

## LOBBYING AND ELECTIONS LEGISLATION IN CANADA: AN INTRODUCTION FOR CHARITIES AND NOT-FOR-PROFITS

*By Ryan M. Prendergast and Terrance S. Carter\**

### A. INTRODUCTION

Recent legislative changes to the *Income Tax Act* (Canada) (“ITA”)<sup>1</sup> have opened the door for registered charities and registered Canadian amateur athletic associations (“RCAAs”) to engage in “public policy dialogue and development activities” (“PPDDAs”). These changes, which were introduced through Bill C-86, *Budget Implementation Act, 2018, No. 2* (“Bill C-86”)<sup>2</sup> and received Royal Assent on December 13, 2018, removed all reference to “political activities,” and now permit charities (and RCAAs) to engage in PPDDAs to the extent that PPDDAs further their charitable purpose. To this end, charities and RCAAs may devote 100% of their resources to PPDDAs, which may include lobbying, as opposed to the previous 10% limit on permitted political activities.

With the upcoming Federal election, and recent amendments to the *Canada Elections Act*,<sup>3</sup> which are meant “to increase transparency regarding the participation of third parties in the electoral process,”<sup>4</sup> it is important that charities, RCAAs, as well as other not-for-profits (“NFPs”) intending to carry out

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<sup>1</sup> *Income Tax Act* (Canada), RSC 1985, c 1 (5th Supp) [“ITA”].

<sup>2</sup> Bill C-86, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, cl 17 and 20 (introduction and first reading 29 October 2018) [“Bill C-86”].

<sup>3</sup> *Canada Elections Act*, SC 2000, c 9. For further discussion on amendments to the *Canada Elections Act*, see section D below.

<sup>4</sup> Bill C-86, *supra* note 2, “Summary”.

lobbying activities understand the legislation for which these activities are subject. In this regard, the lobbying activities carried out by charities and RCAAAs are subject to restrictions under the ITA. In addition, charities, RCAAAs, and other NFPs are subject to federal, provincial, and municipal elections and lobbying legislation. This *Bulletin* provides a very brief introduction to the federal and provincial lobbying legislation (collectively, “Lobbying Legislation”)<sup>5</sup> and its impact on charities, RCAAAs and NFPs.<sup>6</sup> This *Bulletin* also provides a very brief introduction to the recent legislative changes to the *Canada Elections Act*. As Lobbying Legislation is complicated in nature, it is beyond the scope of this *Bulletin* to discuss lobbying legislation as it applies to municipalities (including municipal by-laws), or to provide an in-depth analysis of Lobbying Legislation. As such, this *Bulletin* does not provide a detailed explanation of the law in this regard and the reader will therefore want to refer to the resources cited herein for further details.

## B. BACKGROUND

Although the ITA does not define PPDDAs, the Canada Revenue Agency (“CRA”) has since released a draft administrative guidance, CG-027, *Public policy dialogue and development activities by charities* (“CRA Guidance”), which defines PPDDAs to “generally involve seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country.”<sup>7</sup> While the ITA now permits charities and RCAAAs to engage in such activities, it continues to prohibit them from using any part of their resources in activities that involve the “direct or indirect support of, or opposition to, any political

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<sup>5</sup> For further information, see federal Lobbying Legislation: *Lobbying Act* (Canada), RSC 1985, c 44 (4th Supp); and provincial Lobbying Legislation: *Lobbyists Act* (Alberta), SA 2007, c L-20.5; *Lobbyists Registration Act* (British Columbia), SBC 2001, c 42; *The Lobbyists Registration Act* (Manitoba), SM 2008, c 43; *Lobbyists Registration Act* (New Brunswick), RSNB 2014, c 11; *Lobbyist Registration Act* (Newfoundland and Labrador), SNL 2004, c L-24.1; *Lobbyists’ Registration Act* (Nova Scotia), SNS 2001, c 34; *Lobbyists Registration Act, 1998* (Ontario), SO 1998, c 27, Sched; *Lobbyists Registration Act* (Prince Edward Island), RSPEI 1988, c L-16.01; *Lobbying Transparency and Ethics Act* (Québec), CQLR 2002, c T-11.011; *The Lobbyists Act* (Saskatchewan), SS 2014, c L 27.01, as amended by the *Statutes of Saskatchewan*, SS 2015, c 21, and SS 2019, c 8; *Lobbyists Registration Act* (Yukon), SY 2018, c 13.

