

ADVISORY COMMITTEE ON THE CHARITABLE SECTOR RELEASES ITS FIRST REPORT

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A. INTRODUCTION

The Advisory Committee on the Charitable Sector (“ACCS”) released its “Report #1 of the Advisory Committee on the Charitable Sector” on March 12, 2021, subtitled “Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector” (“ACCS Report #1”).¹ This is the first of a series of reports to be released by the ACCS. In this ACCS Report #1, the ACCS made three very important recommendations: (i) amending the *Income Tax Act* (“ITA”) to remove the “own activities” test and allow for “resource accountability”; (ii) amending the ITA to allow all appeals to go to the Tax Court of Canada; and (iii) creating a permanent “home in government” for the charitable and non-profit sector. This Bulletin provides an overview of the ACCS Report #1.

B. BACKGROUND

By way of background, the ACCS was established in 2019 as a consultative forum for the Government of Canada to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating

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¹ Canada Revenue Agency, Advisory Committee on the Charitable Sector, Report #1 of the Advisory Committee on the Charitable Sector — January 2021 (March 12, 2021), online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-february-2021.html>>.

to charities, and to ensure the regulatory environment supports the important work that charities do.² Following the release of the 2019 Report of Senate Special Committee on the Charitable Sector, “Catalyst for Change: A Roadmap to a Stronger Charitable Sector” (the “Senate Committee Report”),³ which made 42 recommendations to the Government of Canada focusing on various key themes to strengthen and modernize the policy and regulatory framework applicable to the charitable and non-profit sector,⁴ the ACCS was asked to consider the recommendations of the Senate Committee Report.

At its first meeting in December 2019, the ACCS agreed on three broad areas within which it intended to pursue its exploration of issues and the development of its advice and recommendations: (i) evolving the institutional framework to effectively advance public purposes and to maximize sector impact; (ii) ensuring financial sustainability within the charitable sector; and (iii) establishing modern governance for the charitable sector.

In light of the issues highlighted by the COVID-19 pandemic, the ACCS decided in June 2020 to organize itself into five working groups to focus on the following five priorities:

(i) The Purposes and Activities Working Group was tasked with reviewing how Canadian registered charities are required to function under the ITA, including how charities work with non-qualified donees, and revenue-earning activities by charities.

(ii) The Regulatory Framework Working Group was tasked with reviewing the broader regulatory and administrative policy environment in which charities operate.

² For additional information about the mandate, membership, and structure of the Advisory Committee on the Charitable Sector, see Canada Revenue Agency, Terms of Reference (September 5, 2019), online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/terms-reference.html>>.

³ 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: <https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf>.

⁴ *Ibid.* See also Terrance S. Carter, Theresa L.M. Man, and Ryan M. Prendergast, “Special Senate Committee on the Charitable Sector Releases Final Report” *Charity & NFP Law Bulletin* No. 451 (June 27, 2019), online: <<https://www.carters.ca/pub/bulletin/charity/2019/chylb451.pdf>>.

(iii) The Vulnerable Populations Working Group was tasked with discussing and identifying the particular challenges facing charities serving vulnerable populations.

(iv) The Indigenous Peoples Working Group was tasked with exploring charity-related regulatory and legislative issues faced by Indigenous Peoples and organizations.

(v) The Charitable Sector Data Working Group was tasked with exploring how best to enhance and organize the available data about the charitable sector.

The working groups held consultations with organizations and individuals drawing on the previous work of many advisors, analysts and legal experts, as well as the evidence presented in 2019 to the Senate Special Committee on the Charitable Sector. In this regard, the ACCS met in December 2020 to review the conclusions reached by each of the five working groups and decided to make three recommendations for immediate consideration by the federal government.

C. RECOMMENDATIONS

The following are the highlights of each of the three recommendations made by the ACCS.

1. Remove the “own activities” test from the ITA, and allow for “resource accountability”

The ACCS recommends that the Minister of National Revenue work with the Minister of Finance to amend the ITA to remove the “own activities” test, and require a focus on resource accountability instead. In this regard, the current “own activities” test regime requires registered charities to devote all of their resources to charitable activities carried on by themselves. It is recommended that the “own activities” be replaced with a regime that permits registered charities to operate in furtherance of their charitable purposes. The ACCS also recommends to replace the administrative requirements around direction and control with a requirement for registered charities to establish reasonable and practical parameters for ensuring resource accountability when working to achieve a charitable purpose through a third party that is not a qualified donee.

