

## Changes to the Rules on:

- Gifts and Exports of Cultural Property
- Registered Charities and Political Advocacy

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# WELCOME

Non-Profit and Charities



# CULTURAL PROPERTY

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# Cultural Property

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BACKGROUND - *Cultural Property Export and Import Act*  
– 1977 (“CP Act”)

PURPOSE – Establishes rules for the export of culturally important objects from Canada

- Control list of objects or classes of objects regardless of their places of origin, the export of which is deemed necessary to control in order to preserve the national heritage in Canada

# Cultural Property

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- Classes of items designated for the Control List:
- historical documents, photographs, films, sound recordings, mineral specimens, fossils, archaeological artifacts, ethnographic items, military objects, applied artistic and decorative items, fine art, scientific or technological objects, textual and graphic records of all kinds, maps, iconographic items, musical instruments.

# Cultural Property

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- At least 50 years old and creator not alive – 35 years in Canada
- Gives Canadian Institutions two-six months raise funds to buy the item before an export permit is issued
- Government provides some funds
- Application for export permit is made to Canada Border Services Agency. Expert examiner decides if object is subject to control. Appeal to Canadian Cultural Property Export Review Board

# TEST FOR DENIAL OF EXPORT PERMIT

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- S.29(3)(b) and (c) of the CP Act
- In reviewing an application for an export permit, the Review Board shall determine whether the object in respect of which the application was made:
  - (b) is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and
  - (c) is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

# ITA – 1997 Addition of Super Tax Credit for Gifts of Cultural Property

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- EFFECT OF CREDIT – ITA s.39(1)(a)(i.1)
- A taxpayer's capital gain excludes an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the CP Act if
  - (A) the disposition is to a designated institution or a public authority in Canada, or
  - (B) the disposition is made by the taxpayer's estate to such an institution
- Section 110.1(1)(c) contains a similar provision for corporations

## ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

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- In addition to no capital gains inclusion, gifts of cultural property also are entitled to a super credit:
- 100% of the receipted amount may be deducted against income for the year and the preceding five tax years – vs. 75% for a standard receipted amount ITA
- s.118.1(2.1) & definition of “total cultural gifts” in s.118.1(1)

# ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

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- WHO CAN ISSUE RECEIPT – CP Act, s.32, Minister may designate any institution or public authority indefinitely or for a period of time, and generally or for a specified purpose.
- Category A organizations (in operation  $\geq$  2 years) have an unlimited designation from one or more cultural property classes
- Includes art galleries, museums, special collections libraries, each of which is designated for one or more classes of objects
- List at: <https://www.canada.ca/en/canadian-heritage/services/funding/movable-cultural-property/designated-organizations.html>
- Category B organizations are in operation between 1 and 2 years.
- Guide on how to apply to be designated is at: [http://publications.gc.ca/collections/collection\\_2013/pc-ch/CH41-33-2013-eng.pdf](http://publications.gc.ca/collections/collection_2013/pc-ch/CH41-33-2013-eng.pdf)

## ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

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- The amount of the receipt that can be issued by the designated institution or public authority is the fair market value of the property, as determined by the Cultural Property Export and Import Board
- 10-YEAR RULE – ITA, s.207.3 – an institution which disposes of such a gift must pay a tax of 30% of FMV at time, unless to another designated Canadian institution or public authority

# Heffel Decision FCTrial (Summer 2018)



*Iris bleus, jardin du Petit Gennevilliers*

Oil on canvas, 21 $\frac{3}{4}$ " x 18 $\frac{1}{4}$ ", 1892, Gustave Caillebotte French impressionist painter



## Heffel Decision FCTrial (Summer 2018)

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- ... must be a connection with Canadian heritage that is more direct than the fact that Canada is multicultural and Canadians may wish to study the traditions of any one of the many countries from which their ancestors may have come.
- Parliament has chosen words that require a direct connection with the cultural heritage that is particular to Canada, ... and to separate the analysis of aesthetic qualities and value for study from the analysis of national importance.

