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## **SWEEPING CHANGES RECOMMENDED IN REPORT ON POLITICAL ACTIVITIES**

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*By Terrance S. Carter, Jennifer M. Leddy & Ryan Prendergast \**

### **A. INTRODUCTION**

On May 4, 2017, the Canada Revenue Agency (“CRA”) published on its website the excellent and very readable [Report of the Consultation Panel on the Political Activities of Charities](#) (the “Report”),<sup>1</sup> prepared after the CRA’s consultation with the charitable sector that was launched in September 2016 and concluded in December 2016 (the “Consultation”). In conjunction with the release of the Report, the Minister of National Revenue announced on the same day the Liberal government’s suspension of all remaining CRA audits of charities for political activities originally initiated through the 2012 Federal Budget. The suspension is to remain in place pending the implementation of the Report’s recommendation.

The Report, states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for changes to the current administrative and legislative framework governing “political activities” by charities. In doing so, the Report provides four recommendations, including the immediate suspension of the political activity audits that was acted upon by the Minister of National Revenue. The CRA has committed to providing a formal response to the Consultation Panel’s

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<sup>1</sup> Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, Government of Canada, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/pnlrprt-eng.html> [the “Report”]. The Report was prepared by a panel appointed by the Minister of National Revenue, consisting of Marlene Deboisbriand (Chair), Shari Austin, Susan Manwaring, Kevin McCort and Peter Robinson.

recommendations by the end of June 2017. This *Charity Law Bulletin* provides a summary and commentary of the Report and its impact on the charitable sector in Canada.

## **B. THE REPORT AND RECOMMENDATIONS**

The Report explains that there has been much confusion concerning the limits of what charities can say, how much they can say, and to whom they can speak when it comes to advocating for public policy change. The confusion stems from the often conflated terms “activities” and “purposes” in the *Income Tax Act (Canada)* (the “ITA”).<sup>2</sup> While the Report indicates that “political purposes” are prohibited, subsections 149.1 (6.1) and (6.2) of the ITA permit charities to carry out a limited amount of what the Report refers to as “non-partisan political activities” to achieve their charitable purposes. However, many of these key terms remain undefined, and the line between a charity having a political purpose and conducting political activities to achieve its charitable purposes remains unclear.

In particular, the Consultation found a consistent, sector-wide call for legislative change, with many charities stating that administrative changes would be insufficient to address fundamental issues with the current legislative framework over political activities. In response to the Consultation, the Report provided four recommendations to change both the administration of the ITA and the ITA itself with regard to political activities by charities, as well as a broader recommendation to modernize the legislative framework for charities. A brief summary of these recommendations follows.

### **1. Full Public Policy Dialogue and Development**

To eliminate confusion over acceptable activities and how to calculate political activities, the Report recommends that the CRA immediately revise its [Policy Guidance CPS-022, Political Activities](#) (the “Guidance”) to define “political activities” to mean “public policy dialogue and development” and to expressly permit charities to fully engage in them where doing so would further the charity’s charitable purposes, and they are non-partisan and subordinate to the charitable purposes. In this regard, the Report recommends that the Guidance view “public policy dialogue and development” as entailing “providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions.” Examples of such activities provided in the Report include: providing information on their charitable objects to sway public opinion, engaging in

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<sup>2</sup> RSC 1985, c 1 (5th Supp).

advocacy and mobilizing the public to support keeping or changing law or policy, and expressing non-partisan views on social media. This recommended change in terminology from “political activities” to “public policy dialogue and development” is insightful and welcome because it removes the misunderstanding that any contact with a politician is “political” and actually reflects the contribution that charities can make not only to programs but also to social and economic policy development because of their experience and expertise.

The Report also recommends that the CRA remove its policy requirement that charities’ materials reflect all sides of an argument, and instead add a requirement that they be fact-based. It further recommends that charities should not be required to quantify or report on the quantification of political activities on the T3010, Registered Charity Information Return, but instead be required to provide only a narrative description of the nature of public policy dialogue and development work that they undertake.

