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FEDERAL BUDGET 2021: IMPACT ON CHARITIES AND NOT-FOR-PROFITS

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A. INTRODUCTION

AFTER COVID-19 led to the cancellation of the 2020 Federal Budget, Finance Minister Chrystia Freeland tabled the fifth budget of the Liberal Federal Government ("Budget 2021") on April 19, 2021.[1] Released thirteen months into the pandemic, Budget 2021 is comprised of four parts focussing on various priorities: Finishing the Fight Against COVID-19; Creating Jobs and Growth; A Resilient and Inclusive Recovery; and Fair and Responsible Government.

This *Charity & NFP Bulletin* provides a summary and commentary on provisions proposed in Budget 2021 that impact the charitable and the not-for-profit ("NFP") sectors. Budget 2021 includes a number of legislative proposals that could impact the operations of charities, such as a consultation to amend the disbursement quota set out in subsection 149.1(1) of the *Income Tax Act* ("ITA"), as well as proposed amendments to the ITA to prevent terrorist abuse of charitable status, together with revisions to the ITA definition of "ineligible individuals". Additionally, in an effort to support Canada's recovery in the wake of the pandemic, Budget 2021 proposes to provide temporary support to Canada's social sector, including

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[1] Canada, Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience, (19 April 2021) online: <https://www.budget.gc.ca/2021/report-rapport/toc-tdm-en.html>.

charities, non-profits, and "social purpose organizations", by providing financial support and funding through various programs and funds.

What is conspicuously missing from Budget 2021 is any inclusion of or reference to any of the recommendations contained in Report #1 by the Advisory Committee on the Charitable Sector ("ACCS") dated January 2021.[2] This result should also be seen in the context of the letter by the Minister of National Revenue dated March 30, 2021, responding to the Senate's Special Report on the Charitable and Non-profit Sector.[3]

B. CONSULTATION ON POSSIBLE DISBURSEMENT QUOTA AMENDMENTS

IN AN ATTEMPT to "boost" the charitable sector to increase its spending on charitable programs in their communities, Budget 2021 proposes launching public consultations with charities over the coming months to potentially increase the disbursement quota and update the tools at the Canada Revenue Agency's ("CRA") disposal, beginning in 2022. Budget 2021 anticipates that this could possibly increase support for the charitable sector and those who rely on its services by between $1 billion and $2 billion annually.

The "disbursement quota" is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that charitable funds are used for charitable purposes and are not simply accumulated indefinitely by charities. At present, each charity must disburse 3.5% of its assets not used directly in its charitable activities and administration (this is often referred to as the "3.5% disbursement quota").[4] Prior to 2010, charities were also required to disburse 80% of the receipted donations by the following year (referred to as the "80% disbursement quota"), subject to certain very complex exceptions.

[2] See Theresa LM Man and Jacqueline M Demczur, *Charity & NFP Law Bulletin No. 489*, "Advisory Committee on the Charitable Sector Releases its First Report" (24 March 2021) online: Carters Professional Corporation <https://www.carters.ca/pub/bulletin/charity/2021/chylb489.pdf>.

[3] See Terrance S Carter and Esther SJ Oh, *Charity & NFP Law Bulletin No. 491*, "Government Responds to Recommendations of Senate Report on Charities & NFP Sector" (17 April 2021) online: Carters Professional Corporation <https://www.carters.ca/pub/bulletin/charity/2021/chylb491.pdf>.

[4] The value of the assets for the purpose of calculating the 3.5% disbursement quota is based on the average value of the charity's assets that are not used directly in its charitable activities or administration in the 24 months immediately preceding the taxation year. However, if the value of the assets is below a certain threshold level ($100,000 for charitable organizations and $25,000 for foundations), then the 3.5% disbursement quota would not apply. The detailed method for the calculation of the 3.5% disbursement quota is set out in the *Income Tax Regulations*. See Theresa L.M. Man, "Disbursement Quota Reform: The Ins And Outs Of What You Need To Know" (paper delivered at the 2011 National Charity Law Symposium, 6 May 2011) online: Carters Professional Corporation <https://www.carters.ca/pub/article/charity/2011/tlm0506.pdf>.

