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CANADIAN CENTRE
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Submission on behalf of the Canadian Centre for Policy Alternatives regarding the draft legislative proposals for the *Income Tax Act* *October 13, 2018*

I Overview

The Canadian Centre for Policy Alternatives (CCPA) welcomes the opportunity to participate in the consultation announced by the Department of Finance on September 14, 2018, on proposed amendments to *the Income Tax Act* regarding the political activities of charities. Changes to the Act have been long awaited by the CCPA and many in the nonprofit community, following the Prime Minister's call in 2015 to the Minister of National Revenue and the Minister of Finance to modernize the legislation governing the charitable sector.

The CCPA is deeply disappointed with the content of the proposals, the limited ambition of the reform agenda to date, and the poorly structured consultation process. We urge a different approach that more faithfully implements the expert recommendations of the March 2017 *Consultation Panel on the Political Activities of Charities* and the recent decision of the Superior Court of Justice on this matter.

The CCPA is an independent, non-partisan research institute concerned with issues of social, economic and environmental justice. Founded in 1980, the CCPA is one of Canada's leading progressive voices in public policy debates. The CCPA is incorporated under the laws of Canada as a nonprofit corporation and is registered as a charitable organization under the *Income Tax Act* (Canada).

The CCPA has a clear and direct interest in engaging in these consultations both as a charity and as a think tank – which by its very nature, “aims, implicitly or explicitly, to influence public policies, laws, etc., in the short or long term, directly or indirectly, or to shift the terrain to foster greater receptivity within the general public to policies they espouse.”¹ A more detailed account of the role of think tanks in democratic society, and specifically that of CCPA, is set out in an excerpt from the *Submission of the Centre for Free Expression at Ryerson University to the Consultation panel* in Appendix 1.²

Importantly, the CCPA's interest in these consultations also stems from the fact that we were among those targeted in the original political activities audit commenced by the former government - which was, in effect, a key reason why the original Consultation Panel was established.

We have stood with other leading charitable organizations in calling for an overhaul of the legislation and policy framework governing the charitable sector as an essential step for strengthening human rights and democracy in Canada.

¹ Submission of the Centre for Free Expression at Ryerson University to the Consultation panel
https://cfe.ryerson.ca/sites/default/files/CFE_Brief_to_Charities_Panel%202016_11_18.pdf

² Ibid.

II. The consultation in context: after a promising start, a period of delays and confusing signals.

It is important to recall that the current draft legislative proposals stem from a lengthy process of review of the thorny issue of charities and political activities dating from the fall of 2015, when the Prime Minister issued a Mandate Letter to the Minister of National Revenue, asking her to work with the Minister of Finance to modernize the legislation governing the charitable sector. This was specified to include a clarification of the rules governing political activities to allow charities to work "free from political harassment" – obliquely referring to an initiative of the former Conservative government that began in 2012 - the Political Activities Audit Program and its negative impact on the targeted charities. This initiative garnered a great deal of public attention and scrutiny by the sector – many (including CCPA) believed that the audits were politically motivated.³

In 2016, the Minister of National Revenue launched a consultation process with the charitable sector and the public to assist in clarifying the rules for the participation of charities in political activities, and announced the creation of an expert panel to provide recommendations. The consultation and the panel's work were widely applauded and supported by many in our sector. The Panel submitted its report in March 2017 - *Report of the Consultation Panel on the Political Activities of Charities* (hereafter - Panel Report), laying out four critical recommendations.⁴

Pending a more formal response, the federal government suspended all political activity audits - a welcome first step. But it still left charities like CCPA in limbo: audits were suspended but the books weren't closed. The ongoing chill effect in the charitable sector remains one of the most unfortunate outcomes of the CRA's political audit program.

