

CRA RELEASES DRAFT GUIDANCE ON CHARITIES AND PUBLIC POLICY ADVOCACY

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A. INTRODUCTION

On October 2, 2018, the Canada Revenue Agency (CRA) released for public consultation its draft guidance *Charities and public policy advocacy* (the “Draft Guidance”).¹ The Draft Guidance follows the release of the draft legislative proposals announced by the Department of Finance on September 14, 2018 (“Draft Proposal”)² for governing the public policy advocacy activities of charities, as discussed in last month’s *Charity & NFP Law Bulletin* No. 428,³ with additional comments provided in a submission by the Canadian Bar Association’s Charity and Not-for-Profit Law Section.⁴ As well, the Draft Guidance and the Draft Proposal follow last year’s Report of the Consultation Panel on the Political Activities of Charities published on May 4, 2017 (the “Consultation Report”),⁵ as discussed in *Charity & NFP Law*

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¹ Canada Revenue Agency, *Charities and public policy advocacy* (as updated, 3 October 2018), online:

<<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-public-policy-advocacy.html>> [Draft Guidance]. See also Canada Revenue Agency, *Public policy advocacy activities of charities* (2 October 2018), online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/budget-2018-equality-growth-strong-middle-class/public-policy-advocacy-activities-charities/qa.html>> [CRA Q&A webpage].

² Department of Finance Canada, “Consulting Canadians on Draft Legislative Proposals Regarding Political Activities of Charities” (14 September 2018), online: <<https://www.fin.gc.ca/n18/18-083-eng.asp>> [Draft Proposal].

³ Terrance S. Carter and Ryan M. Prendergast, *Charity & NFP Law Bulletin* No. 428, “Draft *Income Tax Act* Changes Proposed for Political Activities by Charities” (27 September 2018), online: Carters Professional Corporation, <<http://www.carters.ca/pub/bulletin/charity/2018/chylb428.pdf>>.

⁴ Submission from the Charities and Not-for-Profit Law Section of the Canadian Bar Association to the Department of Finance Canada (12 October 2018), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=c15919d3-e282-47a4-bea4-05f8fe75a43c>>.

⁵ Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, online: Government of Canada, <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/resources-charities-about-political-activities/report-consultation-panel-on-political-activities-charities.html>> [Consultation Report].

Bulletin No. 403.⁶ It is expected that the Draft Guidance will replace CRA’s Policy Statement CPS-022, *Political activities*,⁷ which currently interprets the *Income Tax Act* (“ITA”)⁸ provisions requiring charities to devote “substantially all” of their resources to charitable activities as an expenditure limit of 10% on political activities by charities.⁹

The effect of the Draft Proposal is that the former “substantially all” test concerning the ability of charitable organizations, charitable foundations, and registered Canadian amateur athletic associations to engage in political activities will be removed from the ITA. The explanatory notes to the Draft Proposal state that the CRA will now need to make the determination of permitted political activities (now identified in the Draft Guidance as “public policy advocacy activities”) by reference to the common law, CRA’s interpretation of which is set out in the Draft Guidance.

This Bulletin provides an overview of the Draft Guidance and comments on some of the issues that may arise in its implementation by CRA.

B. THE DRAFT GUIDANCE

1. The Activity Must be Incidental

The Draft Guidance provides that, in accordance with the ITA, a charity may only be constituted and operated exclusively for charitable purposes, and that a charity’s activities and purposes, together, must deliver a public benefit, as described in the CRA’s Policy Statement CPS-024, *Guidelines for registering a charity: Meeting the public benefit test*.¹⁰

⁶ Terrance S Carter, Jennifer M Leddy & Ryan M Prendergast, *Charity & NFP Law Bulletin* No. 403, “Sweeping Changes Recommended in Report on Political Activities” (25 May 2017), online: Carters Professional Corporation, <<http://www.carters.ca/pub/bulletin/charity/2017/chylb403.pdf>>.

