

## ACCS MAKES SUBMISSION TO FINANCE ON THE DISBURSEMENT QUOTA CONSULTATION

*By: Terrance S. Carter, Theresa L. M. Man, and Jacqueline M. Demczur \**

### A. INTRODUCTION

THE ADVISORY COMMITTEE TO THE CHARITABLE SECTOR (“ACCS”) has responded to the Department of Finance Canada’s (“Finance Canada”) request that the ACCS provide input into its public consultation about the disbursement quota (the “DQ”).<sup>1</sup> Finance Canada announced it was launching a consultation about the DQ on August 6, 2021, with a closing date of September 30, 2021. Finance Canada indicated that it would “engage with the [ACCS]” and consider feedback “alongside input from the [ACCS] to help inform decisions on potentially increasing the disbursement quota and updating enforcement tools.”<sup>2</sup> The August 31, 2021, submission from the ACCS (the “Submission”) was prepared

---

\* Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent, is the managing partner of Carters Professional Corporation and counsel to Fasken on charitable matters. Theresa L.M. Man, BSc, MMus, LLB, LLM, is a partner practicing in charity and not-for-profit law. Jacqueline M. Demczur, B.A., LL.B., is a partner practicing charity and not-for-profit law. The authors would like to thank Lynne Westerhof, B.A., J.D., student-at-law, for her assistance in preparing this *Bulletin*.

Note that Terrance S. Carter was a member of the ACCS until August 31, 2021 when his term ended.

<sup>1</sup> As explained in *Charity & NFP Law Bulletin No. 498*, the DQ 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 accumulated indefinitely. Terrance S. Carter, Jacqueline M. Demczur and Theresa L. M. Man, *Charity & NFP Bulletin No 498 “Complexities of the Disbursement Quota Consultation: More than just a Number”* (25 August 2021), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>>.

For additional background information on the DQ, see Terrance S. Carter and Jacqueline M. Demczur, *Charity & NFP Law Update June 2021 “Pending Disbursement Quota Consultations: Questions for Consideration”* (June 2021), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/update/charity/21/jun21.pdf>>; See also Theresa L. M. Man, 2011 National Charity Law Symposium “Disbursement Quota Reform: The Ins and Outs of What You Need to Know” (6 May 2011), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/article/charity/2011/tlm0506.pdf>>.

<sup>2</sup> “Consultation: Boosting Charitable Spending in Our Communities” (6 August 2021), online: *Government of Canada* <<https://www.canada.ca/en/department-finance/programs/consultations/2021/boosting-charitable-spending-communities.html>>.

with the expectation that it would help “inform the policy conversation on a modernized legislative and regulatory framework for charities in Canada.”<sup>3</sup>

As explained in earlier *Charity & NFP Law Bulletins*, 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 to charities, and to ensure the regulatory environment supports the important work that charities do.<sup>4</sup> The ACCS first met in December 2019 and since then has released three reports which considered the recommendations of the 2019 Report of the Senate Special Committee on the Charitable Sector, “Catalyst for Change: A Roadmap to a Stronger Charitable Sector”.<sup>5</sup>

The Submission itself is broadly set out in three sections: general concerns about the DQ; specific issues about data reporting and legislative structures; and recommendations for Finance Canada.

## B. GENERAL CONCERNS

MUCH OF THE CONVERSATION about the DQ has been about increasing the DQ rate, which is currently set at 3.5% of the value of a charity’s property (e.g., monetary and real estate investments) that is not used for charitable activities or administration. The Submission notes the suggestion “that one route to increase charitable donations is an increase in the annual disbursement quota applied to registered charities (including charitable foundations).” In addition, the Submission highlights the federal government’s “key priority” of “supporting Canada’s charities, non-profits, social enterprises, and other organizations to provide vital services to our communities, including to the most vulnerable members of society.” In the

---

<sup>3</sup> Please note that, because of the federal election, the ACCS’s Submission was unable to be posted on the Government of Canada’s website. As a result, Carters Professional Corporation received permission from the ACCS to post the Submission on Carters.ca. See Advisory Committee to the Charitable Sector (ACCS) Submission to Finance Canada on Disbursement Quota Reform, (31 August 2021) online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/article/charity/2021/ACCS-Submission.pdf>>.

<sup>4</sup> For additional information about the mandate, membership, and structure of the ACCS, 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>>.

For further details and commentary on the background of the ACCS, 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 (pdf): Carters <<https://www.carters.ca/pub/bulletin/charity/2021/chylb489.pdf>> [*Bulletin No. 489*]; Theresa LM Man and Jacqueline M Demczur, *Charity & NFP Law Bulletin No. 495*, “Advisory committee on the Charitable Sector Releases Report #2” (27 May 2021), online (pdf): Carters <<https://www.carters.ca/pub/bulletin/charity/2021/chylb495.pdf>> [*Bulletin No. 495*]; and Theresa LM Man and Jacqueline M Demczur, *Charity & NFP Law Bulletin No. 500*, “Advisory Committee on the Charitable Sector Releases Report #3” (25 August 2021), online (pdf): Carters <<https://www.carters.ca/pub/bulletin/charity/2021/chylb500.pdf>> [*Bulletin No. 500*].