<sup>6</sup> For previous writing on lobbying, see Jane Burke-Robertson, *Charity Law Bulletin No. 147*, “Lobbyist Registration Legislation: Impact on Ontario Charities and Non-Profit Organizations” (24 October 2008), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2008/chylb147.pdf>>; Theresa L.M. Man, *Charity Law Bulletin No. 164*, “Lawyers Who Lobby on Behalf of Charities and Non-Profits” (29 April 2009), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2009/chylb164.htm>>.

<sup>7</sup> Canada Revenue Agency, CG-027: *Public policy dialogue and development activities by charities* (draft) (24 January 2019), online: Government of Canada: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>> [“CRA Guidance”]. For further information on the CRA Guidance, see Terrance S. Carter & Ryan M. Prendergast, *Charity & NFP Bulletin No. 438*, “‘PPDDA’ In, ‘Political Activities’ Out: CRA’s New Draft Guidance on PPDDA Open for Comment” (31 January 2019), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2019/chylb438.pdf>>.

party or candidate for public office.”<sup>8</sup> However, it should be noted that in contrast to charities and RCAAAs, the ITA does not impose such restrictions on other NFPs engaging in these activities.

With respect to lobbying, the CRA Guidance provides that under the ITA, “charities may make representations in writing or verbally to elected officials, public officials, political parties, and candidates, and appear at parliamentary committees, to bring their views to the public policy development process, and may release such materials publicly.”<sup>9</sup> Charities may further engage in activities that include advocating a change in a law, decision or policy of the government; or grass-roots communications, such as communicating their views on public policy on social media or mobilizing others to contact politicians. Again, this is provided that these activities further their charitable purposes. However, in addition to being governed by the ITA with respect to PPDDAs, there are also requirements imposed on charities and NFPs by other legislation, including the *Canada Elections Act*, *Lobbying Act* (Canada), *First Nations Elections Act*,<sup>10</sup> and the various provincial and municipal elections and lobbying legislation.

### C. LOBBYING LEGISLATION

As discussed above, charities and NFPs that carry out PPDDAs that are lobbying activities can become subject to Lobbying Legislation. As of April 1, 2019, when the *Lobbyists Registration Act* (Prince Edward Island)<sup>11</sup> came into force, almost all provinces in Canada have Lobbying Legislation in place. The exceptions include the Northwest Territories and Nunavut, in addition to the Yukon Territory, where the *Lobbyists Registration Act* (Yukon)<sup>12</sup> received Royal Assent on November 22, 2018, but is yet to come into force.

While Lobbying Legislation differs across jurisdictions, it is largely similar in nature. According to the Commissioner of Lobbying of Canada in 2011, “[p]rovincial lobbying legislation has been, in large part, modelled on the federal legislation. Although there are differences across jurisdictions, many of the lobbying laws in place in Canada are founded on the same four overarching principles that form the

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<sup>8</sup> ITA, *supra* note 1, s 149.1(6.2).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *First Nations Elections Act*, SC 2014, c 5.

<sup>11</sup> *Lobbyists Registration Act* (Prince Edward Island), *supra* note 5.

<sup>12</sup> *Lobbyists Registration Act* (Yukon), *supra* note 5.

preamble of the federal *Lobbying Act*.<sup>13</sup> As such, the focus of this *Bulletin* is on the *Lobbying Act* (Canada) and the *Lobbyists Registration Act, 1998* (Ontario), with references to any substantive differences with other Lobbying Legislation.