In August 2018, after a lengthy period without communication, the Minister of National Revenue, along with the Minister of Finance, issued a statement⁵ acknowledging the Government's commitment to clarify the rules governing the political activities of charities and promising amendments to *the Income Tax Act* consistent with recommendation no. 3 of the Panel Report. At the same time, the statement indicated the government would be appealing the recent ground-breaking decision from the Ontario Superior Court of Justice *Canada Without Poverty v. AG Canada*.⁶ That decision struck down restrictions

³ Ibid.

⁴ The four overarching recommendations are:

- i. Revise the CRA's administrative position and policy (including its policy guidance, CPS -022 Political Activities) to enable charities to fully engage in public policy dialogue and development.
- ii. Implement changes to the CRA's administration of the Income Tax Act (ITA) in the following areas: compliance and appeals, audits, and communication and collaboration to enhance clarity and consistency.
- iii. Amend the ITA by deleting any reference to non-partisan "political activities" to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.
- iv. Modernize the legislative framework governing the charitable sector (ITA) to ensure a focus on charitable purposes rather than activities and adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approach.

Report of the Consultation Panel on the Political Activities of Charities. <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/resources-charities-about-political-activities/report-consultation-panel-on-political-activities-charities.html#btrprt>

⁵ <https://www.fin.gc.ca/n18/18-072-eng.asp>

⁶ *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147

in the Income Tax Act limiting charities' ability to engage in political activities on the basis that these infringe on Canadians' constitutional right to free expression. The government's announcement sent very mixed signals to the charitable sector, and has created confusion about the government's intent to follow through on earlier Ministerial commitments.

The draft legislative proposals that are the subject of the current consultation were introduced in this clouded context on September 14, 2018. Still further, on October 2, the Canada Revenue Agency (CRA) released new policy guidance entitled *Charities and Public Policy Advocacy*,⁷ which sets out how CRA will apply these legislative proposals as they are currently drafted.

The two consultations – stemming from different Ministries— are being handled separately notwithstanding the fact that they are so closely linked. The fact that the policy guidance was only released early October has exacerbated the challenge and confusion in the consultation process.

III. CCPA's comments and recommendations on the Draft Legislative Proposals – released September 14, 2018

CCPA appreciates the opportunity for public input on the proposed amendments to the Income Tax Act and proposed changes to CRA rules. We have three areas of concern with the current draft proposals:

1. The proposed amended definition of charitable organization, and the proposed guidance language that sets out how CRA will apply the amendments, are not consistent with recommendation no. 3 of the Panel Report, and must be reworked.

The proposed changes to *the Act* purport to implement changes consistent with the Panel's recommendation but they clearly fall short of this goal. Recommendation 3 is clear – in amending the legislation, the government must “**explicitly**” allow charities to fully engage in public policy dialogue – “**without limitation.**” Neither the legislative changes nor the draft Policy Guidance⁸ allow for this.

The Ministry of Finance has issued a Backgrounder,⁹ which, together with the Policy Guidance, provide a good indication of how the amended legislation will be applied. Both documents indicate that if the proposed amendments are accepted in their current form, CRA will continue to apply restrictions based on an outdated common law understanding of political activities. CRA's position is that “as a general rule, the more resources a charity uses to carry out public policy advocacy activities, the more likely it has a political purpose” and therefore the more likely they are to be de-registered.

Given this, the charitable sector will essentially continue to be under CRA scrutiny with regards to its public policy advocacy, and under threat of having charitable registration revoked if such activities exceed what CRA deems acceptable levels. The only proposed change is in switching to an assessment of

⁷ *Charities and Public Policy Advocacy*, <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-public-policy-advocacy.html>

⁸ *Charities and Public Policy Advocacy*.

⁹ *Backgrounder: Draft Legislative Proposals Regarding Political Activities of Charities* <https://www.canada.ca/en/department-finance/news/2018/09/backgrounder-draft-legislative-proposals-regarding-political-activities-of-charities.html>

whether nonpartisan public policy advocacy is “incidental” in nature as opposed to amounting to more than 10% of resources.

