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## The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar™ February 14, 2019

### Charities and Politics: Where Have We Been and Where Are We Going

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2

### OVERVIEW OF TOPICS

- Review of Recent Initiatives to Modernize the Rules
- Current Legislative Amendments Applying to Registered Charities and the Conduct of Political Activities and What's on the Horizon
- Current Draft Administrative Guidance Concerning Public Policy Dialogue and Development Activities by Charities

See *Charity & NFP Law Bulletins* on this topic at [www.carters.ca](http://www.carters.ca), e.g., *Charity & NFP Law Bulletin No. 438* at <http://www.carters.ca/pub/bulletin/charity/2019/chylb438.pdf>

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## A. REVIEW OF RECENT INITIATIVES TO MODERNIZE THE RULES

### 1. Winding Down of the Political Activities Audit Program for Charities and Consultation with Sector

- On January 20, 2016, Minister of National Revenue, Diane Lebouthillier, announced the winding down of CRA's review of registered charities' political activities which began in 2012
  - A news release from the Government of Canada stated the political activities audit program showed substantial compliance with the rules regarding charities' involvement in political activities and that of the 30 completed audits, only 5 resulted in revocation

- On September 27, 2016, the Minister of National Revenue announced, "the start of public consultations on the rules regarding the involvement of registered charities in political activities" and that a consultation panel had been established consisting of 5 experts
  - Consultation began with the sector in September, 2016 and concluded in December, 2016
- On May 4, 2017, CRA published the Report of the Consultation Panel on the Political Activities of Charities (the "Consultation Report"), prepared after the consultation with the charitable sector, and recommended:
  - Define "political activities" to mean "public policy dialogue and development" and to permit charities to engage in public dialogue

5

- Changes to CRA compliance and appeals, audits, communication and collaboration
- Removal of legislative reference to non-partisan political activities and “political activities”
- A modern legislative framework that focuses on charitable purposes rather than activities
- In conjunction with the release of the Consultation Report, the Minister of National Revenue announced that the government would suspend the remaining audits of charities for political activities initiated in 2012
- On February 27, 2018, the Liberal Federal Government tabled the 2018 Budget, which indicated the government’s commitment to provide a response to the Consultation Report on political activities by charities

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6

## 2. ITA Provisions Concerning Political Activities Struck Down as Unconstitutional

- On July 16, 2018, Ontario Superior Court of Justice struck down provisions of the ITA restricting the amount of non-partisan political activities that registered charities may undertake in the decision of *Canada Without Poverty vs AG Canada* (the “CWP Decision”)
  - Provisions infringed the charity’s right to freedom of expression under 2(b) of the *Canadian Charter of Rights and Freedoms*
  - Court found that there is “no justification of s.149.1(6.2), that draws a distinction between charitable activities and non-partisan ‘political activities’ in the nature of public policy advocacy”

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7

- On August 15, 2018, the Minister of National Revenue announced that the Government of Canada had appealed the decision, citing errors of law
  - The Minister also stated that the CWP Decision would “not change the policy direction the Government intends to take with respect to the removal of quantitative limits on political activities”
  - The government also signaled its intention to amend the ITA to implement recommendation #3 of the Consultation Report to “allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy”
  - Appeal of the CWP Decision by Government of Canada was later abandoned

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8

## **B. CURRENT LEGISLATIVE AMENDMENTS**

### **1. September Release of Proposed Legislative Amendments for Public Consultation**

- On September 14, 2018, the Department of Finance Canada released a draft proposal of legislative amendments for public consultation (the “September Proposed Amendments”)
  - The September Proposed Amendments proposed to remove from the ITA the reference to the “substantially all” test concerning the ability of registered charities to engage in political activities

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- Explanatory notes to the September Proposed Amendments stated that CRA would need to make the determination of permitted political activities by reference to the common law
  - Without reference to the “substantially all” test, this meant that CRA’s interpretation of “incidental” would be critical given there was relatively little case law in this area after 1985
- On October 2, 2018, CRA released draft guidance *Charities and public policy advocacy* for public consultation, but this was subsequently withdrawn

## 2. **Bill C-86, Budget Implementation Act, No. 2 Introduced**

- On October 25, 2018, the Department of Finance Canada tabled a Notice of Ways and Means motion which set out various amendments to the ITA, including those relating to political activities from the September Proposed Amendments, which had been revised as a result of public consultation
- Bill C-86 received Royal Assent on December 13, 2018
- Important to note many of these amendments are retroactive to 2008 or 2012 as applicable, and therefore will impact suspended audits

11

- Amendments to the ITA in Bill C-86
  - Bill C-86 includes the amendments to subsections 149.1(6.1), (6.2) and (6.201) to remove the “substantially all” test
  - Keeps the prohibition on charities from devoting their resources to the “direct or indirect support of, or opposition to, any political party or candidate for public office”, which “shall not be considered to be constituted and operated exclusively charitable purposes”
  - Removes suspension for non-compliance with the “substantially all” test but permits suspension for devotion of resources to partisan activities

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12

- Adds a new definition of charitable activities that “includes public policy dialogue and development activities carried on in furtherance of a charitable purpose”
  - Explanatory notes clarify that charities’ participation in “public policy dialogue and development activities” is “without limitation”
- Also adds a new definition of “public policy activities” as section 149.1(10.1) that provides that
  - “Subject to subsections (6.1) and (6.2), public policy dialogue and development activities carried on by an organization, corporation, or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose”

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13

- The explanatory notes explain that new section 149.1(10.1) “ensures that, where some or all of the activities of a charity are public policy dialogue and development activities carried on in supports of its stated purpose, those activities will not be considered to reflect a separate political purpose.” [emphasis added]