In this regard, Bill S-222, the *Effective and Accountable Charities Act* was introduced in the Senate on February 8, 2021, by the Honourable Ratna Omidvar, Senator for Ontario, and moved to second reading

on March 16, 2021.⁵ Bill S-222 proposes to amend the ITA to remove the “own activities” test; and to allow charities to make their resources available to non-qualified donees provided that the charities take reasonable steps to ensure that those resources are used exclusively for a charitable purpose.⁶

This recommendation is based on the work done by the Purposes and Activities Working Group, which heard from charity leaders, board members, and legal advisors that CRA’s administrative “direction and control” requirements are “paternalistic and intrusive, and contrary to current strategies and policies that favour partnership and collaboration, particularly with Indigenous Peoples and Indigenous-led organizations in Canada and with local communities around the world.” These requirements thereby “create barriers, generate distrust, and can lead to unanticipated liabilities for charitable organizations seeking to achieve their charitable purpose.”

The ACCS Report #1 states that although recent changes to the CRA’s policy guidance on direction and control and activities conducted with intermediaries have “clarified and also created slightly” more flexibility for smaller charities, the fundamental problem remains. As explained in the ACCS Report #1, an amendment to the ITA will also lead to corresponding revisions to CRA administrative policy guidance.

In this regard, the focus of legislation and regulation should be on whether a charity uses, in a responsible manner, its resources to further its charitable purposes, not how the charity carries on those charitable “activities,” be that of its own or otherwise. It is important to stress that in making this recommendation, the ACCS does not suggest that accountability for the use of charitable resources should in any way be weakened. Rather, the controls and accountability measures should be appropriately sized and not counterproductive to collaboration.

⁵ *An Act to amend the Income Tax Act (use of resources)*, 2nd Sess, 43rd Parl, 2021, (first reading 8 February 2021), online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11099585>> [“Bill S-222”].

⁶ See Terrance S Carter and Theresa LM Man, “Bill S-222 Proposes to Eliminate The ‘Own Activities’ Requirement for Charities” *Charity & NFP Law Bulletin* No. 486 (24 February 2021), online: Carters Professional Corporation <<https://www.carters.ca/pub/bulletin/charity/2021/chylb486.pdf>>. See also Terrance S Carter and Theresa LM Man, “Senator Omidvar Speaks in the Senate to Bill S-222” *Charity & NFP Law Bulletin* No. 488 (18 March 2021), online: Carters Professional Corporation <<https://www.carters.ca/pub/bulletin/charity/2021/chylb488.pdf>>.

2. Amend the ITA to allow all appeals to go to the Tax Court of Canada

The ACCS recommends that the Minister of National Revenue formally request the Minister of Finance to amend the ITA, to implement recommendation 23 from the Senate Special Committee Report in two respects: (i) allow all appeals from decisions of the Charities Directorate of the CRA proceed to the Tax Court of Canada for a hearing *de novo*, following consideration by the CRA's Tax and Charities Appeals Branch; and (ii) allow a right to appeal to the Tax Court of Canada for cases where the CRA's Tax and Charities Appeals Branch has not rendered a decision on an appeal by an organization that has had its application for registered charity status refused, or an existing charity that has had its registration revoked, within six months of it having been referred to the Appeals Branch.

The ACCS Report #1 states that, under the current regime, any appeal by a charity of decisions made by the CRA on registration or revocations is required to be heard at the first instance by the Federal Court of Appeal. Such appeal mechanisms are time-consuming, costly and, in almost all cases, do not allow for a reconsideration of the question of what constitutes a charitable purpose, and the legal definition of what is charitable. As a result, the case law has not evolved much in Canada over time.

3. Create a permanent home in government for the charitable and non-profit sector

The ACCS recommends to the Minister of National Revenue that she work with Cabinet colleagues to create, outside of the CRA, a permanent "home in government" for Canada's charities and non-profits. Such a home would: (i) provide a place within government for comprehensive policy development which will strengthen the relationship to ensure a more productive and effective partnership; (ii) advocate on behalf of this sector when broader government policies and programs are being considered, thereby acting as a connector and communicator with other government departments.

The ACCS Report #1 states that federal policy frameworks for the charitable and non-profit sector are missing or uncoordinated, with no comprehensive and coordinated policy development across the different federal departments and/or ministries that work with the sector. As such, a broader policy perspective provided by a cross-government policy unit or secretariat would help ensure a more productive and effective partnership between the charitable and non-profit sector and the federal government across various infrastructural issues. It would also act as a convener and coordinator of other federal departments and, as needed, provincial authorities with responsibilities for the sector.

D. CONCLUSION

Although the priorities adopted by the ACCS in its first year of work have already helped identify a number of issues that will require further consideration by the five working groups of the ACCS in the future, the three recommendations for reform in the ACCS Report #1, if implemented, would fundamentally change the way charities are regulated in Canada and significantly strengthen the relationship between the Government of Canada and the broader sector. As such, charities and non-profits will want to monitor the government's response to the ACCS Report #1 in the coming months, including the introduction of new legislation in Parliament to amend the ITA.



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