

DRAFT INCOME TAX ACT CHANGES PROPOSED FOR POLITICAL ACTIVITIES BY CHARITIES

*By Terrance S. Carter and Ryan M. Prendergast**

A. INTRODUCTION

As reported in *Charity & NFP Law Bulletin* No. 425 last month, the issue of charities engaging in political activities has been brought to the forefront through the Ontario Superior Court of Justice's July 16, 2018 decision in *Canada Without Poverty v AG Canada* ("CWP Decision")¹ (now under appeal) and the government's subsequent August 15, 2018 announcement that it would be clarifying the rules governing political activities.² These clarifications included proposed changes to the *Income Tax Act* ("ITA") that were consistent with Recommendation No. 3 of the Report of the Consultation Panel on the Political Activities of Charities ("Consultation Report"), which was published on May 4, 2017.³

Following up on that announcement, the Department of Finance Canada released a draft proposal of legislative amendments ("Draft Proposal") for public consultation on September 14, 2018. The Draft Proposal, among other things, proposes to remove the quantitative limits for charities on non-partisan

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¹ 2018 ONSC 4147 ["CWP Decision"]. For more details on the CWP Decision, see Jennifer M Leddy & Terrance S Carter, *Charity & NFP Law Bulletin* No. 425, "Ontario Decision is a Game Changer for Charities and Political Activities", online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2018/chylb425.pdf>>.

² Department of Finance Canada, "Statement by the Minister of National Revenue and Minister of Finance on the Government's Commitment to Clarifying the Rules Governing the Political Activities of Charities" online: Government of Canada <<https://www.fin.gc.ca/n18/18-072-eng.asp>>.

³ Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, online: Government of Canada, <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/pnlrprt-eng.html>> ["Consultation Report"]. For further information on the Consultation Report, see Terrance S Carter, Jennifer M Leddy & Ryan M Prendergast, *Charity & NFP Law Bulletin* No. 403, "Sweeping Changes Recommended in Report on Political Activities", online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb403.pdf>>.

political activities from the ITA.⁴ This *Charity & NFP Law Bulletin* provides an overview of the Draft Proposal and discusses the future of political activities under the ITA.

B. BACKGROUND

Subsections 149.1(6.2), 149.1(6.1) and 149.1(6.201) of the ITA provide limitations on political activities by indicating the degree to which charitable organizations, charitable foundations, and registered Canadian amateur athletic associations (“RCAAs”), respectively, may devote their resources to political activities. These provisions permit organizations to devote a portion of their resources to political activities when they devote “substantially all” of their resources to their charitable activities, where such political activities are ancillary and incidental to the charitable activities of the charity and are non-partisan in nature. In accordance with the Canada Revenue Agency’s (“CRA”) CPS-022, *Political Activities*,⁵ the CRA interprets “substantially all” to mean 90% or more. Under this policy, therefore, charities can devote no more than 10% of their resources to ancillary, incidental, non-partisan political activities.

The Consultation Report was prepared after the CRA and an expert panel appointed by the Minister of National Revenue consulted with the charitable sector, and called for changes to the framework governing political activities for registered charities.⁶ To address the concerns of an outdated and overly restrictive legislative framework, the Consultation Report put forth various recommendations. In this regard, Recommendation No. 3 proposes that the Government of Canada “[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.”⁷

Over one year later, by the time of the CWP Decision in July 2018, no changes had been made to the ITA concerning political activities. In the CWP Decision, the court declared that paragraphs (a) and (b) of subsection 149.1(6.2) of the ITA be struck down as unconstitutional for interfering with charities’ freedom of expression. Although the Government of Canada has appealed the CWP Decision, the Minister of National Revenue and Minister of Finance also subsequently announced on August 15, 2018 that the

⁴ Department of Finance Canada, *Legislative Proposals Relating to the Income Tax Act*, online: Government of Canada <<https://www.fin.gc.ca/drleg-apl/2018/Ita-lir-0918-charities-organismes-bienfaisance-l-eng.asp>> [“Draft Proposal”].

