CG-013, "Fundraising by Registered Charities", online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/fndrsng-eng.html>>.

Prohibited activities are those activities that are either illegal or involve partisan political activities, which are not permitted at all. According to subsections 149.1(6.1) and 149.1(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.” Charities should refer to CPS-022 for guidance, as it provides several helpful examples of prohibited partisan political activity. Examples of prohibited partisan political activity include gifts to a political party that support’s a charity’s views on a particular issue and public statements by the charity that endorse or denounce a particular candidate or political party.

#### D. SUMMARY OF AMENDMENTS

Budget 2012 and Bill C-38 will impact charities and registered Canadian amateur athletic associations with regards to political activities in four ways. It should be stressed, however, that these changes do not change the existing rules, but merely add nuances to some of them.

First, Bill C-38, when enacted, will amend the ITA by revising the definition of “political activity” under subsection 149.1(1) as follows: “...includes 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”.<sup>12</sup> The focus of this change to the definition of political activities is on the intent of the donor charity as opposed to that of the recipient qualified donee. The amendment will result in a double counting within the allowable limit on resources for political activities, once by the donor charity if the amendment applies and once by the recipient qualified donee when the funds received are eventually expended on permitted political activities. During her speech to the CBA/OBA National Charity Law Symposium on May 4, 2012, Director General of the Charities Directorate, Cathy Hawara emphasized that the allowable limit on non-partisan political activities of 10% of resources remains unchanged. However, in light of the proposed changes to the definition of “political activity,” a charity that funds another qualified donee for the purpose of enabling political activities will be required to count that donation against its own 10% limit.

Without further details, the meaning of the phrase “can reasonably be considered” in the proposed definition of political activity is ambiguous. As such, it is likely best for a charity making a gift to a qualified donee to designate in writing that the gift is not to be used for political activities. As well, it is likely prudent for

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<sup>12</sup> Bill C-38, *supra* note 1, s. 7(3).

charities to avoid multi-purpose gifts, because Budget 2012 refers to “a purpose” as opposed to “the purpose.” The lack of any details exposes charities to the risk that any political purpose for any part of the gift could possibly taint the whole gift.

Second, Bill C-38 introduces new intermediate sanctions for excessive or unreported political activities. Where a registered charity exceeds the limits in the ITA for political activities (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges (in addition to revocation).<sup>13</sup> As well, if a registered charity fails to report any information (not just information on 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.<sup>14</sup> Presently, the only sanction provided by the ITA for non-compliance in the context of political activities is revocation. According to the Director General, these proposed intermediate sanctions will provide the Charities Directorate with an additional tool to encourage compliance with existing legal requirements.<sup>15</sup>

Third, Budget 2012 states that more disclosure will be required concerning political activities. This requirement will likely be found in in the T3010 Annual Information Return (including funding from foreign donors), though the details of what the requirements will be were not specifically addressed in Budget 2012. However, the Director General discussed the upcoming changes to the T3010 in her speech:

- The financial information section of the T3010 (e.g. Section D for small charities and Schedule 6 for large charities) will be changed to include information about the total amount of gifts to qualified donees that were intended for political activities.
- The Qualified Donees Worksheet (T1236) that is used to document gifts to qualified donees will also be amended to include information about gifts intended for political activities. For each such gift, charities will be required to identify the specific dollar amount and provide a description of the political activity.

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<sup>13</sup> Bill C-38, *supra* note 1, s. 13(1).

<sup>14</sup> *Ibid.*, s. 13(2).

<sup>15</sup> Canada Revenue Agency, *supra* note 10.

- A new political activities schedule will be re-introduced (last used in 2002). On this schedule, a charity will be required to indicate the types of political activities that it engages in, if any. The charity will then be required to explain the relationship between its political activities and its charitable purpose.
- Charities that receive money from foreign sources for the purpose of carrying out political activities will be required to disclose the amount received, the nature of the political activity and the country of origin of the donor<sup>16</sup>, although not the name of the foreign donor.

It is anticipated that the new T3010 will be released in early 2013.

The fourth way that Budget 2012 and Bill C-38 will affect charities and registered Canadian amateur athletic associations is through increased enforcement measures. In Budget 2012, \$8 million was committed to enforcement by the CRA, which includes audits and educational initiatives. In her speech, the Director General outlined CRA's enforcement plans. The existing compliance continuum of education and outreach, monitoring, and verification and audit activities, which has traditionally been used by CRA in respect of all enforcement activities, will be applied to the issue of political activities. Simple and practical self-assessment tools will be developed by CRA to assist charities in better understanding the rules relating to political activities. More proactive monitoring of charities' political activities will occur, and where such monitoring raises concerns, CRA will use its existing enforcement tools. In addition, CRA will be conducting more restricted books and records audits.

## E. CONCLUSION

The new rules and sanctions introduced by Budget 2012 relating to political activities supplement the existing regime, but do not change the basic regime for political activities. However, there will no doubt be enhanced scrutiny of political activities by CRA. As a result, charities will need to be vigilant in ensuring that they understand and are compliant with the rules before embarking on or continuing in the area of political activities. First, they will need to ensure that their activities are either "charitable activities" or "permitted political activities" and do not venture into the area of "prohibited partisan political activities." If a charity does become involved in permitted political activities, then the charity will need to ensure that any

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<sup>16</sup> *Ibid.*



permitted political activities undertaken clearly fall within expenditure limit (i.e., generally within the 10% resource limit). Second, the charity will need to maintain detailed books and records, particularly with regard to the allocation of expenditures between political activities and other forms of expenditures, including charitable, administration and fundraising. Third, charities will need to carefully track gifts to other qualified donees and include a written direction with such gifts to confirm that the gifts being made are not to be used for political activities by the recipient qualified donee. Finally, charities will need to carefully track what they report on their T3010 to ensure that the information is accurate and that their expenditure on political activities stays within the 10% resource limit (subject to certain exceptions) in order to avoid the new sanctions being introduced by Bill C-38. However, based upon what the Director General has said in her speech, the information that CRA will be requiring in its revised T3010 will not be unduly onerous and does not appear to require the naming of foreign donors providing funding for political activities in Canada.

From this overview, it should be clear that the proposals in Budget 2012 do not mean the end of political activities by charities in Canada. However, what it does mean is that charities that want to become engaged in or continue to be involved in political activities will need to do so with their eyes wide open. They will need to carefully study and comply with the rules that are set out by CRA, as well as enhance existing efforts to maintain good books and records in order to be able to justify that the calculation of resources expended in political activities stays within the allowable resource limits. Political activities are still fair game for charities but as with any game, you must know what the rules are and play by the rules.