Budget 2021 states that while most charities meet or exceed their disbursement quotas, a gap of at least $1 billion in charitable expenditures exists today. Furthermore, growth in the investment assets of foundations has increased significantly in recent years. In 2019, charitable foundations held over $85 billion in long-term investments, but grant-making and other charitable activities have not kept pace.

In this regard, the June 20, 2019 final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* ("Report") of the Special Senate Committee on the Charitable Sector,[5] recommended that the Government of Canada direct the ACCS to (i) examine the advantages and disadvantages of amending the disbursement quota; and the advantages and disadvantages of setting the disbursement quota in regulation, rather than statute; as well as to (ii) 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.[6] These recommendations were supported by the Minister of National Revenue's letter of March 30, 2021, in response to the Report, indicating the CRA would ask the ACCS to undertake these reviews.[7]

It is interesting to note that the disbursement quota used to apply to charitable foundations (but not charitable organizations), and was set at 4.5% before it was reduced to 3.5% for taxation years that began after March 22, 2004. That was a welcome amendment to the ITA in 2004 and was applauded by the charitable sector because charities had found it difficult to meet the 4.5% disbursement quota when interest rates were low without expending a portion of the capital of bequests or long-term gifts. As noted in Appendix 9 of the 2004 Budget, the 3.5% figure was intended to be "more representative of historical long-term real rates of return earned on the typical investment portfolio held by a registered charity." The 2004 Budget had indicated that the rate was to be reviewed periodically to ensure that it continued to be representative of long-term rates of return. Unfortunately, this intended flexibility was not built into the

[5] 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]. See Terrance S Carter, Theresa LM Man and Ryan M Prendergast, *Charity & NFP Law Bulletin No 451*, "Special Senate Committee on Charitable Sector Releases Final Report" (27 June 2019) online: Carters Professional Corporation <https://www.carters.ca/pub/bulletin/charity/2019/chylb451.pdf>.
[6] *Ibid* Recommendations #36 and 37.
[7] Letter from The Hon. Diane Lebouthillier, Minister of National Revenue, to Mr. Gérald Lafrenière, Interim Clerk of the Senate, Clerk of the Parliaments, Chief Legislative Services Officer, The Senate (30 March 2021) Senate of Canada, online: <https://sencanada.ca/content/sen/committee/421/CSSB/reports/CSSB_GovResponse_Charitable_e.pdf>. See also Terrance S Carter and Esther SJ Oh, *Charity & NFP Law Bulletin No. 491*, "Government Responds to Recommendations of Senate Report on Charities & NFP Sector" (17 April 2021) online: Carters Professional Corporation <https://www.carters.ca/pub/bulletin/charity/2021/chylb491.pdf>.

amendment to the ITA at the time and thereby was not able to accommodate future adjustments more easily without the need to amend the ITA.[8]

It will be important to monitor the progress of the proposed public consultation.

C. ENHANCED ANTI-TERRORISM PROVISIONS

1. Revocation of Charitable Status of Listed Entities

Budget 2021 proposes to amend the ITA to "address legislative gaps and streamline the revocation process of charitable status" intended to prevent the abuse of charitable registration status for terrorist financing purposes by allowing for the immediate revocation of charitable status of an organization listed as a terrorist entity. Budget 2021, though, does not elaborate on what the "legislative gaps" are, or explain when or if the "abuse of charitable registration status" has occurred, and how it has been used for "terrorist financing purposes."

The Notice of Ways and Means Motion to amend the *Income Tax Act* and Other Related Legislation, included in Annex 6 to Budget 2021, proposes a number of changes with regard to the revocation of charitable status ("Proposed Revocation Amendments"), including a new subsection 168(3.1) of the ITA as follows:

> **Listed terrorist entities**
>
> (3.1) Notwithstanding subsections (1), (2) and (4), if a qualified donee is a listed terrorist entity for the purposes of section 149.1, the registration of the qualified donee is revoked as of the date on which it became a listed terrorist entity.

