

INSTITUTE *for* MEDIA, POLICY *and* CIVIL SOCIETY

THE LAW OF ADVOCACY BY CHARITABLE ORGANIZATIONS

THE CASE FOR CHANGE

Richard Bridge B.A., LL.B.

for IMPACS – INSTITUTE FOR MEDIA, POLICY AND CIVIL SOCIETY, VANCOUVER, B.C.



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EXECUTIVE SUMMARY

It is widely agreed by those active in this field that the law governing advocacy by charitable organizations is in need of reform. It is a need identified as a high priority by two recent high-calibre reports on Canada's large and vital voluntary sector, the Broadbent Panel and the Joint Tables Report.

The basic problem is a lack of clarity in the law. It is difficult to determine what will be deemed to be permissible charitable activity and what will be categorized as unacceptable political activity. Violation of these unclear rules can lead to a refusal to grant or a loss of charitable status, which means loss of tax exemption and tax receipt issuing capacities – very serious implications for organizations in this sector.

Canada's charity law has three sources: i) decisions of the courts (the common law); ii) the federal *Income Tax Act*; and iii) the administrative policies of the Canada Customs and Revenue Agency (Revenue Canada).

The common law of charity originated in Elizabethan England, and the most frequently cited case is from the English House of Lords in the Victorian era. While the world has changed immensely since then, the common law concepts of charity have changed little. The *Income Tax Act* does not add clarity to the common law, and Revenue Canada's administrative policies, which attempt to interpret the common law and Parliament's limited intrusion into this field, are also inadequate.

Distilled to its basics, the law of advocacy by charitable organizations is:

- education must not amount to promotion of a particular point of view or political orientation, or to persuasion, indoctrination or propaganda; and
- a charity cannot have political purposes; but
- it may devote some of its resources to political activities as long as:
 - they are non-partisan; they remain “incidental and ancillary” to the charity's purposes;
 - and – substantially all (“90 percent”) of the charity's resources are devoted to charitable activities.

These rules are not easily applied, and many argue that they are unduly restrictive for charitable organizations. These rules create a number of practical problems: for Revenue Canada as it attempts to administer this field; for the courts as they adjudicate disputes between Revenue Canada and charitable organizations and applicants for charitable status; and for those who manage charitable organizations and risk loss of charitable status should they make mistakes in this uncertainty.

In addition, the advocacy rules impede critical public policy debates by preventing the full participation of charitable organizations, which often possess great

expertise and understanding in their fields of endeavour. This loss of informed voices is particularly problematic at a time when the relationships between public, private, and voluntary sectors are in fundamental change. It can be argued that these rules in effect impede the freedom of expression of charitable organizations – a freedom enshrined in the *Charter of Rights and Freedoms*.

Other countries have resolved this problem. The most helpful example is the American model which recognises the value charities can add to public policy debate. It provides greater latitude and clarity as to what is acceptable activity, and how much of it can be undertaken. It establishes definitions and quantifiable limits that reduce confusion and subjectivity.

Canada's Parliament should build on the work of the Broadbent Panel and the Joint Tables to change and modernize Canadian charity law by providing, among other reforms:

- a clear legal definition of permissible advocacy;
- clear quantifiable spending rules for advocacy activities to replace the 10 percent rule;
- flexible regulatory options for the enforcement of the new rules;
- greater transparency on the part of the federal regulators of this field; and
- increased financial disclosure requirements for charities.

A. INTRODUCTION

It is clear from judgments of the Federal Court of Appeal and the Supreme Court of Canada, and the works of academic and other commentators, that the law governing advocacy by charitable organizations in Canada needs reform.¹ It is also clear that such reform is a high priority for many leaders within the charitable community.

The basic problem is a lack of clarity in the law which causes difficulties for all involved – the Courts, Revenue Canada,² charitable organizations, those who depend upon the services delivered by charitable organizations, and arguably the entire community.

This paper describes the law in this field, examines its shortcomings, considers practices in other countries, and argues for changes to the existing law.

B. WHAT IS A CHARITABLE ORGANIZATION?

Canada's *Income Tax Act* creates three types of registered charities: charitable organizations, public foundations and private foundations. Very briefly, charitable organizations devote their resources to *carrying out* "charitable activities," while foundations are primarily funders of charitable activities. Private foundations differ from public foundations in that their governance is more tightly controlled (often by a family) and their sources of capital are not as diverse. Two other closely related types of organizations are national arts service organizations and registered Canadian athletic associations.

The focus in this paper is on charitable organizations, although many of the issues addressed are of importance to public and private foundations as well.

"Registration" means that the charity has met Revenue Canada's requirements and is in compliance with the *Income Tax Act*, which brings significant tax advantages. Firstly, it allows the charity to issue receipts to donors which enables donors to deduct the donation for income tax purposes. This is vitally important to charities' fund raising activities. Donations to registered charities are simply more attractive to donors than gifts to unregistered organizations.

A second advantage of registration is that it provides automatic exemption from income tax under the *Income Tax Act*. Other advantages include favourable treatment with respect to the Goods and Services Tax, exemption from other taxes in some provinces (for example corporate income tax and retail sales tax in Ontario) and the ability to obtain a bingo or lottery license.³

Charitable organizations are distinct under the law from non-profit organizations. A non-profit organization is defined by the *Income Tax Act* as "a club, society or association that, in the opinion of the Minister, was not a charity within the meaning of subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof ..."⁴

Charitable organizations and non-profit organizations are both income tax exempt, but non-profit organizations are unable to issue tax receipts for donations. Application to and approval by Revenue Canada is required to obtain charitable status, and the regulatory burden is greater than for non-profit organizations.

C. THE VOLUNTARY SECTOR

The term “voluntary sector” has become increasingly popular to describe Canada’s charities, non-profit organizations, and other voluntary church, trade and professional associations.⁵ The most recent estimates⁶ are that Canada’s voluntary sector consists of approximately 175,000 organizations of which close to 80,000 are registered charities.

This sector employs approximately 1.3 million people or roughly 9 percent of the national workforce, pays more than \$40 billion annually in salaries and benefits, and accounts for approximately 1/8 of Canada’s Gross Domestic Product.

Not only is this sector large, it is vitally important to the health of the nation and its communities. Sometimes called the “third sector,” it delivers a huge array of services to Canadians, including services that the private and public sectors cannot or will no longer deliver.

