

NEW DRAFT LEGISLATION PERMITS PUBLIC POLICY DIALOGUE BY CHARITIES WITHOUT LIMITATION

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

A. INTRODUCTION

On October 25, 2018, the Department of Finance Canada tabled in the House of Commons a Notice of Ways and Means Motion,¹ which contained a number of amendments to the *Income Tax Act* (“ITA”)² and other legislation to implement certain provisions previously announced in Budget 2018 and other measures, including amendments to the ITA to modify the rules governing political activities (now referred to as “public policy dialogue and development activities”) by registered charities and registered Canadian amateur athletic associations in Canada. The proposed amendments were introduced as Bill C-86, *Budget Implementation Act, 2018, No. 2*, (“Bill C-86”),³ which received first reading on October 29, 2018, and is included as an appendix to this *Charity & NFP Law Bulletin* for ease of reference. Bill C-86 significantly improves upon the draft legislation released on September 14, 2018 by the Department of Finance Canada (“September Draft Legislation”),⁴ discussed in last month’s *Charity & NFP Law Bulletin* No. 428.⁵

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¹ Department of Finance Canada, “Notice of Ways and Means Motion to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures and Explanatory Notes” (October 2018), online: <<https://www.fin.gc.ca/drleg-apl/2018/bia-leb-1018-eng.asp>> [Notice of Motion].

² RSC 1985, c 1 (5th Supp).

³ Bill C-86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, cl 17 and 20 (introduction and first reading 29 October 2018) [Bill C-86].

⁴ 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>> [September Draft Legislation].

⁵ 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: <<http://www.carters.ca/pub/bulletin/charity/2018/chylb428.pdf>>. For additional commentary about the September Draft Legislation see: 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>>.

This *Charity & NFP Law Bulletin* comments on Bill C-86 and its impact upon charities.

B. BACKGROUND

As previously described in *Charity & NFP Law Bulletin* No. 417,⁶ the Federal Government had expressed its commitment in Budget 2018 to provide a response to last year's Report of the Consultation Panel on the Political Activities of Charities published on May 4, 2017 (the "Consultation Report").⁷

However, before the Federal Government provided any response to the Consultation Report, the issue of charities engaging in political activities was 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")⁸ (now under appeal) and the Federal Government's subsequent August 15, 2018 announcement that it would be clarifying the rules governing political activities by charities.⁹

On September 14, 2018, the Department of Finance released the September Draft Legislation,¹⁰ which removed from the ITA the reference to the "substantially all" test concerning the ability of charitable organizations, charitable foundations, and registered Canadian amateur athletic associations to engage in political activities. The explanatory notes to the September Draft Legislation stated that the Canada Revenue Agency ("CRA") would need to make the determination of permitted political activities by reference to the common law, the CRA's interpretation of which was set out in the draft guidance *Charities*

⁶ Theresa L.M. Man, Esther S.J. Oh, Ryan M. Prendergast & Terrance S. Carter, *Charity & NFP Law Bulletin* No. 417, "Federal Budget 2018: Impact on Charities and Not-for-Profits" (28 February 2018), online: Carters Professional Corporation, <<http://www.carters.ca/pub/bulletin/charity/2018/chylb417.pdf>>.

⁷ Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, online: <<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]. For further discussion 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" (25 May 2017), online: <<http://www.carters.ca/pub/bulletin/charity/2017/chylb403.pdf>>.

⁸ 2018 ONSC 4147 [CWP Decision]. For further discussion 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" (30 August 2018), online: <<http://www.carters.ca/pub/bulletin/charity/2018/chylb425.pdf>>.

⁹ 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" (15 August 2018), online: <<https://www.fin.gc.ca/n18/18-072-eng.asp>>.

¹⁰ September Draft Legislation, *supra* note 4.

and public policy advocacy (“Draft Guidance”), released on October 2, 2018.¹¹ However, Bill C-86 is so fundamentally different from the September Draft Legislation that the CRA’s Draft Guidance has been withdrawn and will have to be significantly revised in the coming months.