To allow such activity “without limitation” as is proposed by the Panel in Recommendation 3, the Panel has suggested that CRA look to expand its view of what is a charitable activity to include public policy advocacy activities. They argue that support for this characterization of an activity can be found in the case law.

The *Vancouver Immigrant Society* decision supports looking at the activity in the context of a charitable purpose. If a charity calls for a change in the law in furtherance of its charitable purpose – and such activity is subordinate and non-partisan, the Panel believes the policy could accept it as charitable.¹⁰

Allowing such public policy advocacy activities without limitation would, as noted in the Panel Report, “go a long way in providing clarity to the charitable sector and would enable the sector to more meaningfully contribute to public policy reform and the democratic process. Further, it would remove the current disadvantage faced by the charitable sector vis-à-vis for-profit companies which can advocate in the public policy arena without restriction.”¹¹

Recommendation: The CCPA urges that the *Income Tax Act* be amended as per the Panel’s recommendation 3, “to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.”

2. The proposed changes to the Act fail to implement the recommendations of the Panel regarding a charity’s involvement in partisan political activities.

Recommendation 3 from the Panel Report calls for changes to the wording regarding charities involvement in partisan politics, which is an area needing better clarity and specificity. The panel recommended the government to

retain the prohibition on charities’ engaging in “partisan political activities”, with the inclusion of “elected officials” (i.e. charities may not directly support “a political party, **elected official** or candidate for public office”), and the removal of the prohibition on “indirect” support, given its subjectivity.¹²

As noted in the report, the rationale is clear:

Further, the prohibition on both “direct and indirect” partisan political activities is highly subjective (particularly “indirect”) and has been the subject of much confusion in the charitable sector. Instead, the CRA could list examples of what will be considered to be partisan political activities, and what will not.¹³

¹⁰ *Report of the Consultation Panel on the Political Activities of Charities.*

¹¹ Ibid

¹² Ibid

¹³ Ibid

There is widespread agreement in the sector that charities must avoid any involvement in partisan political activity that is “direct” – which is generally understood as the provision of funds, endorsements of candidates/political parties etc. However, the current wording of the provision – which includes “indirect” support or opposition to candidates or political parties, has caused a great deal of concern for the sector as it is unclear what types of activities may fall under this category. Analysis or critique of an elected official’s or party’s policies or proposed legislation for example should not be counted as partisan activity. CRA has not released any guidance on this issue – other than short advisories around election time.

This lack of clarity is problematic both for charities and staff at the CRA and engenders uncertainty in the application of the law. In the absence of clear guidance and a consistent approach to the issues, the retention of the indirect category in this provision is problematic.

Recommendation: The CCPA supports the recommendations of the Panel to delete the word “indirect” and urges the Government to revise the draft proposals accordingly.

3. The consultation process on the amendments is disjointed and creates confusion, making comment and analysis more challenging for the charitable sector.

The CCPA would like to express its concern regarding the structure of the consultations – for the draft legislative proposals and the policy guidance. Notwithstanding the importance of implementing Recommendation 3 together with the Policy Guidance changes set out in Recommendation 1, the Government has chosen to separate the two – providing for consultations on Recommendation 3 independently of 1 – the former being dealt with by the Ministry of Finance under specific time periods for the consultation – and the latter, under the Ministry of National Revenue, as an ongoing consultation.

As is clear from our feedback on point 1 above, the two recommendations are closely linked – as the policy guidance is the document that sets out how the proposed amendments to the Act will be applied. The current consultation only concerns the legislation and was announced mid-September with a 30 day deadline. The draft policy guidance was released October 2nd and according to the CRA website there is no deadline for comments. The consultation is ongoing.

The segregated approach – both in timing, and substance of these consultations, creates further confusion to those wishing to make meaningful contributions to the consultation process. An overall more coherent and integrated set of responses to the Panel’s four comprehensive recommendations is still urgently needed from the Government with an effective and clear consultation process.