The environment for much of the voluntary sector has been very challenging in recent years as a result of broad changes in the roles of governments at all levels. Fiscal pressures and political agendas have led governments to retreat from and abandon some social policy fields in part or completely. The roles, responsibilities and relationships between the public, private, and voluntary sectors have changed dramatically. This has resulted in funding shortages for a sector that relies on government for 60 percent of its funding,⁷ has greater demands on its services, and increased expectations as to its capacity to deliver results.

These difficult facts of life have led to some innovative adaptation by the sector.⁸ They have also contributed in large part to much impressive recent work to understand the nature of this sector and its many challenges.

The first was the Panel on Accountability and Governance in the Voluntary Sector, chaired by Ed Broadbent (the “Broadbent Panel”) and including several other prominent Canadians. After more than a year of analysis and public consultations across Canada, the Broadbent Panel produced a landmark report that identifies problems and makes a series of recommendations for new initiatives, legislative, regulatory and policy reforms, as well as new institutions to improve the sector’s strength and performance.⁹

The second major recent work in this field was the August 1999 Report of the Joint Tables, a group consisting of leaders from the sector and key federal government officials with expertise and responsibility in the field. Entitled “Working Together – A Government of Canada/Voluntary Sector Joint Initiative” (the “Joint Tables Report”), this work picked up in part on the Broadbent Panel Report and addressed three basic issues: building a new relationship; strengthening capacity; and improving the regulatory framework.¹⁰

These two impressive works have identified and improved the focus on the key issues facing the sector. As will be discussed in more detail below, a key issue identified in both works is confusion in the law of advocacy by charities.

D. THE PROBLEM

The Joint Tables Report defined advocacy in general terms as "the act of speaking or of disseminating information intended to influence individual behaviour or opinion, corporate conduct, or public policy and law."¹¹ This definition helps make clear why advocacy is an important issue for many charitable organizations.

For example, a charitable organization devoted to assisting Hepatitis C victims might support the establishment of a needle exchange to reduce contamination among intravenous drug users. It might engage in a campaign of disseminating information to users and the public, and lobbying politicians to gain support for the idea and to achieve change to government policy to allow an exchange to be established. The problem is that the law governing advocacy by charities is unclear and confusing, and the charitable organization could lose its charitable status for pursuing such a course of action.

Similarly, an organization devoted to public health issues that is seeking charitable status might be denied by Revenue Canada if a significant portion of its activities consists of advocating for the adoption of new community health care practices based on innovative systems proven successful in Europe.

The same problems exist for organizations dedicated to protecting the environment for future generations. If, for example, their activities include attempting to influence public opinion, legislation or government policy in relation to habitat or species protection, pollution standards and enforcement or other basic issues, they could violate the current charity rules and lose or be denied charitable status. Indeed, these problems exist for organizations in all areas of charitable activity.

E. THE CURRENT LAW

There is no single source of the law of advocacy by charitable organizations. There are instead three sources: i) the decisions of the Courts (the common law); ii) the *Income Tax Act*; and iii) the administrative policies of Revenue Canada. Each is examined below.

I) THE COMMON LAW

The best known and most often cited case in the evolution of charity law in the Commonwealth is *Pemsel's Case*, a decision of the English House of Lords from 1891.¹²

This case approved the classification of charitable purposes that has shaped the field since. The decision established that:

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.¹³

The origins of this categorization link directly back nearly 300 years earlier to Elizabethan England and the preamble to the *Statute of Uses, 1601*.¹⁴ This is the fount of charity law, and the starting point for virtually every case dealing with this field. The preamble is a list of charitable purposes which reads rather like poetry. Indeed “some scholars have noted the similarity between

the list in the preamble of the statute and that in the *Vision of Piers Plowmen*, a poem from circa 1377.”¹⁵

It seems striking, but this Victorian-era categorization of charitable purposes, that drew on the law of the Elizabethan period, and perhaps even the poetry of the fourteenth century, is more than an historical interest. “This overall approach to determining if an object is charitable remains the judicial and administrative approach today.”¹⁶ Indeed, the four categories:

- relief of poverty
- advancement of education
- advancement of religion
- other purposes beneficial to the community

are still used by the Canadian Courts and Revenue Canada to determine whether a purpose is charitable and whether an organization should be granted charitable status.

The common law is evolutionary or organic – it changes over time as courts apply legal precedents and principles to new facts, new circumstances, and in changing social environments. In the case of charity law, it is widely agreed that the field is rather static, largely due to the four categories of charitable purposes from *Pemsel's Case*. The fourth category (other purposes beneficial to the community) has provided the greatest latitude for the courts to be creative and to

add new charitable purposes, but the approach has generally been restrictive. As Frances Boyle observes:

The category has been restricted by statements that not all objects of benefit to the community are necessarily charitable so that, in addition to being beneficial, the purpose of activity must be “recognized by the law as charitable”. This latter requirement has tied the fourth head back to the *Preamble* by decisions which state that for the purposes to fall within the fourth head they must be within the “spirit and intendment” of the *Preamble*, so that an analogy to the *Preamble* or recourse to previous precedent must be found.¹⁷

For the purposes of this paper, two important themes, and sources of friction, arise from the cases. The first is that the courts have held that political objects are not charitable objects under the fourth category of *Pemsel’s Case*. Organizations created for the purpose of advocating or lobbying for changes in the law will not be considered charitable by the Courts, regardless of the public benefits that may flow from their advocacy efforts.¹⁸ The reasoning used by the Courts is summarized in a passage from another House of Lords decision, this one from 1917.¹⁹ After determining that a society seeking charitable status was advocating changes to the law and that these activities were ‘political,’ the House of Lords stated:

Equity has always refused to recognize such objects as charitable ... not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of

judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

The second important theme and source of friction from the cases involves the second category from *Pemsel’s Case* – the advancement of education. Generally, the Courts have distinguished between education, which is charitable, and advocacy which is often deemed to be political activity and not charitable.

To be charitable, education must involve “formal training of the mind” or “the improvement of a useful branch of human knowledge ...”,²⁰ and must be objective and balanced. Simply providing information is not enough.

Activities intended to change people’s behavior or their opinions will only be deemed to be charitable if they are balanced. Distributing incomplete or biased information or efforts “to influence general opinion in favour of some theory, view or aspiration ...”²¹ will not be considered charitable.

Two examples from the case law may be helpful. In one case the Notre Dame de Grace Neighbourhood Association, an organization devoted to the interests of the urban poor, was denied charitable status. The reasons were that its information and letter writing campaigns, lobbying, and efforts to defend the rights of the poor were deemed to be political, not educational.²² In another case, an organization dedicated to changing the laws governing pornography was denied charitable status on the grounds that this was a political purpose.²³

In a more recent case, the Supreme Court of Canada partially expanded the meaning of “education” in this context. Mr. Justice Iacobucci concluded that the treatment of education by Canadian courts “seems unduly restrictive.”