Generally, under Lobbying Legislation, charities and NFPs fall within the definition of “organization,” to which the respective legislation may apply. However, Alberta, Quebec, Manitoba, and Saskatchewan provide certain exemptions for charities and NFPs. The type of Lobbying Legislation that is applicable, whether federal or provincial (or even municipal), depends on the level of government officials that are being lobbied, as well as the jurisdiction in which the charity or NFP is lobbying. For example, a registered charity would fall under the purview of the federal Lobbying Legislation if a federal government official is being lobbied, as opposed to a provincial one.

Charities and NFPs should also note that Lobbying Legislation only applies to paid lobbyists, whether consultant lobbyists (*i.e.* those parties hired by the organization to engage in lobbying on behalf of an organization), or in-house lobbyists (*i.e.* employees of NFPs or charities engaging in lobbying). Volunteers and unpaid workers that may be working for a charity or NFP do not fall within the purview of Lobbying Legislation. Further, not all lobbying activities require registration or reporting in order to comply with Lobbying Legislation. While the federal and provincial Lobbying Legislation might require mandatory registration in certain instances, it should be noted for comparison purposes that municipal legislation, which exists in certain municipalities, such as the City of Toronto, varies between voluntary and mandatory regimes.

## 1. What is Lobbying?

Lobbying Legislation is generally similar in requiring registration of certain lobbying activities, but there are variations in the thresholds required for registration by various organizations, types of communications that fall within the ambit of registrable activities (*i.e.* lobbying activities that, if conducted by a lobbyist or organization, must be registered), and the public office holders captured

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<sup>13</sup> Office of the Commissioner of Lobbying of Canada, *Lobbying Legislation in Canada: Ensuring Transparency: Remarks at the Johnson-Shoyama Graduate School of Public Policy* (Address by Karen E. Shepherd, Commissioner of Lobbying, 27 October 2011), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00543.html>>. The four principles include: (1) Free and open access to government is an important matter of public interest; (2) Lobbying public office holders is a legitimate activity; (3) It is desirable that public office holders and the general public be able to know who is engaged in lobbying activities; and (4) The system of registration of paid lobbyists should not impede free and open access to government. For further information, see Office of the Commissioner of Lobbying of Canada, *The Lobbying Act* (15 February 2012), online: <[https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h\\_00008.html](https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00008.html)>.

by each act.<sup>14</sup> Charities and NFPs conducting lobbying activities in different Canadian jurisdictions, with different actors, need to be mindful of these differences.

Although the *Lobbying Act* (Canada) does not contain a definition for “lobbying” *per se*, the Office of the Commissioner of Lobbying of Canada indicates that “[l]obbying is **communicating**, with **public office holders**, for **payment with regard to**:

the making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs;

the awarding of federal grants, contributions or other financial benefits; and

in the case of consultant lobbyists, the awarding of a federal government contract and arranging a meeting between their client and a public office holder.”<sup>15</sup>

The *Lobbying Act* (Canada) imposes registration and reporting obligations on organizations that employ “in-house lobbyists,” who are individuals employed by the organization, any part of whose duties it is to communicate with public office holders on the organization’s behalf in respect of matters outlined in paragraph 7(1)(a) of the Act.<sup>16</sup> Communication on these matters is a registrable activity and, generally speaking, includes the introduction, amendment, or development of legislation, regulations, bills, resolutions, government policies or programs, or financial awards or benefits.<sup>17</sup>

In addition to employing in-house lobbyists, charities and NFPs may also retain the services of external “consultant lobbyists” to lobby on their behalf. There are no registration and reporting obligations for organizations that retain consultant lobbyists, though consultant lobbyists must individually comply with their own registration and reporting obligations under section 5 of the *Lobbying Act* (Canada). Federally, the Office of the Commissioner of Lobbying of Canada has also published an Advisory Opinion on how the Act may apply to directors of charities and NFPs, noting that “[i]f the chairperson or member of the board is not an employee of the company or non-profit

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<sup>14</sup> Further discussion on “public office holders” is discussed in section C.2, below.

<sup>15</sup> Office of the Commissioner of Lobbying of Canada, *Ten Things You Should Know About Lobbying: A Practical Guide for Federal Public Office Holders*” (30 November 2012), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00403.html>> [emphasis in original].