C. OCTOBER DRAFT LEGISLATION

The proposed amendments in Bill C-86 build on the September Draft Legislation with regard to maintaining the prohibition against partisan political activities, as well as its proposed wording for subsections 149.1(6.1), (6.2), and (6.201) of the ITA, to remove the “substantially all” requirement for non-partisan political activities. However, Bill C-86 would remove any limitations on the extent to which registered charities may carry on public policy dialogue and development activities as a result of the new proposed definition of “charitable activities” in subsection 149.1(1) and new proposed subsection 149.1(10.1), as explained further below.

If passed in its current form, Bill C-86 would amend the definitions in subsection 149.1(1) of the ITA by providing that:

charitable activities includes public policy dialogue and development activities carried on in furtherance of a charitable purpose.¹²

Although Bill C-86 does not provide a definition of the phrase “public policy dialogue and development activities,” the explanatory notes accompanying the Notice of Ways and Means Motion of October 25, 2018 (“Explanatory Notes”),¹³ not included in Bill C-86, explain that “[p]ublic policy dialogue and development activities generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country.”¹⁴

Bill C-86 also proposes a new subsection 149.1(10.1) which, as described by the Explanatory Notes, “ensures that, where some or all of the activities of a charity are public policy dialogue and development

¹¹ Canada Revenue Agency, *Charities and public policy advocacy* (as updated, 3 October 2018), no longer available online. See also Canada Revenue Agency, *Public policy advocacy activities of charities* (2 October 2018), no longer available online. For further information on the CRA’s Draft Guidance and a practitioner’s review of the difficulties in articulating a workable regime imposing quantitative limits on non-partisan political activities by charities, see Terrance S. Carter & Ryan M. Prendergast, *Charity & NFP Law Bulletin* No. 432, “CRA Releases Draft Guidance on Charities and Public Policy Advocacy” (24 October 2018), online: <<http://www.carters.ca/pub/bulletin/charity/2018/chylb432.pdf>>.

¹² Bill C-86, *supra* note 3, cl 17(4).

¹³ Notice of Motion, *supra* note 1, “Explanatory Notes Relating to the Income Tax Act and to Other Legislation” (October 2018), online: <<https://www.fin.gc.ca/drleg-apl/2018/bia-leb-1018-nl-eng.pdf>>.

¹⁴ *Ibid* at 36.

activities carried on in support of its stated purposes, those activities will not be considered to reflect a separate political purpose (which could cause it to fail to meet the relevant ‘exclusively charitable purposes’ test).¹⁵ The new provision states that:

Public policy activities

(10.1) 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.¹⁶

The Explanatory Notes go on to explain that a charity can, without limitation, meet the requirement that all its resources be devoted to charitable activities carried on by the organization itself, in accordance with paragraph 149.1(1)(a),¹⁷ “where some or all of its activities are public policy dialogue and development activities carried on in furtherance of a charitable purpose.”¹⁸

D. CONCLUSION

By removing quantitative limits on non-partisan political activities, Bill C-86, if passed, will complete the process that the Federal Government promised in their announcement of August 15, 2018 to remove quantitative limits on public policy dialogue by charities in furtherance of their charitable purposes, in accordance with the recommendations of the Consultation Report. However, until the CRA produces a new guidance on the amendments in Bill C-86 and, in particular, provides a more robust explanation of what “public policy dialogue and development activities” actually means in practice, the final piece of the puzzle will remain outstanding.



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¹⁵ *Ibid* at 40.

¹⁶ Bill C-86, *supra* note 3, cl 17(11).

¹⁷ Note that existing paragraph 149.1(1)(a) of the ITA would be replaced by the identical paragraph 149.1(1)(a.1) under clause 17(3) of Bill C-86 if passed as currently drafted.

¹⁸ *Supra* note 14 at 36.