Determining whether activities amount to charitable education or political advocacy has been and remains difficult.

To limit the notion of “training of the mind” to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education which is of little use in modern Canadian society.... So long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients – and not solely to promote a particular view or political orientation, it may properly be viewed as falling within the advancement of education.²⁴

While this more modern view of education is helpful, determining whether activities amount to charitable education or political advocacy has been and remains difficult.

In sum, it is evident from the case law that the courts struggle to determine what is charitable, largely due to the inadequacy of the *Pemsel's Case* categories in changing times. The number of cases where the issue of charitable status has been addressed by the Federal Court of Appeal or Supreme Court of Canada is not large, and a summary of each of the key recent decisions is attached in the Appendix.

II) THE INCOME TAX ACT

Charitable law does not have its own statute. The federal *Income Tax Act*, an extremely complex document, includes provisions dealing with tax exemption and the tax deductibility of donations to charities, and is the critical statute in the charitable field. Importantly, the *Income Tax Act* does not define charitable purposes. This is left to the courts.

In relation to the issue of advocacy by charitable organizations, the key section of the *Income Tax Act* is 149.1(6.2), which states:

Charitable activities. For the purposes of the definition “charitable organization” in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and

- (a) it devotes part of its resources to political activities,
- (b) those political activities are ancillary and incidental to its charitable activities, and
- (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

This section was added to the *Income Tax Act* in 1986. It provides some clarity and guidance, for it states conclusively that partisan political activity is not charitable, and that some political activities are considered charitable.

However, this section also has some significant short-comings. It does not define or give much guidance as to what is “political activity,” nor does it provide a clear guide as to how much of such activity will be “incidental and ancillary” to an organization’s charitable activities, and therefore permissible.

In an Act full of mathematical formulae for the determination of tax liabilities in all sorts of different circumstances, this section is remarkably devoid of precision. It is vague and subjective, and does little to help charitable organizations and their accountants categorize and quantify their activities and expenditures as charitable or not.

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III) REVENUE CANADA'S ADMINISTRATIVE POLICIES

Revenue Canada is responsible for administering Canada's charitable system. Revenue Canada staff interpret the common law and the provisions of *the Income Tax Act* to determine whether organizations will be granted charitable status, and whether that status will be revoked. While Revenue Canada's administrative policies are not of the same legal weight or consequence as the common law and the *Income Tax Act*, they are certainly relevant to the field.

In this administrative role, Revenue Canada balances several important factors. One factor is that they are responsible for preserving the integrity of the federal income tax base. If tax exemption and other benefits are granted incorrectly, they shift the tax burden unfairly to others. This is an enormous responsibility, for an income tax system that is fair and efficient is essential to the financial health of the nation.

Another factor is that the decisions Revenue Canada makes in relation to charitable status have very serious implications for the organizations seeking to obtain or preserve that status. Denial or loss of charitable status can be extremely detrimental or fatal to the organizations and the objectives they are pursuing. Although decisions of this kind can be appealed to the courts, the cost of doing so is high, so the power Revenue Canada wields in this regard is substantial.

A third factor is the confused state of the law that Revenue Canada must apply. Administration of a complex and important field is very difficult when the rules are not clear, as is the case here. Uncertainty, frustration, disagreement, and inconsistency are almost inevitable consequences.

Perhaps as a result of these factors, Revenue Canada has attempted to clarify the rules. Information Circular 87-1 "Registered Charities – Ancillary and Incidental Political Activities," issued in 1987, is an attempt to

explain the law and Revenue Canada's administration of it. The Circular is not itself "the law" – it is an expression of Revenue Canada's view of the law intended to reduce the confusion. Its most important contributions are its categorization of types of political activity, and its quantification of the limitations on such activity.

CATEGORIZATION OF POLITICAL ACTIVITY

Revenue Canada has three categories of political activities. The first and clearest is partisan politics (supporting or opposing a candidate or party, etc.). This category is already clearly prohibited by s. 149.1(6.2).

A second category are those activities which Revenue Canada will consider to be charitable. The Circular states:

Although activities designed to persuade government to adopt a particular viewpoint can be considered political (see Appendix A)²⁵ the department views

- (a) oral and written representations to the relevant elected representatives (e.g. Members of Parliament, Members of Legislative Assembly, Municipal Councillors, the involved Minister of the Crown) or a public servant to present the charity's views or to provide factual information;
- (b) oral and written presentations or briefs containing factual information and recommendations to the relevant government bodies, commissions or committees; and
- (c) the provision of information and the expression of non-partisan views to the media,

to fall within the general ambit of charitable activities as long as the devotion of resources to such activity is reasonable in the circumstances

(i.e., is intended to inform and educate by providing information and views designed primarily to allow full and reasoned consideration of an issue rather than to influence public opinion or to generate controversy).

All resources used directly to prepare or substantiate the representations or presentations in (a) to (c) above (such as the cost of research) will be treated as resources devoted to charitable activities.

This category allows charitable organizations to provide material to a limited audience to “inform” and “educate” them, but not to persuade or influence them or to influence the public. It amounts to a very restricted form of advocacy. It is clear who can be so informed, but it is not clear how much is “reasonable in the circumstances” or where informing ends and persuading begins.

A third category consists of “political activities allowed within expenditure limits.” These are not charitable themselves, “but are subordinate to bona fide charitable purposes,” and are permitted under the spending limits discussed below. Examples are:

- (a) publications, conferences, workshops and other forms of communication which are produced, published, presented or distributed by a charity primarily in order to sway public opinion on political issues and matters of public policy;
- (b) advertisements in newspapers, magazines or on television or radio to the extent that they are designed to attract interest in, or gain support for, a charity’s position on political issues and matters of public policy;
- (c) public meetings or lawful demonstrations that are organized to publicize and gain support for a charity’s point of view on matters of public policy and political issues; and
- (d) mail campaign – a request by a charity to its members or the public to forward letters or other written communications to the media and government expressing support for the charity’s views on political issues and matters of public policy.

This category also increases clarity, but it underscores an issue of particular concern to many charitable organizations – the limitations on their ability to advance or seek support for their views “on matters of public policy.” This key issue is explored in more detail below.