<sup>16</sup> *Lobbying Act* (Canada), *supra* note 5, s 7(1)(a).

<sup>17</sup> *Ibid.*

organization in an employee-employer relationship and receives remuneration beyond reimbursement of expenses, the requirement for registration as a consultant lobbyist applies to their lobbying activities.” However, “if the chairperson or member of a board of directors of a corporation, company, association, or non-profit organization is also an employee of that organization,” registration requirements for in-house lobbyists would apply.<sup>18</sup>

In contrast to the federal legislation, the *Lobbyists Registration Act, 1998* (Ontario) contains a definition of “lobby” in subsection 1(1), which includes communication “with a public office holder in an attempt to influence”<sup>19</sup> matters similar to those outlined in paragraph 7(1)(a) of the *Lobbying Act* (Canada). In addition to these matters, the Ontario Act’s definition of lobbying includes influencing decisions by the Executive Council to transfer from the Crown for consideration “all or part of, or any interest in or asset of, any business, enterprise or institution that provides goods or services to the Crown or to the public,” or “to have the private sector instead of the Crown provide goods or services to the Crown.”<sup>20</sup> Other provincial Lobbying Legislation contains similar definitions for lobbying.

Charities and NFPs should also be aware that, while not explicitly part of the “lobby” definition, many provinces also include “grass-roots communication” as a type of activity caught by Lobbying Legislation. Ontario, Saskatchewan, and the Yukon’s Lobbying Legislation have similarly worded definition for grass-roots communication as the *Lobbying Act* (Canada), which considers “any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion,”<sup>21</sup> to be registrable activities. However, Lobbying Legislation of some provinces, including Alberta, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, have added specific exclusions to this definition, stating that grass-roots communication “does not include communication between a person, partnership or organization and its members, officers or

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<sup>18</sup> Office of the Commissioner of Lobbying of Canada, *Boards of Directors: Application of the Act to outside chairpersons and members* (Advisory Opinion), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00129.html>>. The issue of whether a director was also a “remunerated member of the Foundation’s Board of Directors and was therefore subject to the *Lobbying Act*,” also came up in an application for judicial review, *Democracy Watch v Canada (AG)*, 2019 FC 388 at para 132.

<sup>19</sup> *Lobbyists Registration Act, 1998* (Ontario), *supra* note 5, s 1(1).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Lobbying Act* (Canada), *supra* note 5, s 5(2)(j).

employees or between a body corporate and its shareholders.”<sup>22</sup> The others remain silent on this matter.

Further, some communications that may otherwise be considered lobbying activities, such as making inquiries, requesting information or interpretation of a law, or any submissions, whether oral or written, to parliamentary or legislative committees, generally fall outside the scope of registrable activities, as required by Lobbying Legislation.<sup>23</sup>

## 2. What are Public Office Holders?

By definition, lobbying activities consist of communications with public office holders. It is therefore important for charities, NFPs, and their in-house lobbyists to understand whether the parties with whom they are communicating are public office holders. Where they are, their communications may be lobbying activities; where they are not, the activities would not fall under the scope of Lobbying Legislation.

The *Lobbying Act* (Canada) defines “public office holder” as “any officer or employee of Her Majesty in right of Canada and includes

(a) a member of the Senate or the House of Commons and any person on the staff of such a member,

(b) a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the Judges Act or the lieutenant governor of a province,

(c) an officer, director or employee of any federal board, commission or other tribunal as defined in the Federal Courts Act,

(d) a member of the Canadian Armed Forces, and

(e) a member of the Royal Canadian Mounted Police.”<sup>24</sup>

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<sup>22</sup> *Lobbyists Registration Act* (Prince Edward Island), *supra* note 5, s 1(1)(c).

<sup>23</sup> See, for example, Office of the Commissioner of Lobbying of Canada, *supra* note 15; Office of the Integrity Commissioner of Ontario, *A Guide to the Lobbyists Registration Act* (July 2016), online: <<https://www.oico.on.ca/docs/default-source/default-document-library/guide-to-the-lobbyists-registration-act.pdf?sfvrsn=2>>.