<sup>5</sup> 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 (pdf): <[https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB\\_Report\\_Final\\_e.pdf](https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf)>.

Submission, the ACCS agrees with the goal of supporting organizations that provide services to the most vulnerable, but stresses that “raising the [DQ] alone, without making other legislative changes and using other policy tools”, would not achieve this goal.

The ACCS also raises concerns in the Submission that many organizations serving the most vulnerable populations are not qualified donees under the *Income Tax Act* (Canada).<sup>6</sup> Non-qualified donees cannot receive funds from registered charities unless they are “directed and controlled” by the charities as their own activities. Many funders and grass-roots organizations reject this direction and control regime, viewing it as paternalistic and colonial. As a result, the ACCS indicates that “[t]he DQ policy is not a mechanism to increase distribution of resources to vulnerable populations or to organizations hard hit by COVID.”

Instead, as a means of addressing the difficulty of sending funds to non-qualified donees that are helping the vulnerable, the ACCS highlights in the Submission several of the recommendations set out in its first three reports to the Minister of National Revenue.<sup>7</sup> These recommendations include:

- “Removal of [the] ‘own activities’ provision in the *Income Tax Act* ... and change the ‘direction and control’ requirements now imposed on charities and their non-charity partners,”
- “With respect to working with Indigenous Peoples, communities and Indigenous-led organizations: defining Reconciliation as being beneficial to the community under the fourth head of charity and making it easier to obtain [qualified donee] status as municipal or public bodies performing the function of government”; and

---

<sup>6</sup> For a full definition of “qualified donee”, see *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 149.1(1) [“*Income Tax Act*”]. The CRA summarizes the list as follows: a registered charity; a registered Canadian amateur athletic association; a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged; a registered Canadian municipality; a registered municipal or public body performing a function of government in Canada; a registered university outside Canada the student body of which ordinarily includes students from Canada; a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift; Her Majesty in right of Canada, a province, or a territory; the United Nations and its agencies; and registered journalism organizations. See Canada Revenue Agency Guidance CG-010 “Qualified Donees” (15 August 2011), online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/qualified-donees.html>>.

<sup>7</sup> For more information, see *supra* note 4, *Bulletin No. 489*, *Bulletin No. 495*, *Bulletin No. 500.*, ACCS Report #1, ACCS Report #2, and ACCS Report #3.

- “With respect to racialized and vulnerable populations: expand the category of qualified donees to enable non-profit organizations to receive grants without becoming registered charities [...]”<sup>8</sup>

## C. SPECIFIC ISSUES ABOUT DATA REPORTING, COMPLIANCE, AND INVESTMENTS

IN THE SUBMISSION, the ACCS lays out several issues that Finance Canada should consider when making changes to the DQ regime. These issues can be grouped into three main categories. First, there is a need for improved data collection on the T3010, Registered Charity Information Return forms. Second, compliance should largely be based on existing approaches. Third, new approaches to investment should be recognized.

### 1. Improve Data Collection

The Submission acknowledges that “assets held by foundations have continued to increase year over year.” However, the ACCS indicates in the Submission that the accumulation of assets in the sector is not a widespread phenomenon because “on average, foundations are disbursing above 6% of invested assets on charitable activities and grants, particularly when the numbers are adjusted to account for extreme outliers (organizations whose numbers skew the story for the rest of the sector).”

At the same time, the Submission notes that there is a clustering of organizations spending at the 3.5% DQ level. However, it also points out that the data from the T3010s does not explain why some charities only spend 3.5% or why some organizations are not meeting their minimum DQ requirement. On this issue, registered charities are permitted to carry forward a DQ excess up to five years, or back up to one year to satisfy the DQ requirements in those years, so a failure to satisfy the DQ in any one year does not necessarily mean non-compliance.

The ACCS also highlights in the Submission the concern of accuracy in calculating the DQ rate and in subsequent reporting. Important reporting lines in the T3010 are often left blank, which makes an accurate DQ calculation “impossible.” Additionally, the optional filing of T3010 paper returns leaves room for human keystroke error when their contents are manually inputted by the CRA.

---

<sup>8</sup> See *supra* note 4, ACCS Report #1 ACCS Report #2 , ACCS Report #3.