SPENDING LIMITS – THE 10 PERCENT RULE

Circular 87-1 creates quantifiable limits on political activities. It says that the requirement in s. 149.1(6.2) of the *Income Tax Act* that “substantially all” of a charitable organization’s resources be spent on charitable activities means “90 percent or more.” This means that 10 percent “of all the financial and physical assets of the charity as well as the services provided by its human resources” is the maximum that can be spent on “permitted political activities.” This is the third category listed above.

The Circular states that the 10 percent rule “would normally be measured over a charity’s taxation year, although the Department would consider applying the calculation over a longer base (for example, five years) where justified.” There is no indication of how the more flexible longer-term approach is to be justified.²⁶

There is a second, more complicated spending limit described in the Circular. It relates to the general requirement that charitable organizations spend at least 80 percent of their receipted donations of the previous year on charitable activities.

The second category of political activity can be included in the calculation to meet the 80 percent spending quota. That is, those activities are deemed to be charitable for this purpose. Activities from the third category, however, cannot be included in the calculation of the 80 percent spending quota.

The language in the Circular addressing the spending limits is a helpful improvement over the imprecise language in s. 149.1(6.2). However, the tests are complicated, and much still turns on the difficult distinction between “education” and “advocacy.” Education is not limited, but advocacy cannot exceed 10 percent of a charitable organization’s activity.

REVENUE CANADA’S DRAFT PUBLICATIONS

In addition to Information Circular 87-1, Revenue Canada produced draft publication “RC4107 – Registered Charities: Education, Advocacy and Political Activities” a second draft of which became available on March 3, 2000 via Revenue Canada’s website.²⁷ It appears to have been an attempt to simplify the previous explanation of these rules, with express references to the case law. Its thrust is the same as the Circular, as summarized above.

The second draft, which is likely a response to the concerns expressed about the confusion in the field, uses a question and answer format to attempt to clarify the law and Revenue Canada’s administrative positions. It provides more discussion of political activity, uses clearer language, and

includes more examples to attempt to illustrate distinctions. As an attempt to simplify and communicate, the second draft is an improvement over the first draft and Information Circular 87-1, and will be of practical help to charitable organizations. However, it takes some license with the common law and *Income Tax Act* by filling gaps and creating a sense of logic and consistency that really does not exist in the underlying law.

IV) SUMMARY OF THE CURRENT LAW

This combination of sources creates a complex field of law that is not easily simplified. However, an impressive and concise summary is found in a Supplementary Paper to the Joint Tables Report.²⁸ It states that “[g]enerally, the rules may be summarized as follows:

- education must not amount to promotion of a particular point of view or political orientation, or to persuasion, indoctrination or propaganda; and
- a charity cannot have political purposes; but
- it may devote some of its resources to political activities as long as:
 - they are non-partisan; they remain “incidental and ancillary” to the charity’s purposes;
 - and – substantially all (“90 percent”) of the charity’s resources are devoted to charitable activities.

F. DIFFICULTIES ARISING FROM THE CURRENT LAW

The current law in this field creates problems for the courts, for the administration of charitable organizations, and for public policy debate in Canada.

1) THE COURTS

When a decision of the Minister of National Revenue (Revenue Canada) as to whether an activity is charitable or political is challenged, it becomes a matter for the courts to decide. This is a role with which the courts have expressed difficulty.

In the *Human Life International in Canada Inc. v. The Minister of National Revenue*, a 1998 decision of the Federal Court of Appeal, the issue was whether the appellant's actions were charitable, either under the education category or the general category from *Pemsel's Case*. Strayer J.A. stressed the difficulty he had with the courts being asked to determine whether advocacy of opinions on important social issues was for a purpose beneficial to the community. He said at page 12:

Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?

Then at page 13, after reviewing the opinions of the appellants in question, he stated:

Any determination by this Court as to whether the propagation of such views is beneficial to the community and thus worthy of temporal support through tax exemption would be essentially a political determination and is not appropriate for a court to make.

Finally, on page 16, in response to the appellant's argument that the law limiting political activities by charitable organizations should be declared void for vagueness, he states:

I would heartily agree that this area of the law requires better definition by Parliament which is the body in the best position to determine what kinds of activity should be encouraged in contemporary Canada as charitable and thus tax exempt. But I am not prepared to say that the vagueness here is of a degree in excess of the constitutionally permissible.

It is not easy to determine whether a proposed activity will be deemed by Revenue Canada charitable or political. Revenue Canada has broad discretion in making these determinations, but the law and administrative policies they apply have gaps and elements of subjectivity that are problematic.

This judgment expresses a clear frustration with the imprecise and confusing nature of the law in this field and seeks Parliament's leadership to rectify it.

II) THE ADMINISTRATION OF CHARITABLE ORGANIZATIONS

The existing rules surrounding advocacy create practical problems that make it difficult to administer charitable organizations.

A fundamental problem is that the rules create confusion. It is not easy to determine whether a proposed activity will be deemed by Revenue Canada charitable or political.

Revenue Canada has broad discretion in making these determinations, but the law and administrative policies they apply have gaps and elements of subjectivity that are problematic.

The lack of clarity makes it difficult for charitable organizations to make decisions in this area, and creates frustration among managers and boards. This in turn consumes time and resources. In some cases legal opinions are sought to determine whether a proposed action, that would normally be a straightforward management decision, is permissible under the current rules. Unfortunately, because of the uncertain and complex state of the law, conclusive legal opinions are difficult to offer.

In addition to frustration, there is an element of fear caused by this confusion because the stakes are very high. Revenue Canada can revoke charitable status if a charitable organization steps out of bounds in this area – a very serious and potentially fatal punishment.

Another practical problem is that the confusion in this field makes it difficult for charitable organizations to raise funds for activities that involve advocacy. Leaders in the field indicate that charitable foundations, which are critical sources of funds for charitable organizations, are generally very wary of funding projects that might become entangled in a dispute with Revenue Canada over the nature and limits of advocacy, charitable activity, and political activity. As a result, worthy projects may not attract funding from understandably cautious charitable foundations.

Finally, there is a sense among charitable organizations that Revenue Canada applies these ill-defined advocacy rules in an inconsistent, arbitrary or discriminatory manner.²² These perceptions, whether justified or not, exacerbate the confusion and create tension and distrust.

To be fair, consistent application of imprecise law is difficult for Revenue Canada personnel and contract auditors. Unlike traditional financial audits, where the accounting principles are generally agreed upon, audits of charitable organizations for compliance with the advocacy rules involve subjective classifications of a broad range of activities in an often complex and changing environment. Without clear definitions, the auditing process will inevitably be subjective and arbitrary, even with the best intentions and care on the part of the auditors.

