

SPECIAL SENATE COMMITTEE ON CHARITABLE SECTOR RELEASES FINAL REPORT

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A. INTRODUCTION

On June 20, 2019, the Special Senate Committee on the Charitable Sector (“Committee”) released its final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* (“Report”),¹ setting out its findings from a year-long study with respect to the charitable and non-profit sector and making 42 recommendations to the Government of Canada. The Report is intended to provide a “roadmap to ensure that genuine change is delivered so that the sector can reach from great to exceptional,” as well as a “roadmap to a stronger and brighter future for the sector.”

By way of context, the motion to appoint the Committee was adopted by the Senate of Canada on January 30, 2018, to “examine the impact of federal and provincial laws and policies governing charities, nonprofit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada.”² It began meeting with stakeholders in the sector in April 2018, holding 24 public hearings over a period of one year with 160 witnesses from the charitable and not-for-profit sector in Canada, including legal and policy experts, volunteers, front-line workers, board members, government officials, and

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¹ Canada, Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector*, (Final Report), (Ottawa: Senate of Canada, June 2019), online:

sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf [Report].

² For more information, see Terrance S Carter, “Legislation Update”, *Charity & NFP Law Update* (January 2018) at 3, online: *Carters Professional Corporation* <www.carters.ca/pub/update/charity/18/jan18.pdf>.

fundings. The Committee received briefs from more than 90 individuals and organizations. The Committee also conducted an electronic consultation in October 2018 and reviewed survey results from almost 700 responses from charitable and non-profit organizations of all sizes, from every province and territory, and across sectors.³

This *Bulletin* provides a brief summary of the discussions and recommendations made in the Report.

B. STRENGTHENING THE SECTOR

Part 1 of the Report focuses on initiatives that would strengthen the sector. Twenty-two recommendations were made in this regard (Recommendations 1 to 22), addressing four key themes: “the people working and volunteering in the sector; funding for the sector; the rules governing the sector; and the need for a ‘home’ within the federal government for the sector.”⁴

1. Volunteers and Staffing

Recommendations 1 to 4 focus on supporting volunteerism in the sector. The Report indicates several concerns in the area of volunteering in the sector, such as the growing gap between the “goals of volunteers and organizations”, cost barriers with respect to obtaining criminal record checks, and a lack of awareness and recognition of the volunteers in charitable and non-profit organizations. As such, Recommendations 1 to 4 were made to the government to: develop and implement a national volunteer strategy to encourage volunteerism;⁵ include costs associated with the recruitment and retention of volunteers when creating contribution agreements made between the government and the organization;⁶ work with provincial and territorial authorities and the Canadian Association of Chiefs of Police to lessen the financial burden for low-budget organizations when obtaining police checks for their volunteers;⁷ and develop and administer recognition programs for volunteers assisting with government services.⁸

³ For more information, see: Esther S.J. Oh, “Special Senate Committee Update”, *Charity & NFP Law Update* (October 2018) at 9, online: *Carters Professional Corporation* <www.carters.ca/pub/update/charity/18/oct18.pdf>. For a summary of the partial findings of the e-consultation released by the Senate, see Terrance S Carter, “Special Senate Committee Update”, *Charity & NFP Law Update* (May 2019) at 15, online: *Carters Professional Corporation* <<http://www.carters.ca/pub/update/charity/19/may19.pdf>>.

⁴ Report, *supra* note 1 at 12.

⁵ *Ibid*, Recommendation 1 at 29.

⁶ *Ibid*, Recommendation 2 at 30.

⁷ *Ibid*, Recommendation 3 at 31.

⁸ *Ibid*, Recommendation 4 at 32.

With respect to staffing, the Report acknowledges the recruiting and retention challenges faced by community-based organizations due to difficulties in offering competitive employment packages and the lack of job stability compared to the for-profit sector and other parts of the non-profit sector. As such, Recommendations 5 to 7 address these concerns by calling for greater support from the federal and provincial governments on the development of pensions that are portable for staff in the sector,⁹ developing a human resources renewal plan,¹⁰ and recommending the reinstatement of the Human Resources Council for the Voluntary Sector or a similar body.¹¹

Lastly, the Report acknowledges the importance of diversity on boards of governance of non-profit organizations, and recommends that the Canada Revenue Agency (“CRA”) include questions on diversity representation of these boards in the T3010 (which is filed by registered charities) and T1044 (which is filed by certain non-profit organizations) forms.¹²