Recommendation: The CCPA urges the Government to respond to all of the panel’s recommendations in a manner consistent with the Panel’s Report to ensure that its goal of allowing charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy, is realized. Implementation of recommendations 1 through 4 should be forthwith.

Conclusion

The CCPA is pleased to see the government taking action on longstanding calls to modernize outdated and restrictive rules for charities including in the Income Tax Act and CRA rules and policies.

However, the draft legislative proposals fall far short of the action that needs to be taken to give effect to the intended goal of the reforms – to allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy. The proposals also fail to address in any significant way the direction set out in Ministerial mandate letters - a clarification of the rules governing political activities to allow charities to work "free from political harassment" and to modernize the legislation governing the charitable sector.

The CCPA submits that a clear path of action is available. The expert panel's four recommendations are clear, concise, and actionable, and are supported by the decision of Justice Morgan in *Canada Without Poverty v. AG Canada*.

By implementing the Panel's recommendations, the Government will bring the regulation of charities into the 21st century - allowing charities to do the good work they are intended to do and free from political interference.

It's time to end the chill that has dominated the sector landscape in varying degrees over the past few decades and to instead build a robust legal and policy framework that enables charitable organizations to fulfill key roles in our democracy. This includes essential contributions to public debate and discussion, the development of sound public policy, and the education and engagement of citizens.

Appendix 1: Excerpt from the submission of the Centre for Free Expression at Ryerson University to the Consultation panel ¹⁴

Think tanks play a vital role in democratic society—in policy debates, in the policy landscape. They approach issues from a set of either conservative or progressive values. When applied to specific studies or reports these divisions do not apply as easily. Reality is more complex. However, this division expresses the spectrum of input into policy debates.

All think tanks aim, implicitly or explicitly, to influence public policies, laws, etc., in the short or long term, directly or indirectly, or to shift the terrain to foster greater receptivity within the general public to policies they espouse.

The CRA guidelines regarding political action are especially troubling for think tanks. Depending on how it is interpreted by CRA, virtually everything that a think tank with charitable status does would qualify as political activity.

All social science research and especially policy-oriented research starts from a set of values and priorities that underlie and guide the research. Despite some claims to the contrary, they are central to all such research even if they are not explicitly stated.

Take the example of the Canadian Centre for Policy Alternatives, an organization with which we are both very familiar. CCPA make the values underlying its work explicit. This in no way detracts from its obligation and determination to maintain the most rigorous research standards. Having led multiple major Social Sciences and Humanities Research Council (SSHRC) grants is a testament to the sophisticated research capacity that resides within the CCPA.

The values underlying CCPA's work are what are generally considered social, economic and environmental justice values. They include: equality (of both opportunity and condition); full employment; a strong active government to provide collectively public goods and services that Canadians want, a counterweight to large mobile capital, an active government working for shared economic prosperity, and an ability to regulate in the public interest; strong unions as an essential institution of democracy, both in the workplace and in the society at large; fair and inclusive democracy for all citizens; sustainable environmental protection and development, notably the reduction of carbon emissions.

These progressive values are widely shared within the Canadian population, and exist to a greater or lesser extent among all political parties. Policy makers rely on informed, evidence-based policy analysis and development by CCPA and other think tanks. Their work has influenced the policies of municipal, provincial and federal governments—of all stripes. They provide the essential “grist” to inform public debates about policy issues that matter. They inject into the public domain policy ideas, which are evidence-based, cogently argued, and effectively communicated. Their work is especially important now since past governments have reduced in-house policy capacity and eliminated arms-length policy research institutes.

¹⁴ [https://cfe.ryerson.ca/sites/default/files/CFE Brief to Charities Panel%20 2016 11 18.pdf](https://cfe.ryerson.ca/sites/default/files/CFE%20Brief%20to%20Charities%20Panel%202016%2011%2018.pdf)