## 2. Changes to CRA Compliance and Appeals, Audits, Communication and Collaboration

To enhance clarity and consistency, the Report recommends implementing changes to CRA administration of the ITA in the areas of compliance and appeals, audits, communication and collaborative approaches. The recommendations generally focus on greater transparency and communication between the CRA and the charitable sector, consistency in information provided, as well as enhanced avenues through which charities can receive guidance on issues, such as an expanded Charities Liaison Officer role and access to the Taxpayers’ Ombudsman.

Concerning compliance and audits, the Report’s recommendations include ensuring consistency in CRA’s application of the compliance continuum and consulting with the sector when identifying thematic audit topics. Concerning appeals, the Report recommends that appeals should be heard by the Tax Court of Canada rather than by way of judicial review at the Federal Court in order to level the playing field and enhance fairness in a system that is currently perceived to be biased in favour of the CRA. Concerning communication and collaboration, the Report recommends reinstating in-person programs, such as Charities Information Sessions and the Charities Partnership and Outreach Program, as well as the establishment of a high-level standing working group to identify and address issues of concern to charities.

3. Removal of Legislative Reference to Non-partisan Political Activities

The third recommendation in the Report is to “[a]mend the ITA by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes”. The Report’s recommendation to delete any reference to “non-partisan political activities” is somewhat unclear, as there is no mention of such term in the ITA. Nonetheless, the recommendation goes on to provide some clarity by proposing to “retire the term “political activities”, which the Report says tends to be understood as partisan. It reasons that doing so would provide clarity and certainty for the charitable sector and the CRA, and would explicitly allow charities to be fully engaged in “non-partisan public policy dialogue and development.” Similarly, the Report recommends retaining the prohibition on “partisan political activities” and political purposes for charities.

4. A Modern Legislative Framework that Focuses on Charitable Purposes

As a more long-term solution, the Report recommends the modernization of the ITA dealing with charities. Specifically, the Report recommends a focus on charitable purposes rather than activities, an inclusive list of charitable purposes reflecting contemporary issues, and the ability to appeal the Tax Court of Canada’s refusal to register, or to revoke, charitable status.

Building on its mandate, the Report suggests additional legislative changes, including removing the need for charities to maintain “direction and control” of non-qualified donees in certain circumstances. Doing so, the Report states, would enable charities to work with partners “as equals in furtherance of their charitable purposes”. The Report further recommends greater accommodation of social enterprise and social finance models that would benefit the charitable sector.

## C. THE WAY FORWARD

The current suspension of the political activity audits comes as a result of the Liberal government’s commitment that it would “[a]llow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors ... [by] clarifying the rules governing “political activity,” with an understanding that charities make an important

contribution to public debate and public policy.”<sup>3</sup>

However, notwithstanding the Minister of National Revenue’s announcement of the suspension of ongoing audits of charities for political activities, it remains to be seen how the Federal Government and CRA will respond to the remainder of the Report’s recommendations. In particular, many of the recommendations touch on issues related to the regulation of charities that are not limited to political activities, and would require extensive changes to the ITA concerning the administration of charities, *e.g.*, providing for an inclusive list of charitable purposes or permitting appeals to the Tax Court of Canada as opposed to the Federal Court of Appeal.

Nonetheless, the Report and the announcement by the Minister constitute extremely good news for the charitable sector and a hope for the future given that the political audits mandated by the previous government in 2012 have been seen as having created an unjustified and unnecessary “chill” effect on charities in Canada with regard to public policy and advocacy.

CRA is to be commended for the process that it used in this consultation, being a combination of on-line and in-person consultations in seven major cities and appointing a panel of five sector representatives to review the consultation submissions and provide recommendations to CRA which have now been made public in their report.

There is no doubt much anticipation developing in the charitable sector to see how the CRA will respond to the Report by the end June, 2017. Stay tuned!



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<sup>3</sup> Office of the Prime Minister of Canada, *Minister of National Revenue Mandate Letter*, online: Government of Canada <<http://pm.gc.ca/eng/minister-national-revenue-mandate-letter>>.