2. Funding and Supporting the Sector

The Report indicates that the number of donors who claim their charitable donations was decreasing. While some witnesses noted that the tax credit regime in Canada is generous for charitable donations, there was no consensus with respect to whether tax credits incentivized donations to charities. As such, Recommendation 9 calls upon the government to direct the Advisory Committee on the Charitable Sector (“Advisory Committee”), which was announced on March 7, 2019 by the Minister of National Revenue, to review existing tax measures available to individual donors in order to strengthen the culture of giving among new and current charitable donors.¹³

Recommendations 10 to 15 focus on the area of grants and contributions made by the federal government to charities and non-profit organizations, which funding amounted to approximately \$15 million in 2017 to 2018.¹⁴ Concerns put forth by witnesses included the high administrative costs when delivering government-funded services, the short duration of such contribution agreements, increasing accountability requirements, and the burdensome application process. Such obstacles were reported to have negatively

⁹ *Ibid*, Recommendation 5 at 36.

¹⁰ *Ibid*, Recommendation 6 at 37.

¹¹ *Ibid*, Recommendation 7 at 37.

¹² *Ibid*, Recommendation 8 at 38.

¹³ Report, *supra* note 1, Recommendation 9 at 44. For more information, see Terrance S Carter, “CRA News” *Charity & NFP Law Update* (March 2019) at 2, online: *Carters Professional Corporation* <www.carters.ca/pub/update/charity/19/mar19.pdf>.

¹⁴ Report, *ibid*, at 44-45.

impacted organizations by decreasing job security, preventing low-budget organizations from participating in these funding programs, and inhibiting innovation, among others issues. Recommendations include developing policies and initiatives to compensate organizations for full administrative costs associated with the services being funded,¹⁵ requiring a two-year minimum term for grants and contribution agreements along with application and reporting requirements that are proportionate to the level of funding,¹⁶ increasing greater support for innovation across charitable and non-profit organizations,¹⁷ and modifying the government's procurement strategy to remove barriers to the participation by the sector.¹⁸

Other initiatives covered in Recommendations 16 to 19 focus on improving data collection that would assist organizations in the sector to make evidence-based decisions,¹⁹ seeking the advice of the Advisory Committee with respect to making further changes to the T3010 form,²⁰ and establishing initiatives that incentivize organizations to develop their technologies and to innovate.²¹

3. Rules Governing the Sector

The Report acknowledges concerns among stakeholders with respect to the CRA's "communication, timeliness of decisions, and collaboration efforts."²² As such, Recommendation 20 recommends that the Government direct the CRA to improve its relationship with the sector by communicating its decisions more clearly, reducing wait times for responses and requests for information, and increasing collaboration with the provinces and territories to alleviate the reporting burden of organizations.²³ Recommendation 21 proposes that the Advisory Committee include a wide range of organizations on its working groups.²⁴

¹⁵ *Ibid*, Recommendations 10-11 and 13 at 45-46, 49.

¹⁶ *Ibid*, Recommendation 12 at 47.

¹⁷ *Ibid*, Recommendation 14 at 51.

¹⁸ *Ibid*, Recommendation 15 at 52.

¹⁹ *Ibid*, Recommendation 16 at 55.

²⁰ *Ibid*, Recommendation 17 at 56.

²¹ *Ibid*, Recommendations 18-19 at 57-58.

²² *Ibid* at 59.

²³ *Ibid*, Recommendation 20 at 60.

²⁴ *Ibid*, Recommendation 21 at 61.

4. A “Home” within the Federal Government

The Report notes that some witnesses welcomed the creation of the Advisory Committee, while many witnesses stressed that it was important to have a federal focus on the sector outside of the CRA.²⁵ Based on numerous proposals that were presented by the witnesses, Recommendation 22 recommends that the Minister of Innovation, Science and Economic Development create a secretariat on the charitable and non-profit sector. The secretariat would then hold regular meetings of an interdepartmental working group; meet with federal, provincial, and territorial ministers with respect to the regulation of the sector; and publish an annual report on the sector.²⁶

C. MODERNIZING THE LEGAL AND REGULATORY FRAMEWORK

Part 2 of the Report focuses on changes to modernizing the legal and regulatory framework for the sector. Twenty recommendations were made in this regard (Recommendations 23 to 42), addressing various issues.