## 2. Keep Current Compliance Measures

While Finance Canada’s consultation asked what additional tools should be available to the CRA to enforce DQ rules, the ACCS questions in response whether additional tools are needed. Instead, the ACCS “supports [the current] ‘education first’ approach” to enforcing the DQ and recommends that changes be made to the current intermediate sanctions by adopting a “better approach” where the CRA “require[s] the registered charity to address the DQ shortfall.”

The ACCS also indicates in the Submission that compliance agreements, which are part of the current toolbox of the CRA, could be used to require a charity to eliminate its DQ shortfall. If a sanction is proposed for repeat offenders who fail to meet their DQ obligations and which face sanctions as a result, the ACCS supports a provision similar to the existing intermediate sanctions that provide for “payment of a penalty imposed to be satisfied by the registered charity making a grant to an Eligible Donee (another registered charity that operates at arm’s length from the charity paying the penalty).”

## 3. Recognize New Approaches to Investment

The Submission also addresses how some forms of investing, such as donor advised funds (“DAFs”) and program-related investments (“PRIs”), may be contributing to the challenges of registered charities meeting their DQ obligations.

The Submission further notes that since the DQ “is not applied fund by fund ... it is possible that there are some donor advised funds (DAFs) not disbursing at all during a given year.” The ACCS acknowledges in the Submission that “a foundation can meet its DQ by making disbursements from only some of the DAFs,” or a public foundation could address the issue proactively by “advising the DAF donors if no disbursements are being made and acting to make those disbursements with or without donor advice.”

However, elsewhere in the Submission, the ACCS references how “the management of charities’ investments, and [...] the constitutional power over charities, is held by the provinces.” As a result, the Submission states that any increase to the DQ would need to consider “trust law provisions that prohibit encroachment on capital unless authorized by the donor or the court.”

The ACCS also raises the issue of some foundations, as investor charities, making PRIs, “which directly contribute to the charitable purposes and financial stability of charities [...]”, but noting that the CRA does not permit the investor charity to include the PRIs in meeting its DQ.

#### **D. RECOMMENDATIONS FOR FINANCE CANADA**

IN LIGHT OF the concerns and issues highlighted in the Submission, the ACCS makes several DQ-related recommendations to Finance Canada, specifically: to improve data collection; to include PRIs in meeting DQ obligations, to study the impact DAFs are having on the accumulation of assets; and to remove the “own activities” provisions in the *Income Tax Act*.

The recommendations to improve data collection are the most extensive recommendation made, to date, by the ACCS. Building on concerns from the Charitable Sector Data Working Group raised in ACCS Report #3,<sup>9</sup> the ACCS’s Submission recommends several changes to the T3010 reporting form used by charities. These include: a simplification of the explanations provided in the CRA guidance on completing the T3010 form; increased education for accountants and professional advisors who are filling out the T3010 form on behalf of clients; implementing and encouraging use of a digital T3010; and having more detailed sections on financial data in the T3010 including more detailed questions on investments. The ACCS further recommends a regular schedule for a DQ rate review with a transparent rate calculation process, and that the government “partner with intermediaries to fill data gaps more quickly”.

The Submission states it would be “helpful” if the CRA changed its administrative position to include PRIs and other forms of dual-purpose investments used by a charity to achieve its charitable purposes as a charitable disbursement or expenditure for purposes of meeting its DQ, especially since these investments are a growing form of disbursement for charitable purposes within the charitable sector.

With regard to DAFs, the ACCS “believes that more study and consultation is required to understand the growth of DAFs and whether delays in disbursement from individual funds contributes to the perception that there is an accumulation of assets/delay in granting.” The Submission also recommends that

---

<sup>9</sup> See *supra* note 4 ACCS Report #3

consideration be given “to the administrative and technical issues involved if a DQ were to be applied fund by fund, to avoid unintended administrative burdens for charities.”

Finally, the ACCS echoes its recommendations from its first three reports to remove the “own activities” provision of *the Income Tax Act*, which created the current “direction and control” regime. The ACCS also recommends making it easier for organizations serving the vulnerable to become a qualified donee status and/or allowing non-qualified donees to receive grants as necessary.

## E. CONCLUSION

THE ACCS’S SUBMISSION to Finance Canada, made unanimously by its members, lays out several concerns and issues to be considered when planning for the future of the DQ. While the DQ is intended to ensure that the charitable funds are spent on charitable purposes, it is but one tool and “alone it is not enough to gain the federal government’s key policy objective of ‘supporting Canada’s charities, non-profits, social enterprises, and other organizations to provide vital services to our communities, including to the most vulnerable members of society’.”

Rather, as the Submission points out, “policy must find a way to balance the sector’s current needs to respond with flexibility and urgency to today’s demands with the need for sustained and committed long-term funding for the future of communities within Canada and around the world”. To that end, the ACCS recommends “a considered review of the whole regulatory and policy framework for the sector to ensure that the policy goal is achieved.”