⁷ Canada Revenue Agency, *CPS-022, Political activities* (2 September 2003), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html>>.

⁸ RSC 1985, c 1 (5th Supp) [ITA].

⁹ *Supra* note 7.

¹⁰ Canada Revenue Agency, *CPS-024, Guidelines for registering a charity: Meeting the public benefit test* (10 March 2006), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html>>.

The Draft Guidance also states that a charity may carry out public policy advocacy activities, provided the activity is non-partisan and “incidental” to the charity’s charitable purposes. In this regard, the Draft Guidance states that:

The Canada Revenue Agency (CRA) considers an *incidental activity* to be any activity that helps or supports a charity in carrying out its charitable purposes. Any resources devoted to *incidental activities* are considered to be devoted to charitable activities. An *incidental activity* cannot become a purpose in itself, or the charity’s reason for operating. Other types of *incidental activities* include fundraising, management and administration activities, and related business activities.

[...]

An *incidental activity* is one that is always subordinate to a charitable purpose, and the only reason it is carried out is to serve that charitable purpose.

The Draft Guidance explains that, where the public policy advocacy activities are “more than incidental”, the charity is deemed to have a political purpose, in contravention of both the ITA and the common law.

2. Permitted Range of Public Policy Advocacy Activities

The Draft Guidance describes three types of incidental public policy advocacy activities with which charities can be involved, namely: informing a government, informing the public, and engaging with the public.

a) Informing a government

This type of activity, pursuant to the Draft Guidance, involves communicating directly with elected representatives or public officials in order to provide them with information that will assist them in making decisions regarding a change in legislation, regulations or policies. Some of the examples provided in the Draft Guidance include a refugee settlement charity meeting with elected representatives to “share its observations on the effectiveness of a government settlement program”; as well as an elderly care charity providing feedback to government officials on “the development of better healthcare services”.

b) Informing the public

The Draft Guidance provides that there are several ways in which a charity may inform the public about current or proposed legislation and policies, such as by disseminating reports and statistics on the relevant issues so that the public is better prepared to make informed decisions on those

issues, or by sharing its own opinions “on the root of social and political causes of inequality and poverty” online, or by inviting *all* competing candidates for public office to present their ideas, in a non-partisan manner.

However, the Draft Guidance explains that, in certain cases, the activity of informing the public about legislation and policies does not have to be “incidental” and can be a charity’s focus and reason for operating, as described in CRA’s Policy Statement CPS-029, *Research as a charitable activity*,¹¹ and Guidance CG-001, *Upholding human rights and charitable registration*.¹²

c) Engaging with the public to persuade a government

The Draft Guidance states that a charity can engage with the public in an attempt to persuade that a piece of legislation, a policy or governmental decision be kept, changed or repealed, such as by holding public rallies or demonstrations, using social media or print media, or petitions, in order to explain the charity’s opinions to the public and ask that elected representatives be contacted to express support for or opposition to a given law, policy or decision.

3. The Activity Must Be Non-partisan

The Draft Guidance reminds charities that, while a charity may express itself in regard to a particular policy issue, a charity’s resources can never be used directly or indirectly for “partisan activity”, such as supporting or opposing a political party or candidate for public office. For example, the Draft Guidance explains, during an election period, a charity may express support of or opposition to a policy that a political party or candidate also supports or opposes, but may not refer to the political party or candidate, and may not promote a candidate’s comments about the charity or its research on the charity’s website.

4. Limits on Public Policy Advocacy Activities

The limit on public policy advocacy activities by a charity, in accordance with the Draft Guidance, is the “incidental” character of the activity in regard to the charity’s charitable purposes. The draft

¹¹ Canada Revenue Agency, *CPS-029, Research as a charitable activity* (30 April 2009), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-029-research-a-charitable-activity.html>>.

¹² Canada Revenue Agency, *Guidance CG-001, Upholding human rights and charitable registration* (15 May 2010), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-001-upholding-human-rights-charitable-registration.html>>.