APPENDIX

Notice of Ways and Means Motion to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures

MINISTER OF FINANCE

That it is expedient to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures as follows:

Short Title

1 This Act may be cited as the *Budget Implementation Act, 2018, No. 2*.

[...]

- 17** (1) The definition *political activity* in subsection 149.1(1) of the Act is repealed.
- (2) The definition *charitable purposes* in subsection 149.1(1) of the Act is replaced by the following: *charitable purposes* includes the disbursement of funds to a qualified donee; (*fins de bienfaisance*)
- (3) Paragraph (a) of the definition *charitable organization* in subsection 149.1(1) of the Act is replaced by the following:
- (a) constituted and operated exclusively for charitable purposes,
 - (a.1) all the resources of which are devoted to charitable activities carried on by the organization itself,
- (4) Subsection 149.1(1) of the Act is amended by adding the following in alphabetical order: *charitable activities* includes public policy dialogue and development activities carried on in furtherance of a charitable purpose; (*activités de bienfaisance*)
- (5) The portion of subsection 149.1(1.1) of the Act before paragraph (a) is replaced by the following:
- Exclusions**
- (1.1) For the purposes of paragraphs (2)(b), (3)(b) and (4)(b) and subsection (21), the following shall be deemed to be neither an amount expended in a taxation year on charitable activities nor a gift made to a qualified donee:
- (6) Subsection 149.1(1.1) of the Act is amended by adding "and" at the end of paragraph (a) and by repealing paragraph (b).
- (7) Paragraphs 149.1(6)(b) and (c) of the Act are replaced by the following:
- (b) in any taxation year, it disburses not more than 50% of its income for that year to qualified donees; or
 - (c) it disburses income to a registered charity that the Minister has designated in writing as a charity associated with it.
- (8) Subsections 149.1(6.1) and (6.2) of the Act are replaced by the following:
- Charitable purposes**
- (6.1) For the purposes of the definition *charitable foundation* in subsection (1), a corporation or trust 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.

Charitable purposes

(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.

(9) Subsection 149.1(6.201) of the Act is replaced by the following:

Activities of Canadian amateur athletic associations

(6.201) For the purposes of the definition *Canadian amateur athletic association* in subsection (1), an association 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 devote that part of its resources to its exclusive purpose and exclusive function.

(10) Subsection 149.1(10) of the Act is replaced by the following:

Deemed charitable activity

(10) An amount paid by a charitable organization to a qualified donee that is not paid out of the income of the charitable organization is deemed to be a devotion of a resource of the charitable organization to a charitable activity carried on by it.

(11) Section 149.1 of the Act is amended by adding the following after subsection (10):

Public policy activities

(10.1) 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.

(12) Subsections (1), (2), (7) and (10) are deemed to have come into force

(a) on June 29, 2012 in respect of organizations, corporations and trusts that are registered charities on September 14, 2018 and in respect of associations that are registered Canadian amateur athletic associations on that date; and

(b) on September 14, 2018 in any other case.

(13) Subsections (3), (4), (6), (8) and (11) are deemed to have come into force

(a) on January 1, 2008 in respect of organizations, corporations and trusts that are registered charities on September 14, 2018; and

(b) on September 14, 2018 in any other case.

(14) Subsection (9) is deemed to have come into force

(a) on January 1, 2012 in respect of associations that are registered Canadian amateur athletic associations on September 14, 2018; and

(b) on September 14, 2018 in any other case.

20 (1) Subsection 188.2(2) of the Act is amended by adding "or" at the end of paragraph (d) and by replacing paragraphs (e) to (g) with the following:

(e) in the case of a person that is a registered charity or registered Canadian amateur athletic association, if the person devotes any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office.

(2) Subsection (1) is deemed to have come into force

(a) on June 29, 2012 in respect of organizations, corporations and trusts that are registered charities on September 14, 2018 and in respect of associations that are registered Canadian amateur athletic associations on that date; and

(b) on September 14, 2018 in any other case.