## Heffel Decision FCTrial (Summer 2018)

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- Decision on export permit let to dismay in the philanthropic community and a freeze of gifting due to concern about meeting much higher national importance standard

## Heffel Decision FCTrial (Summer 2018)

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- BUDGET MARCH 19, 2019 – PROPOSED TO REMOVE NATIONAL IMPORTANCE AS REQUIREMENT FOR GIFTS
- BILL C-97, WAYS AND MEANS MOTION TO IMPLEMENT BUDGET –
- [s.4 (1)] subparagraph 39(1)(a)(i.1) of the ITA will be amended to require the object to be certified only to be of outstanding significance, and will no longer required to be of national importance. The amendment is deemed to have come into force on March 19, 2019

## Heffel Decision FCTrial (Summer 2018)

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- HEFFEL FCA April 16 – REVERSING FCT – result a work by an international artist can be of “national importance”
- C-97 STATUS IN PARLIAMENT [Second reading at this time – not sure if it will be proceeded with in the circumstances]

# CHARITIES AND ADVOCACY

# Charities and Advocacy

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BACKGROUND – Under the ITA, charities are currently required to devote all of their resources to their charitable purposes

## Charities and Advocacy

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- In 1985 *Scarborough Legal Services* case led to a concern that any sort of advocacy, whether partisan or non-partisan, was not a charitable activity and could lead to de-registration
- S.149.1(6.1) for foundations and (6.2) for organizations were passed (1987), allowing charities to devote up to 10% of their resources to non-partisan advocacy “ancillary and incidental” to their charitable purposes
- This was considered to be a relieving provision, but quickly became regarded as a limitation

# Charities and Advocacy

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- Over the years CRA published several interpretation bulletins, setting out how it interpreted these provisions, the most recent of which, prior to the developments of last summer, was CPS-022, Political Activities, first published in 2003 and updated several times.
- A number of years ago the 10% limit was increased to 20% for charities with revenues under \$50,000
- The limiting provisions of the ITA and the perceived shortcomings of CRA's published policies led to most organizations shying away from any kind of activities that might run afoul of the ITA and CRA's policies

## CRA Political Audits

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- In 2012 CRA undertook a series of audits of approximately 60 charities to review their degree of engagement in political advocacy.

## CRA Political Audits

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- When Liberal government came into power in 2015 it suspended all of the ongoing audits while it engaged in a consultation on the situation.
- March 31, 2017 report (Report) of the Consultation Panel on the Political Activities of Charities (Panel), four recommendations

## CRA Political Audits

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1. 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.
2. Implement changes to the CRA's administration of the ITA in the following areas: compliance and appeals, audits, and communication and collaboration to enhance clarity and consistency.

## CRA Political Audits

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3. 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.
4. 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 approaches.

# CWP Charter Challenge

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*Canada without Poverty v. Attorney General of Canada*

- CWP is a registered charity whose charitable purpose is the relief of poverty. It generally does not fulfill its purpose through the provision of housing, food, or other tangible benefits, but mostly engages in public advocacy for policy and attitudinal change.
- In the course of its audit CRA determined that virtually all of its activities consisted of public advocacy and indicated its intention to de-register the charity.

# CWP Charter Challenge

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*Canada without Poverty v. Attorney General of Canada*

- Justice Morgan declared that the limitation of 10% of a charity's resources for political activities in ITA s.149.1(6.2) violates the charity's s.2(b) Charter right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, and was not saved by being within such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

# CWP Charter Challenge

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*Canada without Poverty v. Attorney General of Canada*

- Since “charitable activities” must be read to include political activities, without quantum limitation, in furtherance of the organization’s charitable purposes, he declared that the two relevant sections of the ITA, ss.149.1(6.2)(a) and (b) were of no force and effect, effective immediately;
- Finally, he held that the exclusion of partisan political activities from the definition of “charitable activities” in s.149.1(6.2)(c) was to remain in force.

# CWP Charter Challenge

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*Canada without Poverty v. Attorney General of Canada*

- Initially the Government announced its intention to appeal this decision – which in my personal opinion is somewhat suspect on a number of grounds, but in the light of amendments to the charitable advocacy provisions of the ITA in December 2018, they abandoned the appeal.