III) PUBLIC POLICY DEBATE IN CANADA

It is widely agreed that full and informed public debate on all issues is a key element of civil society and democracy, and will lead to better public policy decision-making. Public expectation of such debate appears to be growing for issues of all kinds and at all levels – local to international.

The third problem with the advocacy

There is a sense among charitable organizations that Revenue Canada applies these ill-defined advocacy rules in an inconsistent, arbitrary or discriminatory manner. These perceptions, whether justified or not, exacerbate the confusion and create tension and distrust.

rules is that they impede critical public policy debates by preventing the full participation of charitable organizations.

In many cases these organizations possess extraordinary understanding of their fields of endeavour and can enrich the debates. But as Shira Herzog observes, our system "... can mute the strongest and most knowledgeable voices on a wide range of issues."³⁰ Opportunities are being lost in terms of the quality of public debate and decision-making because of this muting.

Herzog provides clear examples to illustrate the illogical nature of the current law:

- A group that provides wheelchairs and crutches for the disabled can register as a charity, while another group that advocates safer workplaces and changes to bylaws governing the workplace might be denied charitable status.
- An organization that counsels bereaved families whose children were killed by a drunk driver can register as a charitable organization, while another dedicated to changing public behaviour around drinking and driving may be denied or lose charitable registration if that work is not deemed to be a "reasoned and balanced" presentation of ideas.

This muting of voices is particularly troublesome in light of the fact that the relationships between the public, private, and voluntary sectors are undergoing dramatic, fundamental shifts. Governments' retreats have resulted in increased expectations and burdens on charitable organizations, yet these organizations are restrained, in part, from attempting to shape government or public opinion on such issues.

There is a compelling argument that in these times of rapid and massive structural change in all sectors, the full engagement of

the voluntary sector in the public debate is essential as a source of creativity and solutions. The traditional public sector is of limited utility as a source of innovation, while the private sector is not the source of answers to non-market problems. A vocal and engaged voluntary sector can fill the void between the market-driven private sector and the diminished public sector. Charitable organizations have a major role to play in this regard.

This view of the role of charitable organizations in public policy debate is not shared by all. Some view advocacy as the domain of political parties, not charitable organizations. For example, Hamilton Ontario Liberal M.P. John Bryden has complained that "what we have done is create a whole edifice in charities and non-profit organizations on the government payroll to prepare briefing notes to government."³¹ He argues for a more restrictive approach to advocacy by charitable organizations.

A full recital and critique of Bryden's reasoning and conclusions is not attempted here. However, it is worth recognising that charitable status does not mean an organization is "on the government payroll." Rather, it means that the organization, and the funds it generates from the community, are exempt from taxation. While governments do provide funding for and purchase services from many charitable organizations, many others operate completely independently of government.

Ultimately, Bryden's arguments do not change the writer's conclusions that charitable organizations have a great deal to add to public policy debate, and that they should be permitted to devote a portion of

There is a compelling argument that in these times of rapid and massive structural change in all sectors, the full engagement of the voluntary sector in the public debate is essential as a source of creativity and solutions.

their energy and resources to advocacy without losing their charitable status.

IV) INCONSISTENT TREATMENT – ADVOCACY BY BUSINESSES IS ENCOURAGED BY THE TAX SYSTEM

While charitable organizations can lose their charitable status for engaging in advocacy activities, corporations and other tax payers are in effect encouraged to do so under Canadian tax law. Section 20 of the *Income Tax Act* provides that "in computing a taxpayer's income for a taxation year from

a business or property, there may be deducted such of the following amounts ..."

20(1)(cc) Expenses of representation – an amount paid by the taxpayer in the year as or on account of expenses incurred by the taxpayer in making any representation relating to a business carried on by the taxpayer,

(i) to the government of a country, province or state or to a municipal or public body performing a function of government in Canada, or

(ii) to an agency of a government or of a municipal or public body referred to in subparagraph (i) that has authority to make rules, regulations or by-laws relating to the business carried on by the taxpayer,

including any representation for the purpose of obtaining a licence, permit, franchise or trademark relating to the business carried on by the taxpayer.

This ability to deduct lobbying expense exacerbates the public policy debate problem described above. For example, a charitable organization dedicated to the protection of west coast marine environments and species may oppose the annual herring roe fishery as destructive and wasteful. This charitable organization would need to be very cautious about how it raised its concerns, opinions and options with the public and the federal Department of Fisheries and Oceans for fear of running afoul of the advocacy rules. In contrast, a herring roe processing and exporting company could engage in a lobbying effort to have the season extended or catch limitations lifted, and then deduct the expenses of these efforts from their income for tax purposes.

Similarly, a charitable organization dedicated to the relief of poverty that wants a provincial government to increase the minimum wage must be very careful how it advocates for such a change. Yet a meat packing company that opposes such a change can lobby, deduct the expenses, and pay less income tax. An additional unfairness is that an individual employee of the company who wanted to lobby government for changes to employment standards or safety legislation would have to pay for it with after-tax dollars.

These provisions of the *Income Tax Act* have the peculiar effect of encouraging lobbying of government by commercial and private interests, and hindering lobbying by non-commercial entities that are often pursuing a broader public interest. "The argument has been made that, since these deductions are also being diverted from public coffers, the treatment might be made more equal."¹⁷

Another related anomaly is that the *Income Tax Act* also allows businesses to deduct advertising expenses from income, thus reducing their tax burden. This creates

These provisions of the Income Tax Act have the peculiar effect of encouraging lobbying of government by commercial and private interests, and hindering lobbying by non-commercial entities that are often pursuing a broader interest.

a form of tax incentive for businesses to lobby the public through advertising, with no restriction as to what they can say. Charitable organizations do not enjoy such an incentive or freedom.

In summary, there is inconsistency and unfairness in the tax treatment of lobbying, advertising and advocacy by businesses, charitable organizations and individual citizens.