Guidance states that, where the public policy advocacy activities by a charity are no longer incidental, then they constitute a political purpose, which is not a charitable purpose because it does not deliver a public benefit.

In this regard, the Draft Guidance defines political purpose as including “any purpose that seeks to further the interests of a particular political party; or support a political party or candidate for public office (partisan); or retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.”

The Draft Guidance further describes the “indicators” on which the CRA relies in determining whether, in the context the charity’s activities and its stated purposes, the charity has a political purpose or not. These indicators include:

- Whether the public policy advocacy activities are **unrelated** to the charity’s charitable purposes;
- Whether the resources used for public policy advocacy activities are **disproportionate** to the resources used by the charity to deliver a public benefit, such that the public policy advocacy activities of the charity appear to be its primary focus, are carried out frequently and over a long period of time, as reflected in the charity’s external communications materials and internal records.
- Whether the charity’s public policy advocacy activities are **politically partisan**. For example, if the charity is mostly funded or operated by individuals known to be closely associated with a political party or election campaign, or the charity “works closely” with another organization established for partisan activities, or the charity’s activities are “only on a narrow range of topics, and that aligns with a prominent issue of a political party’s platform”.

In reviewing the presence of these indicators, the Draft Guidance explains through various examples how the CRA will evaluate whether a charity’s public policy advocacy activities are related, proportionate non-partisan in the circumstances.

5. The CRA's compliance approach

The Draft Guidance states that the CRA generally takes an “education-first approach” to help charities follow the legislative requirements for maintaining charitable registration. However, it recognizes that revocation may be appropriate in certain situations where a charity is not operating exclusively for charitable purposes.

C. COMMENTARY

While the Draft Guidance is helpful in providing a number of examples of different common situations that charities may face in determining how to comply with the Draft Proposal, there are various aspects of the Draft Guidance that are concerning, as explained below.

1. Lack of Case Law Authority

While the CRA's efforts to write the Draft Guidance in a manner that will be understood by operating registered charities themselves, rather than by only their legal advisors and tax professionals, at present the Draft Guidance does not cite any legal authority for any of the various positions taken by the CRA with respect to its interpretation of key terms such as “incidental” or “partisan political activities”.

Since the Draft Guidance will become the *de facto* administrative law within which the charitable sector will need to operate, it is important that the Draft Guidance reference the applicable case law to support the CRA's interpretations, particularly with regards to sanctions or penalties that the CRA may impose that may become the subject matter of litigation. To include case law citations would be consistent with the existing policy statement CPS-022 *Political Activities* and other guidance documents and policy statements published by the CRA.

2. Unclear Determination of “Incidental”

Under the Draft Proposal and the Draft Guidance, in their current versions, the CRA's interpretation of “incidental” will become paramount.

In the existing CRA Policy Statement, CPS-022 *Political activities*,¹³ the phrase “ancillary and incidental” is defined as follows: “[i]n this policy statement, ancillary is defined as *connected* and incidental is defined as *subordinate* to make these concepts more easily understandable [emphasis added].” In this regard, the definition of “incidental” for the purposes of the Draft Guidance constitutes a combination of the former interpretation of ancillary and incidental, that is, that an incidental activity is not merely subordinate, but that it also “helps or supports” charitable activity.

Given how little case law there is concerning the interpretation of incidental, it is not surprising that the CRA has attempted to provide guidelines concerning how the Draft Proposal will be applied when passed. However, this is not the first guidance where the CRA has had to address whether and how an activity is more than incidental. In this regard, the Q&A released by the CRA in conjunction with the Draft Guidance states that:¹⁴

...rather than applying a strict quantitative test as required under the existing rules, the CRA proposes to employ an approach that relies on the principles of the common law to look at public policy advocacy activities in the broad context of the charity’s ongoing work. This is similar to the approach the CRA now uses for other incidental activities, such as fundraising and administration.