<sup>24</sup> *Lobbying Act* (Canada), *supra* note 5, s 2(1).

The *Lobbyists Registration Act, 1998* (Ontario) defines public office holders to include similar individuals to those identified under the *Lobbying Act* (Canada), such as Crown ministers, officers and employees; Legislative Assembly members and their staff; individuals appointed to any office or body by or with the approval of the Lieutenant Governor in Council or a minister of the Crown (except for judges or justices of the peace); Ontario Provincial Police Force members; and officers, directors and employees of certain Ontario Crown corporations. Additionally, the Ontario Act includes in its definition “an officer, director or employee of any agency, board or commission of the Crown.”<sup>25</sup> Other provincial Lobbying Legislation also contains similar definitions for public office holders.

The *Lobbying Act* (Canada) also distinguishes between public office holders and “designated” public office holders. This differs from the provincial Lobbying Legislation, which does not contain a “designated” public office holder category or distinction. “Designated” public office holders are defined, broadly speaking, as including ministers of the Crown or state and certain employees; public office holders (as defined under the federal Act) who occupy senior executive, associate deputy minister, assistant deputy minister, or comparable positions; and other individuals listed under the *Designated Public Office Holder Regulations*, SOR/2008-117.<sup>26</sup>

In addition to registering under the *Lobbying Act* (Canada), the Act also requires lobbyists to file a monthly return (*i.e.* a monthly communication report) when engaging in lobbying activities with a “designated” public office holder, regardless of whether the lobbyist or designated public office holder initiated the communication.<sup>27</sup> This includes all “oral and arranged meetings between a lobbyist and a designated public office holder.”<sup>28</sup> The Act requires lobbyists to file the monthly return no later than 15 days after the end of the month in which the lobbying activity occurred. The provincial Lobbying Legislation does not contain a similar requirement.

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<sup>25</sup> *Lobbyists Registration Act, 1998* (Ontario), *supra* note 5, s 1(1).

<sup>26</sup> *Lobbying Act* (Canada), *supra* note 5, s 2(1).

<sup>27</sup> See Office of the Commissioner of Lobbying of Canada, *Communicating with Designated Public Office Holders* (Interpretation Bulletin, September 2010), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00120.html>>. Further discussion on individuals responsible for filing and registering, on behalf of charities and NFPs is found in section C.4, below.

<sup>28</sup> *Ibid.*



### 3. Threshold for Compliance with Legislation

Under Lobbying Legislation, certain thresholds need to be met before the registration and filing obligations for in-house lobbyists are triggered. In contrast, no such threshold is in place for consultant lobbyists to register, thus imposing a greater burden on them to comply with the Legislation, as soon as a consultant lobbyist engages in any amount of lobbying activity.

Some of the major differences among the different Lobbying Legislation pertain to the threshold at which the in-house lobbyists are required to register. Under the *Lobbying Act* (Canada), charities and NFPs are only required to register with the Office of the Commissioner of Lobbying of Canada if the lobbying activities “constitute a significant part of the duties.”<sup>29</sup> The Office of the Commissioner of Lobbying of Canada interprets this as “The 20% Rule” (*i.e.* if the cumulative lobbying activities of all employees of the charity or NFP exceed 20% of one person’s duty over a month, then the organization needs to register).<sup>30</sup> This includes the time that is spent preparing for communications, such as researching, travelling, *etc.* In contrast, the *Lobbyists Registration Act, 1998* (Ontario) requires registration from in-house lobbyists if their lobbying activities (*i.e.* only the actual time spent communicating, without regard to any time spent on preparations, as explained by the Office of the Integrity Commissioner of Ontario)<sup>31</sup> exceed 50 hours in a year, compared to at least 100 hours of lobbying required under the *Lobbyists Registration Act* (British Columbia). These thresholds vary across the different provinces.