V) TAX TREATMENT OF POLITICAL DONATIONS

Another provision of the *Income Tax Act* that highlights the inconsistency of tax policy and broader public policy in this field is section 127(3), which addresses contributions to registered parties and candidates. It provides that:

There may be deducted from the tax otherwise payable under this Part for a taxation year in respect of the total of all amounts each of which is an amount contributed by the taxpayer in the year to a registered party or to an officially nominated candidate at an election of a member or members to serve in the House of Commons of Canada (in this section referred to as “the total”),

- (a) 75% of the total if the total does not exceed \$100,
- (b) \$75 plus 50% of the amount by which the total exceeds \$100 in the total exceeds \$100 and does not exceed \$550,
- (c) the lesser of
 - (i) \$300 plus 33 1/3% of the amount by which the total exceeds \$550 if the total exceeds \$550, and
 - (ii) \$500,

if a receipt from the party or candidate is provided. Most provincial legislation mirrors

this provision. For example, see section 20 of British Columbia’s *Income Tax Act*. Note that these provisions provide for a deduction from “the tax otherwise payable” rather a deduction from income for the purposes of determining income tax payable as with lobbying expenses. Political parties and candidates are provided with very favourable tax treatment in Canada.

The point made here is not that deductability of donations to political parties or candidates is wrong or benefits only corporations; indeed, this development can be viewed as important encouragement for citizen participation in public processes. The intention here is to again point out the complexity, inconsistency, and at times irrationality of income tax policy in this area. As one observer states:

The fact is that the tax system provides groups, businesses and individuals all manner of fiscal benefits, ranging from favourable tax treatment to direct subsidies, without restricting or limiting their political involvement. Whether special provisions for deduction of expenses in earning business income, or full deduction of losses against income, or special treatment of capital gains, or political tax credit for contributions to registered parties and candidates, the state invariably uses the tax system to promote a range of economic, social and political goals. The argument that registered charities must be prevented from significantly engaging in political activity, either through support for (or opposition to) candidates or through developing and advocating particular policies and laws, dissolves in the face of the extent to which the state supports all sorts of individuals and groups, including business, without restricting their political involvement.³³

VI) TYPES OF ADVOCACY

Another anomaly from the current law is a distinction that appears to be made between advocacy directed toward: a) public opinion; b) politicians and c) the courts. The first two forms of advocacy are restricted as described above, but the rules appear to be much more generous in terms of charitable organizations engaging in advocacy before the courts.

There is some irony here, for in the age of the *Charter of Rights and Freedoms*, changes to the law can in many circumstances be brought about most effectively through the courts rather than by lobbying politicians or attempting to sway public opinion. It seems inconsistent to allow change through the courts, but to limit change through other avenues.

G. LESSONS FROM OTHER JURISDICTIONS

I) THE AMERICAN MODEL

There are lessons to be learned from the American experience with this issue. Through legislation passed in 1976 and detailed regulations issued by the U.S. Internal Revenue Service (“IRS”) in 1990, the United States adopted a system that provides much greater latitude and clarity for charitable organizations involved in advocacy or lobbying.³⁴

Prior to 1976, the IRS applied a “substantial part” test to all charities involved in lobbying. Similar to the 10 percent rule enforced by Revenue Canada, this test prevented charities from engaging in “substantial” lobbying – an ill-defined and uncertain standard. The charitable group Independent Sector, which educates charities “about the important and appropriate role lobbying can play in achieving their missions,” identified the following weaknesses with this test in brief terms:

- Organizations operate under vagueness and uncertainty over possible dire tax results of engaging in lobbying.
- Quantitative *and* qualitative standards of measuring lobbying activities.
- No certain and definitely allowable amounts of lobbying expenditures.
- No safe harbor exceptions.
- A single year violation may result in loss of tax exempt status.
- Managers of non-electing organizations may become subject to penalty tax due to an organization’s lobbying activities.

- Importance of an issue to an organization is a relevant factor in determining permissible lobbying activity.³⁵

These problems are very similar to the difficulties faced by Canadian charities under the existing Canadian rules.

According to Troyer, this restrictive test led to denials of charitable status and “a good deal of anxiety in the charitable community.”³⁶ This in turn led to years of work by charities and Congress to devise an alternative approach, which is now well established.

The current system is optional for charities, which can choose to be bound by the old “substantial part” test, or opt into the new system. The two fundamental elements of the new system are: a) that it provides clear definition of the concept of permissible lobbying, and b) that it establishes easily understood expenditure limits for permissible lobbying.

A) DEFINITIONS

“Lobbying” or “attempting to influence legislation” means:

1. Any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof (grass roots lobbying), and
2. Any attempt to influence any legislation through communication with any member or employee of a legislative

body or with any government official or employee who may participate in the formulation of legislation (direct lobbying).

The definition goes on to state that “attempting to influence legislation” does not include the following activities:

1. Making available the results of nonpartisan analysis, study or research,
2. Examining and discussing broad social, economic and similar problems,
3. Providing technical advice or assistance (where the advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by that body or subdivision,
4. Appearing before, or communicating with, any legislative body about a possible decision of that body that might affect the existence of the organization, its powers and duties, its tax-exempt status, or the deduction of contributions to the organization, or
5. Communicating with a government official or employee, other than:
 - a. A communication with a member or employee of a legislative body (when the communication would otherwise constitute the influencing of legislation), or
 - b. A communication with the principal purpose of influencing legislation.

The IRS goes on to explain that “[a]lso excluded are communications between an organization and its bona fide members about legislation or proposed legislation of direct interest to the organization and the members, unless these communications directly encourage the members to attempt to influence legislation or directly encourage

the members to urge nonmembers to attempt to influence legislation, as explained earlier.”¹⁷

This definition effort goes a long way to clarifying what charities can do in this field. They can attempt to influence legislation, but their expenditures on these activities must not exceed the limits discussed below. Activities 1 through 5 above are expressly stated to fall outside the definition of “attempting to influence legislation” so charities may engage in them without limitation. Expenditures on activities 1 through 5 are not part of the calculation to determine whether charities have complied with the lobbying expenditure limits.

B) EXPENDITURE LIMITS ON PERMISSIBLE LOBBYING

The American system creates a relatively simple formula that prescribes the expenditure limits on lobbying by charities. The basics of the formula are these:

- charities can spend up to 20% of the first \$500,000 of their “exempt purpose expenditures” (essentially their annual budget).
- as a charity’s “exempt purpose expenditures” rise above \$500,000, the percentage of these incremental dollars that can be spent on lobbying falls in stages from 20% to 5%.
- The maximum that can be spent by any charity on lobbying is \$1,000,000 annually. This requires an annual budget of over \$17,000,000.
- The formula also sets the limits for “grass roots” lobbying efforts, which are “lobbying expenditures that are made to influence legislation by attempting to affect the opinions of the general public or any segment thereof.” They form part of the general lobbying limits.