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14

- Amendments to the ITA did not define “public policy dialogue and development activities”
  - The explanatory notes state that they “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”
  - The Consultation Report recommended use of the term “public policy dialogue and development” and recommended that it mean “providing information, research, opinions, advocacy mobilizing others, representation, providing forums and convening discussions”
- On October 31, 2018, a press release stated, “These changes are consistent with Recommendation no. 3 of the Consultation Report”

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15

## C. CURRENT DRAFT ADMINISTRATIVE GUIDANCE

### 1. Highlights of CRA New Draft Guidance on PPDDA

- On January 21, 2019, CRA release CG-027 Public policy dialogue and development activities by charities (the “Draft Guidance”) together with a new Q&A webpage on public policy dialogue and development activities (“PPDDA”) by charities
- The Draft Guidance is open for comments until Apr. 23, 2019
- Definition of PPDDA is confirmed to include “seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country”

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16

- For the most part, the Draft Guidance also includes the list of PPDDA from the Consultation Report, for example:
  - **Advocacy** - “charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country”
  - **Mobilizing others** – “charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country”

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17

- The Draft Guidance confirms that the ITA places **no limits** on the quantum of PPDDA
- As such, charities may devote up to 100% of their total resources to PPDDA, provided that the PPDDA furthers the charity's stated charitable purpose
- However, PPDDA, as a means to achieve a charitable purpose, **cannot become the purpose itself**
  - E.g., “charitable purpose” cannot “refer to influencing the laws, policies, or decision of a government”
  - Rather, the purpose has to be a charitable purpose at common law, but PPDDA can be utilized to achieve that purpose

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18

- In addition, PPDDA, when considered together with the charity's stated purpose, must provide a public benefit
- The Draft Guidance and CRA's Q&A also confirm:
  - A charity can make a gift to another qualified donee to support the recipients PPDDAs, which the ITA previously limited concerning political activities; and
  - Resources in support of political activities used to be excluded from satisfying the disbursement quota, but expenditures towards PPDDAs will be included in determining whether or not a registered charity has met the disbursement quota

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19

- However, charities continue to be prohibited from “directly or indirectly support or oppose a political party or candidate for public office,” examples of which are provided in the Draft Guidance
- Examples of **direct** support or opposition, includes for example:
  - “endorsing a candidate over social media”
  - “telling people on a charity’s website not to vote for a political party”
  - “making a donation to a political party or a candidate’s election campaign”

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20

- Examples of indirect support or opposition:
  - “a charity’s internal planning documents explicitly confirm that it will oppose a political party that takes a different view on a certain policy issue...”
  - “the internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election...”
  - The Draft Guidance also requires that a registered charity with a website or blog, “must monitor these platforms, and remove messages that support or oppose a political party or candidate for public office” or post a notice that “messages that support or oppose a political party or candidate will be removed”

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- Examples of allowed activities:
  - Communicating about policy issues
    - PPDDAs can occur at any time, either in or outside of an election period, provided they do not identify a political party or candidate
  - Informing the public about policy positions of political parties and candidates
    - Registered charities can, “[p]ublish on its website or social media platforms... the policy positions of all political parties...” provided it does so in a neutral fashion
    - Hold all candidates debates
    - Provide the voting record for all MPs or other level of government on an issue

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- The Draft Guidance also clarifies the application of the ITA to representatives of a charity involved in politics during “personal time”
  - Must be done carefully
  - Registered charities cannot “use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual’s personal political involvement”
  - Representatives are suggested to “indicate that their comments are personal rather than the views of the charity”

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23

- The Draft Guidance notes that while the ITA permits PPDDA without restriction, registered charities need to be aware of the intersection of other legal requirements such as:
  - Federal and provincial lobbying and election legislation
  - The common law in different provinces, as applicable, although the Draft Guidance is unclear on this point

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## 2. Issues to be Aware of with Draft Guidance

- Avoid mission drift
  - PPDDA activities are only allowable where they support the “stated purpose” of a charity
  - Registered charities need to be clear about their charitable purposes and whether PPDDAs furthers those activities
  - E.g., avoid pursuing PPDDA to encourage a change in the law that is not related to the charitable purposes of the charity

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- Keep books and records
  - The Draft Guidance states that, “A charity must keep records that demonstrate its primary consideration in carrying on PPDDAs is to further its stated charitable purpose and provide a public benefit.”
  - The Draft Guidance makes reference to reliance on records throughout, e.g., review of meeting minutes concerning indirect support of political candidates
  - The onus remains on the charity that PPDDA activities are done in compliance with the ITA
    - An absence of records may make this difficult

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26

- Track expenditures accordingly
  - Registered charities previously had to carefully track political activities in order to meet quantitative limits
  - Since PPDDA carried on in furtherance of a stated purpose are charitable activities, it will be important to categorize these expenditures accurately

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27

- How will this impact new registrations?
  - The T2050 currently asks questions with respect to any intended “political activities” of a registered charity, which are further addressed in CRA’s guidance on completing the T2050
- How will this impact the T3010, given retroactive application of legislation?
- Both to be updated in the near future

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
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## CONCLUDING THOUGHTS

- Bill C-86 is a very good development for the charitable sector in Canada
- Important to remember though that recommendation no. 3 of the Consultation Report was described as an “interim legislative step” necessary with respect to political activities
- The Consultation Report contained other recommendations, including the modernization of the charitable framework in Canada which is “urgent and needed”, beyond changes dealing with political activities

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