The Proposed Revocation Amendments would also introduce in subsection 149.1(1) of the ITA the definition of "listed terrorist entity" as "a person, partnership, group, fund, unincorporated association or organization that is at that time a listed entity, as defined in subsection 83.01(1) of the *Criminal Code*." The Proposed Revocation Amendments would further include a "deeming rule" in a new subsection 149.1(1.02) of the ITA to provide as follows:

> If, but for this subsection, a person, partnership, group, fund, unincorporated association or organization becomes a listed terrorist entity at a particular time and ceases to be a listed terrorist entity at a later time further to an application made

[8] Maria Elena Hoffstein and Theresa LM Man, "New Disbursement Quota Rules Under Bill C-33" online: (2007) 4:20 The Philanthropist <https://thephilanthropist.ca/2007/01/new-disbursement-quota-rules-under-bill-c-33/>.

> under subsection 83.05(2), or as a result of paragraph 83.05(6)(d), of the *Criminal Code*, then the entity is deemed not to have become a listed terrorist entity and not to have been a listed terrorist entity throughout that period.

By way of background, the Regulations Establishing a List of Entities under the *Criminal Code* establishes a list of entities that have knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity, or, is knowingly acting on behalf of, at the direction of or in association with an entity that has knowingly carried out, attempted to carry out, or participated in or facilitated a terrorist activity. The list was last updated on February 3, 2021 and includes 73 organizations, including the neo-fascist organization, the "Proud Boys." The list must be reviewed every two years to determine whether there are still reasonable grounds for an entity to be a "listed entity."

The procedure for an entity to be placed on or be removed from the list is set out in sections 83.05 to 83.07 of the *Criminal Code.* However, this procedure can raise a number of issues because there is no notification or any type of judicial oversight process *prior* to an organization becoming a "listed entity."

The Proposed Revocation Amendments would also introduce a change to subsection 188(1) of the ITA dealing with "deemed year-end" as follows:

> The portion of subsection 188(1) of the Act before paragraph (a) is replaced by the following:
>
> **Deemed year-end on notice of revocation**
>
> 188(1) If on a particular day the Minister issues a notice of intention to revoke the registration of a taxpayer as a registered charity under any of subsections 149.1(2) to (4.1) and 168(1), <u>it becomes a listed terrorist entity</u> or it is determined, under subsection 7(1) of the *Charities Registration (Security Information) Act*, that a certificate served in respect of the charity under subsection 5(1) of that Act is reasonable on the basis of information and evidence available, [(a) the taxation year of the charity that would otherwise have included that day is deemed to end at the end of that day…]
>
> [Emphasis added to highlight the proposed amendment]

2. <u>Amendments to *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*</u>

Budget 2021 also proposes to introduce amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") in order to enable the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") to develop and administer a cost-recovery process for its compliance costs, clarify FINTRAC's ability to obtain information from reporting entities and expand the information that FINTRAC can disclose. Budget 2021 also proposes to amend the PCMLTFA with regard to criminal penalties and the registration framework for money services businesses and to make various technical amendments.

D. EXPANDED DEFINITION OF INELIGIBLE INDIVIDUALS

IN ADDITION TO the changes related to registration and revocation rules applicable to qualified donees concerning listed terrorist entities explained above, there is also a corresponding expansion of the existing provisions related to "ineligible individuals."

As background, the ineligible individual provisions were introduced in the 2011 Budget and were implemented through amendments to subsections 149.1(1), 149.1(4.1), 149.1(25) and 188.2(2) of the ITA. In general, these provisions provide the CRA with the authority to refuse or revoke the registration of a registered charity and to suspend a charity's receipting privileges when an ineligible individual is a board member, officer, or controls or manages the charity.

Currently the provisions concerning an ineligible individual can be summarized as an individual who generally falls within any one or more of the following four categories:

1. Has been convicted of a criminal offence (without a pardon) anywhere in the world that relates to theft, financial dishonesty or is otherwise relevant to the operations of the charity.

2. Has been convicted of an offence (non-criminal) within the last five years anywhere in the world relating to financial dishonesty or is otherwise relevant to the operations of the charity.

3. Has been a director, officer, or manager of a charity in Canada during a period when the charity was engaged in serious non-compliance that lead to the revocation of the charity within the last five years.

4. Has been a promoter of a tax shelter in which a charity in Canada participated and the registration of that charity was revoked within the last five years.