### 4. Filing Requirements

Lobbying Legislation requires a “senior officer” to be designated as the person responsible for the filing of returns for a charity or NFP. While the federal Lobbying Legislation defines a “senior officer” in respect of a corporation as being “a chief executive officer, chief operating officer or president of the corporation, or any other officer who reports directly to the chief executive officer, chief operating officer or president of the corporation,” it has different treatment for “corporations” and “organizations”, and does not define a “senior officer” in relation to an “organization”, of which a charity or NFP may be. The provincial Lobbying Legislation, on the other hand, generally defines

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<sup>29</sup> *Lobbying Act* (Canada), *supra* note 5, s 7(1)(b).

<sup>30</sup> For further information on “The 20% Rule”, see Office of the Commissioner of Lobbying of Canada, *A Significant Part of Duties (“The 20% Rule”)* (Interpretation Bulletin, 8 November 2011), online: <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00115.html>>.

<sup>31</sup> For further information, see Office of the Integrity Commissioner of Ontario, *supra* note 23.

“senior officer” to mean the most senior officer of the organization who is compensated to perform his or her duties, or in the absence of one, it may be also be the in-house lobbyist.<sup>32</sup> The general requirement to file a return for in-house lobbyists is within two months of meeting the threshold of having engaged in lobbying activities (*i.e.* becoming an in-house lobbyist). In addition to this, a six-month return needs to be filed in the absence of a filing over a six-month period.<sup>33</sup>

The various commissioners under Lobbying Legislation have broad investigative powers, and may find the senior officer or lobbyist of a charity or NFP to be personally liable, and impose penalties for non-compliance of the reporting or registering requirements. Depending on the relevant Lobbying Legislation, and gravity of the offence, these may involve, for example, monetary fines ranging from \$25,000 to \$200,000, prohibitions on lobbying for a number of years, or in the case of the federal Lobbying Legislation, even imprisonment. It is therefore important that charities and NFPs that engage in lobbying activities comply with the registration and reporting requirements under Lobbying Legislation.

#### D. CANADA ELECTIONS ACT DEVELOPMENTS

As previously discussed, under the ITA, charities may now engage in lobbying activities where those activities are PPDDAs that are carried out in furtherance of their charitable purposes in a manner that does not directly or indirectly support or oppose a political party or candidate for public office.<sup>34</sup> In contrast, with the exception of RCAAAs, other NFPs have no such restriction imposed under the ITA, and may engage in activities that support or oppose a political party or candidate for public office. In addition to the ITA and Lobbying Legislation, charities and NFPs will also need to familiarize themselves with the *Canada Elections Act*, and the recent legislative changes introduced through Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* (“Bill C-76”).<sup>35</sup> Bill C-76 received Royal Assent on December 13, 2018, and came into force on June 13, 2019. Certain

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<sup>32</sup> Charities and NFPs should be aware that not all provincial Lobbying Legislation defines “senior officer,” and there are some differences among the various provincial Lobbying Legislation when the term is defined. See, for example, *Lobbyists Registration Act, 1998* (Ontario), *supra* note 5, s 6(5); *Lobbyists Registration Act* (British Columbia), *supra* note 5, s 1(1).

<sup>33</sup> For an overview of the steps to register under the *Lobbying Act* (Canada), see The Office of the Commissioner of Lobbying of Canada, *How to register and report your lobbying activities* (Registration Help Tools, 5 April 2019), online: <<https://lobbyscanada.gc.ca/eic/site/012.nsf/eng/01116.html>>.

<sup>34</sup> ITA, *supra* note 1, s 149.1(6.2).

<sup>35</sup> Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42nd Parl, 2018, c 31 (Royal Assent 13 December 2018) [“Bill C-76”].

activities undertaken by charities and NFPs, such as grass-roots communications, may fall within the purview of regulated activities under the *Canada Elections Act* during election and pre-election periods, imposing reporting and registering obligations on charities and NFPs. As stated above, these amendments will apply to “third parties,” including charities and NFPs that engage in election-related lobbying.