⁵ Canada Revenue Agency, *CPS-022, Political Activities*, online: Government of Canada, <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities-policies-guidance/policy-statement-022-political-activities.html>>.

⁶ Consultation Report, *supra* note 3.

⁷ *Ibid.*

Government was proceeding with its commitment to clarify the rules governing charities' participation in political activities and, in particular, that amendments would be made to the ITA to address certain concerns surrounding political activities.⁸ They also promised that the appeal of the CWP Decision would not change the Government's policy direction with regard to the removal of quantitative limits on political activities. The Draft Proposal was then released on September 14, 2018 for a 30-day public consultation, proposing amendments to the ITA.

C. THE DRAFT PROPOSAL

In its current form, the Draft Proposal amends the definition of "charitable organization" in subsection 149.1(1) by clarifying that a charitable organization must be "constituted and operated exclusively for charitable purposes," in line with the existing definition for charitable foundations. It also removes the exception for gifts that constitute political activities from the definition of "charitable purposes" in subsection 149.1(1), such that a charitable purpose would be defined as including "the disbursement of funds to a qualified donee." Of note, the definition of "political activity" is also removed from subsection 149.1(1). Consequently, references to political activities have been removed from paragraphs 149.1(1.1)(b), 149.1(6)(b) and (c), and subsection 149.1(10).

The Draft Proposal also replaces the wording in subsections 149.1(6.1), 149.1(6.2) and 149.1(6.201) with new wording that removes the "substantially all" requirement for non-partisan political activities. Consistent with the Consultation Report, the replacement provisions maintain the prohibition on partisan political activities. All three amended subsections contain similar wording to one another, with necessary amendments for their respective application to charitable foundations, charitable organizations, and RCAAAs, with amended subsection 149.1(6.2) stating:

149.1(6.2) – For the purposes of the definition charitable organization in subsection (1), an organization that devotes any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes.

⁸ Department of Finance Canada, "Statement by the Minister of National Revenue and Minister of Finance on the Government's Commitment to Clarifying the Rules Governing the Political Activities of Charities" online: Government of Canada <<https://www.fin.gc.ca/n18/18-072-eng.asp>>.

Although Recommendation No. 3 also proposed that the prohibition on partisan political activities be clarified to include “elected officials” together with political parties or candidates for public office, this recommendation does not appear to have been adopted.

Similarly, the Minister’s power to suspend a charity’s receipting privileges is amended through the removal of paragraphs 188.2(2)(e), (f) and (g) concerning suspensions where a charity does not meet the “substantially all” requirement for political activities or devotes resources to partisan political activities. In their place, new paragraph 188.2(2)(e) is added to allow the Minister to suspend receipting privileges where charities devote any part of their resources to partisan political activities.

D. IMPACT OF THE DRAFT AMENDMENTS

If the provisions in the Draft Proposal are adopted by Parliament and passed into law as currently drafted, the current 10% resource limitation under the ITA (in accordance with the CRA’s interpretation of the “substantially all” requirement) should afford charities greater freedom to conduct non-partisan political activities. This should pave the way for charities to engage in non-partisan political activities, such as public advocacy, to a greater degree than in the past. While the Draft Proposal does not contain an explicit requirement that political activities be “subordinate to and further their charitable purposes,” as contained in Recommendation No. 3 of the Consultation Report, it may be inferred that any political activities carried on by the charity would need to be related and subordinate to its charitable purpose in order to meet the “exclusively for charitable purposes” requirement for charitable foundations and now for charitable organizations as well. This is consistent with the Backgrounder document released by the Department of Finance Canada (“Backgrounder”) concerning the Draft Proposal which states that:

As a result of these changes, the issue of political activities would be largely governed by the common law – meaning that a charity's political activities would continue to be permitted if those activities are ancillary and incidental to the fulfillment of its charitable purposes. At the same time, these changes would leave untouched the common law requirement that a registered charity cannot be established or operated for a political purpose.⁹