1. Modernizing the Definition of Charity

Recommendations 23 to 26 focus on modernizing the definition of charity through different means. The Report notes that the majority of witnesses recommended giving the Tax Court of Canada (“Tax Court”) jurisdiction over charity law cases, as it would provide consistency with respect to having all tax appeals governed by the Tax Court, lower costs and make justice more accessible, increase legal clarity, and improve the quality of the decisions due to the ability of the Tax Court to hear evidence.²⁷ Further, witnesses expressed the need for policy review with respect to qualified donee status under the *Income Tax Act* (“ITA”) to better understand what types of organizations should be awarded preferential tax treatment.²⁸

Accordingly, the Report recommends amending the ITA to change the appeal process associated with CRA decisions. Specifically, all appeals would be allowed to proceed to the Tax Court for a hearing *de novo* following decisions by the CRA’s Tax and Charities Appeals Directorate. It also recommends that organizations be given the right of appeal to the Tax Court for cases where the CRA’s Tax and Charities

²⁵ *Ibid* at 61.

²⁶ *Ibid*, Recommendation 22 at 62.

²⁷ *Ibid* at 76.

²⁸ *Ibid* at 78.

Appeals Directorate has not rendered a decision within six months for an appeal by an organization that has had its application for registered charity status refused, or by an existing charity that has had its registration revoked.²⁹

The Report also recommends that the Government consider measures to assist organizations that have had their application for registered charity status refused, or existing charities that have had their registration revoked, in appealing these decisions of the Charities Directorate. The Report recommends that the government, through the Advisory Committee, review the common law meaning of charity to determine whether Canada should follow the approach of other jurisdictions, such as Australia and England, and enact legislation to broaden the legal meaning of charity.³⁰

Further, the Report recommends the Advisory Committee to review policy considerations with respect to qualified donee and tax preferred status with the aim of establishing a principle-based framework for new categories of qualified donee and other tax preferred entities.³¹

2. Regulating Charitable Endeavors

One priority that emerged from public hearings was the need for the ITA rules governing the behavior of registered charities to be clear and fit for its purpose, and consequently, the need for comprehensive review and reform of these rules. Recommendations 27 to 33 address the following key areas of reform: (1) categories of registered charity; (2) political activities; (3) business activities; (4) direction and control/own activities; (5) the no gift to non-qualified donees rule; and (6) review of ITA provisions relating to charities.³²

a) Categories of Registered Charities

Witnesses expressed that the current distinction between foundations and charities is outdated, confusing, and leads the courts and the CRA to “fixate on activities.”³³ In response, and based on proposed solutions from witnesses, the Report recommends that the current three categories of registered charities (*i.e.*

²⁹ *Ibid*, Recommendation 23 at 77.

³⁰ *Ibid*, Recommendations 24-25 at 77-78.

³¹ *Ibid*, Recommendation 26 at 80.

³² *Ibid* at 81.

³³ *Ibid* at 83.

registered charities, and public and private foundations) be replaced by two categories: public and private charities.³⁴

b) Political Activities

While the topic of political activities was discussed extensively during the public hearings, since legislative reform with respect to political activities were made during the course of the Committee's study, no recommendations were made on this subject other than to encourage the Government to monitor the impact of these rules through regular statutory review.³⁵

c) Business Activities

With respect to business activities of registered charities, which may be undertaken to generate revenue to fund their charitable activities, the Report acknowledges that charities "will need to explore every funding opportunity available to them" in light of the context in which they operate. One proposed solution advocated by many of the witnesses was the adoption of a "destination of funds" test, which focuses on the purpose and use of the funds raised rather than the method by which the charities raise money.³⁶ Accordingly, the Report recommends that the CRA undertake a pilot project to assess the viability of allowing charities greater latitude to carry on revenue-generating through the implementation of a "destination of funds" test. As well, the Report recommends that CPS-019, *What is a related business*, be updated in order to clarify permissible revenue generation activities for registered charities, especially in relation to revenue-generating opportunities arising from new technologies.³⁷

³⁴ *Ibid*, Recommendation 27 at 84.

³⁵ *Ibid* at 84. See Terrance S Carter's submissions to the Committee with respect to political activities: "Oral Submission to The Special Senate Committee on the Charitable Sector" (26 November 2018), online: <www.carters.ca/pub/seminar/charity/2018/Statement-Oral-Submission-to-Senate-Committee-2018-11-26.pdf>.