1. Activities regulated by the *Canada Elections Act*

Charities and NFPs fall under the broad definition of “third parties,” which may include any person or group (including “persons acting together by mutual consent for a common purpose”),<sup>36</sup> with limited exclusions for election candidates or registered political parties. With the introduction of Bill C-76, the *Canada Elections Act* now imposes reporting requirements on third parties that engage in “partisan activities, partisan advertising, and election surveys,”<sup>37</sup> in addition to the previously imposed obligations for “election advertising.” These are all defined terms in the *Canada Elections Act*. However, despite being permitted activities under the *Canada Elections Act*, charities and RCAAAs will continue to need to comply with the restrictions under the ITA, and as such, may not engage in partisan activities or partisan advertising as defined in the *Canada Elections Act* (though, as previously stated, there are no restrictions on NFPs from doing so). Charities may therefore engage in election surveys and election advertising, where such activities do not directly or indirectly support or oppose a political party or candidate for public office, and where they constitute PPDDAs that further their charitable purposes.

The *Canada Elections Act* defines election advertising as:

the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;

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<sup>36</sup> *Canada Elections Act*, *supra* note 3, s 349.

<sup>37</sup> Bill C-76, *supra* note 35, “Summary”.

- (c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;
- (d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views; or
- (e) the making of telephone calls to electors only to encourage them to vote.<sup>38</sup>

Similarly, “partisan advertising” comprises of the same activities as election advertising, but is done during the pre-election period, as opposed to the election period.<sup>39</sup>

Election surveys are conducted to find the intentions of individuals to vote, or the actual status regarding casting a vote, in addition to finding out more information on any issues they may have, with any of the registered candidates or parties.

A partisan activity for purposes of the *Canada Elections Act*, as opposed to the ITA, includes:

an activity, including canvassing door-to-door, making telephone calls to electors and organizing rallies, that is carried out by a third party — a person or group other than a political party that is registered under an Act of a province — and that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant, candidate or leader of a registered party or eligible party, **otherwise than by taking a position on an issue with which any such party or person is associated.**<sup>40</sup>

In response to recent discussion regarding charities being able to comment on climate change without repercussions, the Chief Electoral Officer of Canada issued a statement clarifying that the *Canada Elections Act* “does not prevent individuals or groups from talking about issues or publishing information.”<sup>41</sup> Recognizing the complexity of the third party regime, the Chief Electoral Officer of Canada further stated the following:

The only instance in which the Act covers the promotion of an issue, without mentioning a candidate or party, is when someone spends money on issue advertising during the election period. Also, in such cases, the issue must be clearly

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<sup>38</sup> *Canada Elections Act*, *supra* note 3, s 2(1).

<sup>39</sup> The *Canada Elections Act* defines the “pre-election period” to start on June 30<sup>th</sup>, generally of an election year, and end on the day before the general election day; and “election period” as the “period beginning with the issue of the writ and ending on polling day or ... on the day that the writ is withdrawn or deemed to be withdrawn.” For further details, see *ibid*.

<sup>40</sup> *Ibid*, s 349 [emphasis added].

<sup>41</sup> Elections Canada, *CEO Statement Regarding Third Party Requirements on Issue Advertising* (20 August 2019), online: <<https://elections.ca/content.aspx?section=med&document=aug2019&dir=spe&lang=e>>.

associated with a candidate or party. When someone spends money on issue advertising, they have to register with Elections Canada and provide reports.

...

The rules in the Act on issue advertising that is clearly associated with a party do not cover other advocacy activities and communications, such as sending emails or text messages, having a website, canvassing door-to-door or giving media interviews.<sup>42</sup>

In addition, simply because an activity may constitute a regulated activity for the purposes of the *Canada Elections Act* does not necessarily mean that the same activity would be seen by the CRA as constituting a prohibited activity under the ITA for charities and RCAAAs. In this regard, the CRA has confirmed that “the mere act of a charity registering as a third party under the *Canada Elections Act* would not itself mean the charity is undertaking activities that support or oppose a political party or candidate as prohibited by the *Income Tax Act*.”<sup>43</sup> Conversely, charities and RCAAAs should also be aware that just because an activity is permitted under the *Canada Elections Act* does not automatically make it permissible for charities and RCAAAs, given the ITA prohibition on directly or indirectly supporting or opposing a political party or candidate for public office.