## Amendments to ITA

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- On December 13, 2018, amendments to ss.149.1(1), (6.1) and (6.2) came into effect
- A new definition of “charitable activities” in s.149.1(1)”includes public policy dialogue and development activities carried on in furtherance of a charitable purpose;” (“PPDDAs”, also, but less often, called “P2D2A”)
- The amended sections now permit charities to devote all of their resources to “public policy dialogue and development activities” in furtherance of their stated charitable purposes.

## Amendments to ITA

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- New ss. 149.1(10.1) provides that non-partisan “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”

## Guidance CG-027

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- DRAFT GUIDANCE – STATUS Guidance - CG-027 (Public policy dialogue and development activities by charities) - January 21, 2019, replaces CPS-022
- CRA also provided a Q&A elaborating on this Guidance
- Public feedback accepted until April 23rd. [Waiting for CRA to publish final version]

## Guidance CG-027

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- The new legislation does not define PPDDA's. The explanatory notes that accompanied the bill and CRA's draft Guidance define them as activities that "generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country"
- In other words, under the *Income Tax Act*, a charity is now free to advocate for any change to a law, policy, or decision of government that would further its stated charitable purpose.

## Guidance CG-027

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- A charity's PPDDAs further a stated charitable purpose if they satisfy both of the following criteria:
  - the PPDDAs relate to the charity's stated charitable purpose
  - the PPDDAs, when considered together with the charity's stated charitable purpose, would provide a benefit to the public (see Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test)

## Guidance CG-027

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The Draft Guidance includes the following list of PPDDAs from the Consultation Report:

- Providing information – charities may provide information to their supporters or the general public related to their charitable purposes (including the conduct of public awareness campaigns) in order to inform or persuade the public in regards to public policy. Such information must be truthful, accurate, and not misleading.

## Guidance CG-027

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- Research – charities may conduct research into public policy, distribute the research, and discuss the research and findings with the media and with others as they see fit. Note that to advance education as a charitable purpose, a charity's research must meet the criteria in Policy statement CPS-029, Research as a charitable activity.
- Disseminating opinions – charities may express opinions on matters related to their charitable purposes to participate in developing public policy, as long as they draw on research and evidence and are not contrary to hate speech laws or other legitimate restrictions on freedom of expression.

## Guidance CG-027

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- 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.

## Guidance CG-027

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- Representations – 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. Note that a charity engaging in this type of activity may be required to register as a lobbyist organization.

## Guidance CG-027

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- Providing forums and convening discussions – charities may invite competing candidates and political representatives to speak at the same event, or may request written submissions for publication, to discuss public policy issues that relate to the charity's purposes.
- Communicating on social media – charities may express their views, and offer an opportunity for others to express their views, in regards to public policy, on social media or elsewhere.

## Guidance CG-027

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- Incorporation for Purpose of Advocacy?
- The explanatory notes to the new s.149.1(10.1) state that PPDDAs will not be considered to reflect a separate political purpose.

## Guidance CG-027

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- NO PARTISAN ADVOCACY – s.149.1(6.1) and (6.2) continue to provide that a charity “that devotes any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes.”

## Guidance CG-027

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- **ADVOCACY IN SUPPORT OF PURPOSE = COUNTS AS A CHARITABLE ACTIVITY – FORM T3010 Registered Charity Information Return.** 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.

## Guidance CG-027

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- Since charities now must report on PPDDAs rather than political activities, revised versions of Form T3010 and Form T2050, Application to Register a Charity under the Income Tax Act, will be released in November 2019. In the meantime, CRA has provided guidance on its website on how to use the existing forms

<https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/t3010.html> for T3010 and

<https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/t2050.html> for T2050

## Federal Election – Permitted Activities

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- Beyond scope of this talk, but need to be aware of different rules which apply during election campaigns
- Draft Guidance has sections dealing with the extent to which charities can properly participate in election campaigns without crossing the line into supporting or opposing a candidate or party

## Consultation Panel Status

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- March 7, 2019, the Minister of National Revenue (Minister) published its response (Response) to the 2017 report (Report) of the Consultation Panel on the Political Activities of Charities (Panel).
- Funding to CRA to enhance outreach and education of the charitable sector, including enhanced CRA employee training.
- Established Permanent Advisory Committee on the Charitable Sector, to provide recommendations on “important and emerging issues facing charities and other qualified donees.”



**Questions?**



# Contact Us

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