Exceeding these limits does not automatically result in a loss of tax exempt charitable status. Rather, the excess lobbying expenditures become subject to a 25% excise tax. Tax exemption will only be lost if the sum of a charity's lobbying expenditures exceeds the limits imposed by the formula by more than 50% over a moving four year period.

The following benefits of this new system have also been summarized by the charitable group Independent Sector:

- Tax certainty for charities engaged in lobbying;
- Strictly quantitative standards for measuring permissible lobbying activities;
- Certainty as to the allowable amount of lobbying expenditures;
- Safe harbor expenditures;
- No jeopardy to tax-exempt status for a single year's violations;
- Managers of electing organizations never become subject to a penalty tax by reason of an organization's lobbying activities; and
- Importance of an issue to an organization is not a relevant factor in measuring permissible lobbying activities.

In summary, there are important common themes between the American and Canadian experiences with the issue of advocacy or lobbying by charitable organizations. The problems that are now becoming acute in Canada existed in the United States prior to 1976. They led to a cooperative effort between American charitable organizations and legislators, which resulted in creative solutions to the problems. A similar cooperative approach is due in Canada.

II) THE ENGLISH MODEL

The most important lesson available from the English model is its administrative structure. While thorough treatment of the issue of optimum administrative structure would require a separate major paper, this model is worth brief mention here.

The Charity Commission for England and Wales is a government body consisting of non-elected members responsible for "registering, monitoring, supervising and advising charities, promoting the effective use of charitable resources and promoting and making effective the work of the charity in meeting the needs designated by its trusts."³⁸ It is a product of the *Charities Act, 1993*, and is separate from Inland Revenue, which is responsible for tax collection.

Boyle credits the Charity Commission with a "combination of a consultative approach and careful reasoned decisions." "Decisions are made in a consultative, open process frequently involving input from the applicant and Inland Revenue with involvement from the larger community being sought in cases where public input would be helpful."³⁹ Further, the Commissioners themselves expressly boast that they "have the capacity to respond to changing circumstances and needs of charities."⁴⁰

The benefits of the Charity Commission have been well recognized in Canada.

III) AUSTRALIA

Like Canada, Australia inherited the English common law system, and scholars, lawyers and courts in both countries often look to the other for lessons or guidance on legal and public policy issues. Unfortunately, Australia's handling of the issue of advocacy by charitable organizations does not appear

In France, nonprofit organizations receive favourable tax treatment, but there are no prohibitions on their political activity.

to provide an example for Canada to emulate.

A textbook that provides a comprehensive analysis of non-profit law around the world states that in Australia "the legal and regulatory treatment of nonprofit associations is lax and muddled."¹⁰ On close scrutiny, it is evident that Australia shares many of Canada's problems in this field, but has not yet implemented solutions.

IV) OTHER COUNTRIES

The legal concept of "charity" as it is used in Canada is generally shared by countries with legal systems based on the English common law. In the rest of the world there is great variety regarding the underlying legal principles, history, terminology, administration and tax treatment of activities called "charitable" under the common law. Despite these differences, and the resulting complications, it is interesting to see how other countries deal with the issue of advocacy by organizations akin to charities, and to see that some countries provide far more latitude than Canada.

For example, in France, non-profit organizations receive favourable tax treatment, but there are no prohibitions on

their political activity, as long as the bylaws of the organization permit it, and the activity is not seditious.¹¹ Permissible activities include:

1. Active participation in legitimate campaign activities;
2. Active lobbying for legislation with the government or parliamentarians;
3. Raising money for political campaigns.¹²

Similarly, "there are no restrictions on nonprofit organizations in the Netherlands with regard to lobbying, advocacy, or other political activities. Organizations that are involved in these activities receive the same tax treatment as other nonprofit organizations. The only limitation is that it is forbidden to have a purpose or perform activities that undermine the public order."¹³

The same approach applies in Italy, where, according to Salamon, the absence of restrictions on political activity has resulted in increased advocacy by nonprofit organizations, particularly those dedicated to improving healthcare.¹⁴ Other countries where organizations akin to Canadian charities receive favourable tax treatment but are not restricted from engaging in advocacy include Israel, Spain, Japan and South Africa.¹⁵

Other countries where organizations akin to Canadian charities receive favourable tax treatment but are not restricted from engaging in advocacy include Israel, Spain, Japan and South Africa.

H. OPTIONS

In order to better understand the models and options in this field, it may be helpful to view them on a spectrum. At one end (the restricted end) is a complete prohibition against any advocacy activities by charitable organizations. At the other end of the spectrum (the unrestricted end) there are no limits on advocacy activities by charitable organizations. The current approach in Canada would fall to the restricted end of the spectrum, while the American approach is closer to the unrestricted end.

Below are three other approaches that represent different points on the advocacy spectrum.

I) THE BROADBENT PANEL REPORT

The Broadbent Panel Report included a wide range of recommendations. One bears directly on the issue of advocacy, discussed under a heading “Proposals for Better Regulation.” The Panel suggested that government:

Reaffirm and maintain the legitimacy of space for non-partisan political advocacy. While partisan activities should continue to be forbidden, the right to bearing a public witness on an issue affecting the very purpose of a charitable organization should be affirmed. The rules governing advocacy activity need to be clarified in ways that can be better understood, that militate

against arbitrary application and that cohere with the values of a healthy civil society. In particular, the 90/10 rule has to be regarded as only an approximate standard since allocations under it are extremely difficult for a registered organization to calculate or Revenue Canada to measure. The important tests are that the rule not be applied in an arbitrary or unduly restrictive manner.⁴⁷

The Panel does not provide a draft of new definitions or rules to deliver clarity, nor does it provide a specific alternative to the 10 per cent rule created by Revenue Canada. Instead, the Panel has flagged these as important issues and left more detailed recommendations for a later stage.

In terms to the advocacy spectrum, the Panel Report approach would be less restrictive than the current approach in Canada. However, it is not a radical move to the other end.

II) JOINT TABLES REPORT

The Joint Tables Report advanced some of the Broadbent Panel’s recommendations, providing a new and clearer definition of advocacy. It stated:

The rules governing advocacy activity need to be clarified in ways that can be better understood, that militate against arbitrary application and that cohere with the values of a healthy civil society.

Instead of the current definition, section 149 of the *Income Tax Act* should be changed to permit “political activities” by charities, provided that:

- a. the activities relate to the charity’s objects, and there is a reasonable expectation that they will contribute to the achievement of those objects; and
- b. the activities:
 - i. are non-partisan;
 - ii. do not constitute illegal speech or involve other illegal acts;
 - iii. are within the powers of the directors of the organization;
 - iv. are not based on information that the group knows or ought to know, is inaccurate or misleading; and
 - v. are based on fact and reasoned argument.