In addition, the new language of subsections 6.1, 6.2 and 6.201 in the Draft Proposal make very clear that registered charities are not permitted to conduct any partisan political activities. This is because the amended language in each paragraph states that devotion of “any part of its resources” to partisan political

⁹ Department of Finance Canada, *Backgrounder: Draft Legislative Proposals Regarding Political Activities of Charities*, online: Government of Canada <https://www.fin.gc.ca/n18/data/18-083_1-eng.asp>.

activities will deem the registered charity to not be considered to be constituted and operated exclusively for charitable purposes, *i.e.*, it will no longer meet the definition of being a charitable organization or charitable foundation. To be clear, partisan political activities were always prohibited but now any misapplication of funds or volunteer time or other resources by a registered charity to partisan political activities are clearly grounds for revocation or suspension of receipting privileges by the CRA.

As outlined by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v MNR* (“*Vancouver Society*”), a charity may carry on non-partisan political activities that are “ancillary and incidental” to its charitable purpose.¹⁰ Further, *Vancouver Society* states that charities are not permitted to have a political purpose: “Very simply, the [political purposes] doctrine provides that political purposes are not charitable purposes. Accordingly, the presence of political objects negates an organization’s claim to benefit the community as a charity.”¹¹ As such, while charities would continue to be prohibited from having a political purpose, neither the common law nor the ITA, after the Proposal is adopted, would draw a distinction between activities that are inherently considered to be achieving a charitable purpose and “political activities” of a non-partisan nature, because they are all activities that further a charitable purpose.

Despite eliminating quantitative limits from the ITA, the CRA will still be able to question whether a charity’s purposes are charitable purposes or are instead collateral unstated non-charitable political purposes where the charity devotes a substantial portion of its resources to activities of a political nature. The practical effect of the removal of the quantitative limit may therefore be that the threshold for determining whether a charity is pursuing a collateral unstated non-charitable purpose may change as the common law develops, rather than being referenced by an arbitrary *de minimis* 10% threshold as determined in the discretion of the CRA. As a result, the removal of the *de minimis* threshold may have only a small impact in practice, since the CRA will continue to be able to determine whether a charity has been operating with a collateral unstated non-charitable political purpose as grounds for revocation of charitable status. Notwithstanding this fact, the removal of the *de minimis* 10% threshold and the corresponding focus on charitable purposes is indicative of an important shift away from looking to see whether an activity is charitable or not to whether an activity is a legitimate means in achieving the charitable purpose of the charity in accordance with Recommendation No. 4 of the Consultation Report.

¹⁰ [1999] 1 SCR 10 at para 107.

¹¹ *Ibid.*

This re-focus in approach will no doubt be a welcome development by the charitable sector, which has long been advocating for this change.

Finally, as drafted, the Draft Proposal's amendments to the ITA will be deemed to have come into force on various dates, as far back as January 1, 2008. The Backgrounder to the Draft Proposal ("Backgrounder") further clarifies that the amendments would apply "retroactively to related audits and objections that are currently suspended."¹² This may be welcome news for charities that were in the midst of political activities audits prior to the suspension of those audits in 2017, though in our experience, few audits are solely focused on non-compliance with the political activities sections of the ITA.

E. CONCLUSION

If passed in its current form, the Draft Proposal and the political activities regime would still be subject to guidance on political activities from the CRA, which is still to come. In the meantime, the Draft Proposal is certainly a positive development that the Government of Canada is taking steps to bring much needed amendments to the political activities regime under the ITA. The Draft Proposal will introduce important changes through the removal of the quantitative limits on political activities. This will give charities greater freedom concerning how they conduct activities that further their charitable purposes. However, as the Draft Proposal is still in draft form, and given the reliance on the common law rules regarding charitable purposes versus political purposes, it remains to be seen exactly how the Draft Proposal will affect charities involvement in political activities in practice. Until the new regime is in place and further clarification is provided, charities conducting or considering conducting political activities should continue in the immediate future to operate in compliance with the current political activities regime until the Draft Proposal has been passed and proclaimed into force.