Budget 2021 will amend this definition so that it would also include the following:

> f. a listed terrorist entity or a member of a listed terrorist entity,
>
> g. a director, trustee, officer or like official of a listed terrorist entity during a period in which that entity supported or engaged in terrorist activities, including a period prior to the date on which the entity became a listed terrorist entity, or
>
> h. an individual who controlled or managed, directly or indirectly, in any manner whatever, a listed terrorist entity during a period in which that entity supported or engaged in terrorist activities, including a period prior to the date on which the entity became a listed terrorist entity;

Budget 2021 states that, "[t]he existing rule that requires the Canada Revenue Agency to only consider circumstances occurring within the preceding five-year period would not apply in relation to this measure." It is not clear why this statement is included, as there is no existing rule in the ITA concerning ineligible individuals only being applicable for a five-year period, given that paragraph (a) of the definition concerning those who have committed a "relevant criminal offence," *i.e.* an offence involving financial dishonesty, is not currently subject to a five-year period for consideration.

It should be noted that the expanded definition of ineligible individual includes not only those who were directors, officers, or senior management of organizations that became listed terrorist entities but also those who were involved during "a period **prior** to the date on which the entity became a listed terrorist entity" [emphasis added]. As such, registered charities in conducting due diligence concerning new board members will need to confirm not only were they not involved with an organization at the time or after the organization became a listed terrorist organization, but also whether or not they were involved with such organization during a period of time prior to the determination that it was a listed terrorist entity.

Currently, the CRA's administrative guidance CG-024, *Ineligible Individuals*, dated August 27, 2014, states that when the CRA discovers an ineligible individual on a board, it will set out in writing its concerns and provide the organization with an opportunity to respond. Given the new ability for the CRA to immediately revoke registration of a registered charity or other qualified donee upon its listing as a terrorist entity under the *Criminal Code*, it remains to be seen whether advance notice in writing will be the case where the CRA discovers an ineligible individual based upon the expanded definition.

This amendment would apply on Royal Assent.

E. SUSPENSION OF RECEIPTING FOR FALSE STATEMENTS

CURRENTLY PARAGRAPH 149.1(4.1)(c) of the ITA provides the CRA with the discretion to revoke the charitable status of a registered charity, if "a false statement, within the meaning assigned by subsection 163.2(1), was made in circumstances amounting to culpable conduct, within the meaning assigned by that subsection, in the furnishing of information for the purpose of obtaining registration of the charity."

In this regard, Budget 2021 proposes to amend the ITA so that, in addition to being able to revoke registration, the CRA could also suspend the ability of a registered charity to issue official donation receipts for one year where a false statement amounting to culpable conduct was made for the purpose of obtaining or maintaining its registration.

Specifically, paragraph 149.1(4.1)(c) would be amended and a new paragraph 188.2(2)(f) would be added as follows:

> 149.1(4.1)(c) - of a registered charity, if a false statement, within the meaning assigned by subsection 163.2(1), was made in circumstances amounting to culpable conduct, within the meaning assigned by that subsection, in the furnishing of information for the purpose of obtaining registration of the charity;
>
> 188.2(2)(f) - in the case of a person that is a registered charity, if a false statement (as defined in subsection 163.2(1)) was made in circumstances amounting to culpable conduct (as defined in subsection 163.2(1)) in the furnishing of information for the purpose of maintaining its registration.

This amendment would apply on Royal Assent.

F. FINANCIAL SUPPORT FOR THE CHARITABLE AND NFP SECTOR

BUDGET 2021 CONTAINS a number of initiatives aimed at supporting the economy with a particular focus on women, youth, as well as indigenous and racialized communities. The following is a select list of initiatives directed specifically at the charitable and NFP sector:

1. New and Proposed Programs

- Canada Recovery Hiring Program – to help eligible employers, including Canadian controlled charities and non-profits, with hiring back laid-off workers and bringing on new workers. The program, which will cost $595 million in 2021-22, will be available for active employees between June 6 and November 20, 2021.

- Community Services Recovery Fund – $400 million provided to Employment and Social Development Canada to create a new temporary fund to assist charities and non-profits to adapt and modernize by transitioning to remote work and online programming.