For more discussions on the topic of political activities, see: Terrance S Carter & Ryan M Prendergast, "PPDDA' In, 'Political Activities' Out: CRA's New Draft Guidance on PPDDA Open for Comment" *Charity & NFP Law Bulletin No 438* (31 January 2019), online: <www.carters.ca/pub/bulletin/charity/2019/chylb438.pdf>; Terrance S Carter & Ryan M Prendergast, "New Draft Legislation Permits Public Policy Dialogue by Charities Without Limitation" *Charity & NFP Law Bulletin No. 434* (2 November 2018), online: <www.carters.ca/pub/bulletin/charity/2018/chylb417.pdf>; Terrance S Carter & Ryan M Prendergast, "Draft Income Tax Act Changes Proposed for Political Activities by Charities" *Charity & NFP Law Bulletin No. 428* (27 September 2018), online: <www.carters.ca/pub/bulletin/charity/2018/chylb428.pdf>; and Terrance S Carter, Jennifer M Leddy & Ryan Prendergast, "Sweeping Changes Recommended in Report on Political Activities" *Charity & NFP Law Bulletin No. 403* (25 May 2017), online: <www.carters.ca/pub/bulletin/charity/2017/chylb403.pdf>.

³⁶ Report, *ibid* at 89.

³⁷ *Ibid*, Recommendations 28-29 at 92.

d) Own Activities/Direction and Control

The Report notes challenges relating to the own activities/direction and control requirement that were expressed by witnesses. In particular, the direction and control requirement was reported to be an obstacle for charities that operate as a part of an international network, given that Canadian charities are not always the dominant partner and cannot actually exercise the direction and control as required by the CRA. Other reported difficulties include high compliance costs and uncertainty as to whether compliance is achieved, as well as the fact that it does not align with contemporary international development values or Canadian international development policy.³⁸ In response, the Report recommends that the CRA revise its Guidance CG-002, *Canadian registered charities carrying out activities outside Canada*, to replace the direction and control mechanism to careful monitoring through the implementation of an “expenditure responsibility test.”³⁹

e) No Gifts to Non-Qualified Donees Requirement

With respect to the rule prohibiting a registered charity from transferring gifts to a non-qualified donee, the Report acknowledges that this prohibition, combined with the direction and control requirement, raises issues for charities seeking to partner with Indigenous communities and also results in lost opportunities for partnerships between registered charities and not-for-profits. The Report therefore recommends that the CRA undertake a pilot project allowing registered charities to make gifts to non-qualified donees in situations where the gifted funds would be subject to careful monitoring and used for exclusively charitable purposes.⁴⁰

f) Additional Review of ITA Legislation Governing Charities

In addition, the Report recognizes that there had not been a review of the ITA provisions regulating charities since its introduction fifty years ago. The Report recommends that the Government review ITA provisions governing registered charities every five years, beginning no later than next fiscal year, and that the Government consider which activities registered charities should not be allowed to carry out and proscribe them through precisely defined statutory prohibitions.⁴¹

³⁸ *Ibid* at 95.

³⁹ *Ibid*, Recommendation 30 at 97.

⁴⁰ *Ibid*, Recommendation 31 at 99.

⁴¹ *Ibid*, Recommendations 32-33 at 100.

3. Incentivizing the Donation of Real Estate and Private Company Shares

The Report notes that several witnesses proposed eliminating the capital gains tax on charitable donations of private company shares and real estate on the grounds that this would increase much-needed funding for the sector and promote equity among entrepreneurs. However, this proposal was met with mixed responses by other witnesses regarding the effectiveness of such measure as well as concerns with respect to whether it would disproportionately benefit larger organizations as opposed to smaller charities, as well as certain donors. Further, there was no consensus as to the cost of implementation of this measure to the federal government.⁴² Nevertheless, the Report indicates that the majority of witnesses agreed that eliminating the capital gains tax for these gifts would benefit the sector, provided that there were safeguards in place to protect the ecological gifts program and to manage the risks associated with in-kind donations.⁴³ In response to these concerns, the Report recommends that the CRA undertake a pilot project to evaluate the impact on the charitable sector of exempting donations of private shares from capital gains tax and to study the extent to which the donation of non-environmental real estate could be incentivized without undermining the ecological gifts program.⁴⁴

4. Donor Advised Funds

The Report acknowledges that donor advised funds (“DAFs”) are the fastest-growing destination for charitable giving in Canada and U.S.⁴⁵ and recognizes that some witnesses are proponents of using DAFs as a charitable giving tool due to its ability to attract a wide range of donors and its ease of use. However, the Report states that there were also concerns raised by other witnesses, namely that the use of DAFs might result in a delay in funds being distributed to charities, the lack of transparency, the lack of regulation of DAFs which could lead to a concentration of assets as opposed to the distribution of wealth to charities for their operations, and the potential for a conflict of interest resulting from the involvement of the financial services industry. Proposed solutions to better regulate DAFs include implementing a disbursement quota for each individual DAF as opposed to the current rule, which applies the disbursement quota to a foundation as a whole. Other solutions include imposing a reasonable payout term

⁴² *Ibid* at 105.

