



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

October 12, 2018

Via email: fin.charity-bienfaisance.fin@canada.ca

Brian Ernewein
General Director, Legislation
Tax Policy Branch
Department of Finance Canada
90 Elgin Street
Ottawa, ON K1A0G5

Dear Mr. Ernewein:

Re: Legislative proposals regarding political activities of charities

I am writing on behalf of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section) to comment on draft legislative amendments announced by Finance Canada on September 14, 2018 (Proposal). Among other things, the Proposal would remove the quantitative limits for charities on non-partisan political activities from the *Income Tax Act* (the Act).

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and law students across Canada. The CBA's mandate includes seeking improvements in the law and the administration of justice. The CBA Section has members across Canada practicing in all areas of charities and not-for-profit law and in every size of practice, from large national firms to small and solo practitioners. We are dedicated to the evolution of a fair and efficient system reflecting principles of natural justice and Canadian interests.¹

Subsections 149.1(6.2), 149.1(6.1) and 149.1(6.201) of the Act currently limit political activities by indicating the degree to which charitable organizations, charitable foundations and registered Canadian amateur athletic associations (RCAAs), respectively, may devote their resources to political activities. These provisions permit organizations to devote part of their resources to political activities

¹ For recent examples of the CBA Section's law reform efforts, see: Voluntary Disclosures by Canadian Registered Charities (Ottawa: CBA, 2017) [online](https://bit.ly/2K9Ersh) (<https://bit.ly/2K9Ersh>); Report of the Consultation Panel on the Political Activities of Charities (Ottawa: CBA, 2017) [online](https://bit.ly/2FXOONf) (<https://bit.ly/2FXOONf>); Canada's National Security Framework (Ottawa: CBA, 2017) [online](https://bit.ly/2IuaeXC) (<https://bit.ly/2IuaeXC>); National Security Green Paper, 2016 (Ottawa: CBA, 2016) [online](https://bit.ly/2K5oqDM) (<https://bit.ly/2K5oqDM>); Political Activities for Charities (Ottawa: CBA, 2016) [online](https://bit.ly/2KNMcp1) (<https://bit.ly/2KNMcp1>); Regulation of Charitable and Not-for-Profit Sectors (Ottawa: CBA, 2016) [online](https://bit.ly/2KQHZ3E) (<https://bit.ly/2KQHZ3E>).

when they devote “substantially all” of their resources to their charitable activities, where the political activities are ancillary and incidental to the charitable activities of the charity and are non-partisan in nature. The Canada Revenue Agency’s (CRA) CPS-022, *Political Activities*² interprets “substantially all” to mean 90% or more. Under this policy, therefore, charities can devote up to 10% of their resources to ancillary, incidental, non-partisan political activities.

The Proposal would amend the definition of “charitable organization” in subsection 149.1(1) of the Act by clarifying that a charitable organization must be “constituted and operated exclusively for charitable purposes”, in line with the existing definition for charitable foundations. The Proposal also replaces the wording in subsections 149.1(6.1), 149.1(6.2) and 149.1(6.201) with new wording that removes the “substantially all” requirement for non-partisan political activities. Finance Canada’s Backgrounder expressly anticipates that political activities will be regulated with reference to the common law standard of “ancillary and incidental” in the future.

These proposals will hopefully afford charities more freedom to conduct non-partisan political activities, such as public advocacy, than in the past, which we support. However, we have some concerns about the proposals, and offer recommendations to address these concerns.

1. The new definition of charitable organization in the Proposal retains the language “all the resources of which are devoted to charitable activities carried on by the organization itself”. This language has created considerable uncertainty in the past, continues to use the phrase “charitable activities” which the Proposal was intended to eliminate, and would only perpetuate unnecessary confusion about the distinction between a purpose and an activity. In our view, the definition of charitable organization should mirror the definition of charitable foundation and omit any reference to charitable activities.
2. The provisions to be repealed have three criteria:
 - a. The “substantially all” requirement that all resources had to be devoted to charitable purposes/activities;
 - b. An ancillary and incidental criterion (that the political activities had to be ancillary and incidental to charitable purposes/activities); and
 - c. A prohibition against partisan politics.

The Proposal essentially eliminates these criteria other than the prohibition against partisan political activity.

It notes, however, that the ancillary and incidental criterion remains part of the common law. The current CRA policy statement on political activities (including quantitative limits on political activities) contains interpretations of what is meant by ancillary and incidental.

The repeal of provisions meant to help reconcile political activities with the requirements for exclusively charitable purposes/activities should be helpful. However, it leads to a concern that CRA will have to rely on the common law definition of “incidental” and will arbitrarily determine when a charity began pursuing an unstated collateral non-charitable political purpose. The term “incidental” is vague, and little case law actually emanates from Canada’s courts concerning political activities. To address this uncertainty, we recommend that CPS-022, *Political Activities* be amended to include the term “subordinate” when describing the upper limit of the quantum of political activities that a charity can engage in, and that the

² Political activities, [Policy statement](#).

general definition of “subordinate” from CPS-019, *What is a related business?*³ be used, since that term is defined in much more robust terms than “incidental” in CPS-022, *Political Activities*. This is even more important because the draft Guidance on Charities and Public Policy Advocacy posted by CRA on October 2, 2018 heavily relies on the concept of “incidental” without providing any meaningful definition of this concept, other than vague notions that will permit overly subjective interpretation by CRA. The CBA Section will address this draft Guidance in a separate submission.

3. The March 31, 2017 Report of the Consultation Panel on the Political Activities of Charities included four recommendations of which only Recommendation 3 on political activities is addressed in the Proposal. However, only part of Recommendation 3 would be implemented by the Proposal. Recommendation 3 also proposed that the prohibition on partisan political activities be clarified to include “elected officials” together with political parties or candidates for public office. This does not appear to have been adopted and we suggest that it should be. The recommendation was also to delete the term “indirect” before the term partisan activities. “Indirect” retains much of the subjectivity and uncertainty that has created difficulties for charities. The Panel suggested the section prohibit direct partisan activities and we believe this aspect of the recommendations should be adopted.
4. The proposed amendments to the Act in the Proposal will be deemed to have come into force on various dates as far back as January 1, 2008. However, the Proposal does not say when the change to the portion of subsection 149.1(1.1) before paragraph (a) (that is, subsection 1(4) of the Proposal) would come into force. This appears to be an oversight, which should be corrected before the legislation is enacted.

Thank you for considering the CBA Section’s views. We would be happy to respond to any questions or elaborate further about the proposals in this letter.

Yours truly,

(original letter signed by Gaylene Schellenberg for Susan Manwaring)

Susan Manwaring
Chair, Charities and Not-for-Profit Law Section

cc. Tony Manconi
Director General
Charities Directorate
tony.manconi@cra-arc.gc.ca

³ What is a related business?, [Policy statement](#).