- Black-led Philanthropic Endowment Fund – to be led by Black Canadians and create a sustainable source of funding to support Black organizations and programs, help combat anti-Black racism and improve social and economic outcomes in Black communities. Budget 2021 proposes to provide $200 million in 2021-22 to Employment and Social Development Canada to establish the fund. Budget 2021 will also provide $100 million in 2021-22 to the Supporting Black Canadian Communities Initiative at Employment and Social Development Canada, to support capacity building among Black led non-profit organizations.

- Canadian Social Bond – Budget 2021 also announces the Federal Government's intention to engage in consultations on issuing a new "Canadian Social Bond" that will allow socially conscious investors to support social objectives. These consultations will be included in the Government's Debt Management Strategy consultations, to be held in Fall 2021.

2. <u>Enhanced/Amended Programs</u>

- Canada Emergency Wage Subsidy (CEWS) – proposed extension of the CEWS until September 25, 2021 to further support employee wages, with a gradual decrease to the subsidy rate beginning in July.

- Canada Emergency Rent Subsidy (CERS) – proposed extension of commercial rent subsidy and lockdown support to "eligible organizations", including certain charities and NFPs, until September 25, 2021, with a gradual decrease to the subsidy rate beginning in July. Budget 2021 states that the government will seek a further extension of the program to November 2021 should that be required by the public health and economic situation.

- Canada Small Business Financing Program – proposed amendments to the *Canada Small Business Financing Act* and its regulations to increase annual financing under the Canada Small Business Financing Program by $560 million and expand program eligibility to include non-profit and charitable social enterprises.

- Social Finance Fund – proposed launch of planned disbursements of the $755 million fund, originally proposed in the 2018 Fall Economic Statement and expanded upon in the 2019 Federal Budget. Budget 2021 proposes to deploy up to $220 million over its first two years to mobilize private capital to support charities, non-profits, and other social purpose organizations, create jobs in the sector, and drive social change.

- Investment Readiness Program – renewal of the program for an additional $50 million over two years to advance social innovation and social finance by supporting charities, non-profits, and social purpose organizations to develop the necessary skills and capacity to access social finance opportunities. This program would cost $50 million over two years, starting in 2021-22.

- Improved Food Security – a proposed $140 million top-up of the Emergency Food Security Fund and Local Food Infrastructure Fund to provide continued support to emergency hunger relief organizations.

G. PRIVACY PROVISIONS OF NOTE FOR THE SECTOR

BUDGET 2021 INCLUDES a number of measures aimed at enhancing privacy, access to information and cyber security that will impact charities and NFPs. These measures include the following:

1. Enhancing Data Collection on Cyber Security Threats

Budget 2021 proposes to provide $4.1 million over five years, starting in 2021-22, for Public Safety Canada to continue the Cyber Security and Cybercrime Survey program, which allows the government to monitor trends, collect data, and better respond to cyber security threats to the private sector across the country.

2. Improving How Access to Information Works for Canadians

Budget 2021 proposes to provide the Treasury Board of Canada Secretariat with $12.8 million over five years, starting in 2021-22, to support improvements to the online Access to Information and Personal Information Request Service and to complete the review of the *Access to Information Act*. This investment is intended to promote transparency and accountability of Canada's federal institutions. These funds are in addition to the $35 million previously invested in access to information.

3. Protecting Taxpayer Information

In light of the increasing frequency and sophistication of cyber security threats, Budget 2021 proposes to provide the CRA with $330.6 million over five years, starting in 2021-22, to increase the cyber security of taxpayer information. These funds will be used for up-to-date technology to monitor and defend against cyber threats as well as for specialized skills training for the CRA's workforce.

4. Improving and Defending Our Cyber Networks

Similarly, Budget 2021 proposes to provide $456.3 million over five years, starting in 2021-22, to Shared Services Canada and the Communications Security Establishment to increase the cyber security and defense capabilities of Canada's government services networks.

5. Establishing a New Data Commissioner

Budget 2021 proposes to create a new Data Commissioner to help promote positive uses of data, including artificial intelligence, and balance the promotion of technology and innovation with privacy protection and other social considerations, at a cost of $17.6 million over five years, starting in 2021-22, and $3.4 million per year ongoing, and an additional $8.4 million over five years to the Standards Council of Canada to continue its work to advance industry-wide governance standards.

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