⁴³ *Ibid*.

⁴⁴ *Ibid*, Recommendations 34-35 at 108.

⁴⁵ *Ibid* at 109.

(e.g., 5 or 10 years) and delaying some of the tax incentives available to donors until the funds are distributed to a charity.⁴⁶

With respect to the concerns surrounding the disbursement quota, the Report recommends that the Advisory Committee review whether the disbursement quota should be amended, and whether it should be set in regulations as opposed to statute.⁴⁷ In relation to DAFs, the Report recommends that the Advisory Committee consider means of ensuring that “donations do not languish in donor-advised funds, but are instead used to fund charitable activities in a timely fashion.”⁴⁸

5. Non-Profit Organizations

In examining the impact of laws and policies governing non-profit organizations under paragraph 149(1)(l) of the ITA (“NPOs”), the Committee focused its recommendations on the CRA’s treatment of surpluses held by NPOs and transparency issues with respect to information disclosed by NPOs. The Report recommends that the Government direct the CRA to revise and clarify its interpretation of the “not-for-profit purpose rule,” in order to provide greater clarity and certainty regarding the extent to which NPOs may hold surplus income, and to reflect the language of the ITA which focuses on the purposes of the organization.⁴⁹ In response to concerns regarding the lack of information and transparency with respect to NPOs, the Report recommends that the CRA assess whether the ITA should be amended so that information on the T1044 (Non-Profit Organization Information Return) can be publicly disclosed.⁵⁰ The Report further recommends that the Advisory Committee review the treatment and regulation of NPOs, including whether the ITA should be amended to distinguish between public benefit and member benefit non-profit organizations.⁵¹

⁴⁶ *Ibid* at 112.

⁴⁷ *Ibid*, Recommendation 36 at 113. See also Jacqueline M Demczur, “Primer on Donor Advised Funds and Current Issues” delivered at the CBA Charity Law Symposium 2019, 6 May 2019 [unpublished], online: *Carters Professional Corporation* <www.carters.ca/pub/seminar/charity/2019/Paper-Primer-or-Donor-Advised-Funds-and-Current-Issues-Jacqueline-Demczur-2019-05-06.pdf>.

⁴⁸ Report, *ibid*, Recommendation 37 at 113.

⁴⁹ *Ibid*, Recommendation 38 at 118.

⁵⁰ *Ibid*, Recommendation 39 at 120.

⁵¹ *Ibid*, Recommendation 40 at 121.

6. Other Legal Issues

The Report recognizes that charities and charity-like organizations (*e.g.* agents of the Crown and qualified donees) need to be able to communicate with potential donors,⁵² and recommended that the Advisory Committee review the impact of Canada’s Anti-Spam Legislation on charities and charity-like organizations.⁵³

Further, the Report recommends that the Government review the “ineligible individual” provisions in the ITA (to serve as a director or manager of a registered charity or registered Canadian amateur athletic association) as part of a comprehensive review of the ITA provisions governing registered charities, other qualified donees and non-profit organizations.⁵⁴

D. CONCLUSION

The Report is the product of an extensive year-long consultation in which the Committee heard from a diverse group of individuals and organizations actively involved in the charitable and non-profit sector, and also examined additional materials provided by these stakeholders. While the recommendations made by the Committee in the Report are not binding on the government, they form an important list of suggested areas of reform that can direct the government as continued reform occurs in the sector. As the Report states, the Committee “trusts that the federal government, together with the Advisory Committee on the Charitable Sector, will work swiftly to implement its recommendations.” The Committee is to be congratulated on their work. The Report is a seminal study that will no doubt inform dialogue about reform to the charitable sector for years to come.

⁵² *Ibid* at 123.

⁵³ *Ibid*, Recommendation 41 at 123.

⁵⁴ *Ibid*, Recommendation 42 at 125.