## 2. Registering and Reporting Requirements

Under the *Canada Elections Act*, third parties, including charities and NFPs, may be required to register if, in the pre-election or election periods, their expenses on partisan activities, advertising (*i.e.* partisan advertising during pre-election period, and election advertising during election period), as well as election surveys under the Act exceed the aggregate amount of \$500.<sup>44</sup> The *Canada Elections Act* also imposes requirements to file interim expenses returns, if certain thresholds of expenses are passed,<sup>45</sup> and to maintain separate bank accounts for expenses relating to the regulated

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<sup>42</sup> *Ibid.*

<sup>43</sup> Written confirmation provided by the CRA to Imagine Canada. For further information, see, Imagine Canada, “UPDATE – Elections Canada rules for charities during the election period” (Press release, 21 August 2019), online: <<https://beta.imaginecanada.ca/360/update-elections-canada-rules-charities-during-election-period>>.

<sup>44</sup> The aggregate amount limit of \$500 applies separately for the pre-election and election periods. If registration is required in both instances, a third party that has registered in the pre-election period is also deemed to have registered in the election period. See *supra* note 3, s 349.6(1), 353(1), (1.1).

<sup>45</sup> See, for example, *ibid.*, s 349.92(1).

activities. There are also restrictions on the maximum expenditures on the regulated activities during both the pre-election and election periods.<sup>46</sup>

Since charities and RCAAAs are only permitted under the ITA to engage in activities that do not directly or indirectly support or oppose a political party or candidate for public office, the obligations imposed by the *Canada Elections Act* during the election period for election advertising would be of particular relevance, while other NFPs need to be careful during both periods, as they may engage in partisan advertising and activities without registering under the ITA.

### 3. Prohibitions on Certain Communications

In addition to regulating and requiring registration for the engagement in certain activities, Bill C-76 has also expanded the scope of prohibited communications between third parties and candidates, registered parties, or associated persons. During both the pre-election and election periods, there is now a prohibition on collusion, whereby even the mere sharing of information that may influence the third party's partisan activities, advertising, or election surveys, could be considered collusion.<sup>47</sup>

### 4. Penalties

The Commissioner of Canada Elections has the power to conduct investigations, and institute prosecutions for non-compliance with the Act. Punishments may include monetary penalties that may vary depending on the type of offence committed, and can range anywhere from \$1,000 to five times the amount of the permissible expenses limit exceeded. There is also potential for imprisonment, or other penalties, such as performing community service, fulfilling an obligation not performed, or any other reasonable measure, as deemed appropriate by the court, depending on the nature and circumstances surrounding the offence.

## E. CONCLUSION

Lobbying Legislation is complex, and can be a trap for unwary charities and NFPs. Charities and NFPs need to be aware, if engaging in any lobbying activities, that in addition to Lobbying Legislation, the

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<sup>46</sup> For example, the *Canada Elections Act* imposes a maximum aggregate amount limit on third parties' expenses on regulated activities of \$700,000 during the pre-election period, and \$350,000 during the election period, as adjusted for inflation. For further information, see *ibid*, s 349.1, 350.

<sup>47</sup> See *ibid*, s 349.3, 351.01.

requirements imposed by the ITA on charities and RCAAAs, and the *Canada Elections Act*, will also need to be taken into account. The ITA permits charities to engage in PPDDAs, so long as they are in furtherance of their charitable purposes, and do not directly or indirectly support or oppose a political party or candidate for public office (with no similar restriction on activities for NFPs). The same activities that may be considered prohibited under the ITA may or may not be acceptable activities under the *Canada Elections Act*, with the differences being particularly nuanced and beyond the scope of this *Bulletin*.

With the upcoming Federal election, charities and NFPs need to keep in mind that both Lobbying Legislation and the *Canada Elections Act* impose distinct registration and reporting obligations when engaging in affected activities. As well, charities and NFPs will need to ensure that they comply with the requirements of the ITA. This *Bulletin* provides no more than a very basic introduction to the issues, and is therefore not intended to serve as a guide for charities and NFPs. Instead, charities and NFPs planning to become involved in these areas should seek legal advice before doing so.



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