With reference to fundraising that delivers more than an incidental private benefit, the CRA’s Guidance CG-013, *Fundraising by registered charities*,¹⁵ states that the CRA will look at whether a private benefit is necessary, reasonable and proportionate to the public benefit achieved.¹⁶ Similarly, in determining the extent to which a private benefit is considered “incidental, Policy Statement CPS-024 *Guidelines for registering a charity: Meeting the public benefit test*,¹⁷ states that the CRA will look at “the degree to which the private benefits further the charitable purpose” and whether it is “reasonable”. The approach described in these CRA policy and guidance documents is different from the indicators used in the Draft Guidance (*i.e.* activity must not be “unrelated” or “disproportionate”). This will invariably cause confusion within the charitable sector.

¹³ *Supra* note 7.

¹⁴ CRA Q&A webpage, *supra* note 1.

¹⁵ Canada Revenue Agency, *CG-013 Fundraising by registered charities* (20 April 2012), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/fundraising-registered-charities-guidance.html>>.

¹⁶ *Ibid* at paras 36-40.

¹⁷ *Supra* note 10.

As an alternative, instead of using “disproportionate” as an indicator in determining what constitutes an incidental activity, the CRA should consider utilising the concept of “subordinate”, already referenced in the Draft Guidance itself. This is similar to the current Policy Statement on *Political Activities*, CPS-022 in sections 5, 7.1, and 7.3 that currently makes reference to the concept of “subordinate” with regard to both permitted political activities as well as communication that is a charitable activity. In addition, recommendation No. 3 from The Report of the Consultation Panel on the Political Activities of Charities recommends that charities be able to participate in public policy dialogue and development, provided that such activities are subordinate to and further the charitable purpose of the charity. As well, the concept of “subordinate” has already been well developed in the context of related business in the CRA’s Policy Statement CPS-019 *What is related business?*,¹⁸ which could be used as a base to develop a complementary definition of “subordinate” for the purposes of public policy advocacy activities. For example, CPS-019 explains that a business is subordinate to a charity’s purpose if “it remains subservient to a dominant charitable purpose”,¹⁹ and with regards to the first of four factors used to determine what subordinate is, it states that a subordinate activity “receives a minor portion of the charity’s attention and resources”.²⁰ In this regard, the concept of “subordinate”, as adopted by the CRA in terms of either a *minor* or *major* portion of the charity’s attention and resources, would provide a much clearer and more easily understood concept for the charitable sector to work with and for the courts to interpret than difficult to understand ones like “disproportionate” that involve a vague description of what a charity cannot do rather what it can do.

In addition to the above, the new concept of “political partisan” as an indicator for the determination of what constitutes a political purpose raises a number of issues. Since the Draft Proposal would maintain the prohibition against partisan political activities under the ITA, whether or not a public policy advocacy activity is a prohibited partisan activity or not is a separate analysis from the determination of whether or not the charity is pursuing an unstated collateral political purpose. The examples provided in the Draft Guidance with respect to when an activity is “politically partisan” are also concerning. This is because they suggest that there may be factors that are either outside the

¹⁸ Canada Revenue Agency, *CPS-019 What is a related business?* (31 March 2003), at paras 31-43, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-019-what-a-related-business.html>>.

¹⁹ *Ibid*, at para 31.

²⁰ *Ibid*, at para 33.

control of the charity or unrelated to whether a charity is pursuing a political purpose, not to mention the impracticality of enquiring of donors or volunteers whether they are “closely associated with a political party or candidate’s election campaign”.

D. CONCLUSION

As the Draft Proposal makes its way past public consultations and through Parliament over the coming months and the CRA continues to receive input regarding its Draft Guidance, charities will need to proceed with caution in order to successfully weather the current climate of uncertainty. It is hoped that this non-exhaustive list of issues with the Draft Guidance will assist charities in understanding the approach that the CRA will be taking in articulating their understanding of the Draft Proposal and the common law concerning the extent to which charities can become involved in public policy advocacy activities.



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