ORAL SUBMISSION TO THE SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

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Oral Submission to the Special Senate Committee on the Charitable Sector

By Terrance S. Carter, Managing Partner of Carters Professional Corporation

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Introduction

I would like to express my thanks to the Hon. Senators for the opportunity to appear today. As a matter of background, I have had the privilege of practising charity law for 38 years and, in the course of doing so, have found that Canadians are generous in spirit, time and resources in wanting to support the public good through private actions. I applaud the Committee members for the important work that they are doing in assisting the charitable sector in facilitating a passion for the purpose.

Background

I have been asked to present today on the topic of political activities involving charities and, in particular, with regard to an article that I co-wrote in 2015, as well as an earlier paper that I co-authored and presented at NYU in 2010, copies of which have been given to you.

The topic of charities and political activities has had a long and complicated history. I will therefore try to provide a high-level overview of where we have been and where we are at present concerning political activities by charities, as well as some thoughts concerning the proposals contained in Bill C-86 on political activities that the Senate will be considering.

The Past

A key point to remember is that charity law is grounded on the concept of charitable purposes as articulated by the courts over many years. The means, or activities, by which a charity achieves its charitable purpose is not the focus. Rather the focus is on the purpose to be achieved through the activities undertaken by the charity.

The difficulty that the charitable sector has faced in this regard is that the *Income Tax Act* has been drafted over the years with a focus on charitable activities rather than charitable purposes. When the government introduced the existing provisions in the *Income Tax Act* in 1985 to deal with advocacy by charities, they used the term "political activities" without defining it, which has led to much confusion. As well, charities wanting to engage in political activities were required to comply with a "substantially all" test that has generally limited charities to expending no more than 10% of their resources on non-partisan political activities.

The 1985 amendments resulted in a long list of court cases in the 1990s restricting what charities could do in the area of political activities. This, in turn, led the CRA to develop its current Policy Statement on Political Activities in 2003. While not perfect, the Policy Statement did a good job in explaining what charities could and could not do as a result of the 1985 amendments.

This relative calm came to an end in January 2012 when the federal government at the time targeted "environmental and other radical groups" as threatening "to hijack the regulatory system". This led to the 2012 Federal Budget that imposed sanctions on charities that exceeded

the 10% limit on political activities, as well as provided the CRA with $13 million in funding to undertake "education and compliance activities". As a result, 54 political activity audits were subsequently conducted to the dismay of the charitable sector. The upshot of these political activity audits left the charitable sector feeling vulnerable and confused about the role they are able to play in public policy dialogue in Canada.

The Present

This takes us to the present and a consideration of the recommendations in the Report of the Consultation Panel on the Political Activities of Charities that you are familiar with, which was released by the Minister of National Revenue in May 2017. Although the government has been slow to respond to the Report, the Minister of National Revenue and the Minister of Finance finally issued a joint statement on August 15, 2018. Notwithstanding the government's appeal of the July 2018 decision in *Canada Without Poverty*, the joint statement indicated that the government would be proceeding with removal of the quantitative limits on political activities in accordance with recommendation number 3 in the Report, provided that charities would still be required to have exclusively charitable purposes and that the prohibition on partisan political activities would remain.

This announcement led to draft legislative proposals being introduced on September 14, 2018, to remove the 10% quantitative limit on political activities. However, the Department of Finance also indicated that political activities would only be permitted if they were "ancillary and incidental" to the charitable purposes of the charity. This led to a backlash from the charitable sector that this approach would lead to the imposition of a new quantitative test based upon the vague common law notion of "ancillary and incidental" that would be inconsistent with the recommendation in the Report that charities should be allowed to participate in public policy dialogue without limitation.

As a result, on October 25, 2018, the Department of Finance included new proposed legislation dealing with political activities by charities in Bill C-86. The key aspect of the changes provides that charities can be involved in "public policy dialogue and development activities" without limitation. The issue before this Committee and the Senate as a whole is whether Bill C-86 has got it right or whether it goes too far. It is my opinion that Bill C-86 has got it right for the following four reasons:

1. Bill C-86 will avoid charities having to deal with complicated quantitative thresholds that would otherwise be required with either an "ancillary and incidental" common law test or a more generous "subordinate" test that some have suggested as an alternative approach. With either, the question would be how to define the threshold – is the limit to be 20%, 49% or 51%, for instance, and what is the threshold to be calculated on; is it a percentage of resources of the charity as is the case now, or something else, and, if so, how do you define resources; and what does a charity do when dealing with intangibles like volunteer time as a resource, and how do charities monetise their resources. The questions are many but the answers are few.

2. Bill C-86 makes it clear that a charity must be "constituted and operated exclusively for charitable purposes" and that "public policy dialogue and development activities" must be carried on in "furtherance of a charitable purpose". This means that a registered charity must be established to further one or more legitimate charitable purposes in accordance with the common law. As well, "public policy dialogue and development activities" can only be done without limitation if done "in support" of those charitable purposes. The CRA will be able to provide guidance concerning what is meant by "furtherance" and "support" in their forthcoming publication on the legislation.
3. Similarly, since "public policy dialogue and development activities" is not defined in Bill C-86, what those terms mean in practice can also be clarified by the CRA, likely in accordance with the broad description of such terms as reflected in the Report of the Consultation Panel that extend well beyond simply undertaking political advocacy.
4. The approach reflective in Bill C-86 is consistent with what is taking place in other common law jurisdictions, such as England, Australia and New Zealand without concern being raised in those countries that lobby groups are being able to obtain charitable status. The suggestion that Bill C-86 might lead to the development of Super PACs in Canada as has happened south of the border in accordance with the *Citizens United* decision by the US Supreme Court is not a concern in Canada. This is because *Citizens United* was a decision dealing with election expenditure issues by a non-charity in the US, whereas, in Canada, charities are prohibited from being involved in any type of partisan political activities.

Based upon the above, I believe the proposals in Bill C-86 are a very positive step forward for the charitable sector and hopefully will be supported by the Senate when it considers the Bill in the days ahead. If the proposals in Bill C-86 are adopted, the charitable sector will have much greater flexibility in achieving their charitable purposes as well as clarity in what they can do, although, as a consequence, charity lawyers may unfortunately have much less to do.