Little merit is seen in quantitative limits on the extent of political activities, whether set in law or through departmental policy, although such activities cannot become predominant. The contention here, however, is that the 10 percent ceiling allows far too narrow a scope as a general guidance.⁴⁸

This definition amounts to a modest clarification of the current Canadian law. Political activity or advocacy would be permitted, but in limited circumstances. The current requirement that charities provide “balanced information” is replaced with a greater freedom to advocate based on accurate facts and reasoned argument. However, charities would not be permitted to advocate based on misleading, inaccurate or unlawful information.

Charities are plagued with the uncertainty of what activities can or cannot be engaged in, as well as how much of that activity can be done. The Joint Tables clarification is

helpful on these issues, but does not provide complete clarity. Although critical of the 10 percent rule as too restrictive, the report does not provide an alternative as to the amount of political activity that would be permissible. The rule that “political activities shall not become predominant” does not provide a clear line as to where predominance begins. This rule could give charities much greater latitude, replacing the 10 percent rule with a 50 percent rule, for example.

The lack of quantitative limits for advocacy poses further problems. Uncertainty and the possibility of arbitrary application of limits remain.

A quantitative formula to measure political activities is a strength of the American approach, as it provides an objective tool for making determinations on such activities. In turn, the quantitative formula provides greater certainty and direction for managers of charities. Further, regulatory audits will be less subjective and arbitrary when reviewing expenditure limits for political activities. These advantages are significant.

III) ADVOCACY AS A CHARTER RIGHT

The freedom of expression is a fundamental freedom enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*. Professor Peter Hogg has observed that “Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it ... it is obvious that political speech is at the core of s. 2(b) of the Charter ...”⁴⁹

It has been argued that the current restrictions on advocacy by charitable organizations are a violation of the freedom of expression.⁵⁰ Edward Hyland has made the Charter argument, and suggested an administrative model in which the only restriction for advocacy for charities “would be a prohibition against providing any

It has been argued that the current restrictions on advocacy by charitable organizations are a violation of the freedom of expression.

material or organizational or human-resource support” in electoral campaigns.⁵¹ “[C]harities would be required to provide audited statements of disbursements, as well as an accounting of their involvement in political campaigns” to regulators and the public, but would otherwise be free to engage in political activity and advocacy as they wish. He argued that this approach would provide clarity, administrative simplicity, and accountability for all involved.⁵²

Hyland’s model is even farther along the unrestricted end of the spectrum than the American approach, as he opposes any quantitative spending limits on political activity.

The Charter argument underlying this model has not been successful with the courts. In two cases, the Federal Court of Appeal has found that no breach of freedom of expression occurred when two charities were stripped of their registered status on the grounds that they were too political. In *Alliance for Life* (1999), the court quoted with approval an earlier decision that made the point bluntly:

With respect to the Charter argument based on alleged infringement of freedom of expression, the basic premise of the appellant is untenable. Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On

this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he contributes for this purpose. The appellant is in no way restricted by the *Income Tax Act* from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held.⁵³

While the courts have not applied the Charter to overturn the existing rules governing advocacy by charitable organizations on this basis, the practical reality is that the unclear and restrictive rules impede charitable organizations from adding their often well-informed voices and opinions to the public debate. As described above, this impediment is substantial because of the potentially dire consequences for charitable organizations that violate the advocacy rules. In effect, the government is achieving indirectly thorough tax policy what it cannot do directly – explicitly prohibit charitable organizations from expressing their opinions.

This conflict between fundamental principles and administrative practice should not be dismissed lightly.

I. CONCLUSIONS

It is clear from a review of the issue of advocacy by charitable organizations that the current Canadian approach is inadequate and in need of significant change. Improvements should include:

- a clear legal definition of permissible advocacy;
- clear quantifiable spending rules for advocacy activities to replace the 10 percent rule;
- flexible regulatory options for the enforcement of the new rules;
- greater transparency on the part of the federal regulators of this field; and
- increased financial disclosure requirements concerning advocacy activities by charities.

The American model detailed above provides a very useful guide, and could be adapted to meet Canadian circumstances. Parliament should build on the work of the Broadbent Panel and the Joint Tables, and make these changes as part of a modernization of the field of Canadian charity law.

APPENDIX

SUMMARY OF CANADIAN CASES

The following case summaries describe the recent Federal Court of Appeal judgments that address the issues of charitable status, the *Income Tax Act* and political activity. The summaries are drawn, with some minor changes, from Frances Boyle's paper "Charitable Activity Under the Canadian Income Tax Act: Definition, Process and Problems" a background paper for the Voluntary Sector Roundtable, 1997, at 22-26. One additional subsequent case has been added, as has reference to a 1999 decision of the Supreme Court of Canada on an appeal from the Federal Court of Appeal.

Scarborough Community Legal Services v. The Queen, [1985] 1 C.T.C. 98, 85 D.T.C. 5102 (F.C.A.)

This decision found that political activities in the form of participation in rallies and work to change municipal by-laws would not invalidate charitable purposes because they were non-essential and incidental to other charitable activities. This issue was addressed by the amendments to the *Income Tax Act* in 1985-86 to permit limited political activity.

Native Communications Society of British Columbia v. M.N.R., [1986] 2 C.T.C. 170, 86 D.T.C. 6353 (F.C.A.)

In this case, the Court analysed the fourth category from *Pemsel's Case* within the context of the "spirit and intendment" of the *Preamble*, however noting that the law of charity is a moving subject. The activities of the society in

publishing a newspaper on issues of concern to the aboriginal community were held to be beneficial to the community (implied the community as a whole and not only the aboriginal community) and hence charitable. The Court examined the activities proposed to be conducted and held that there was no political activity, based on statements that the newspaper was politically non-aligned, despite references in the society's objects to providing information on political matters which the court characterized as related only to "procurement and delivery of information."

Although hailed at the time as a "truly Canadian definition of charity" and a groundbreaking case [see Ellen B. Zweibel "A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes: A Comment on *Native Communications Society of B.C. v. M.N.R.*" (1987) 26 *Estates and Trusts Reports* 41], its impact in subsequent decisions has been diminished by focus on statements in the decision relating to "the special legal position in Canadian society occupied by the Indian people."

Alberta Institute of Mental Retardation v. The Queen, [1987] 2 C.T.C. 70, 87 D.T.C. 5306 (F.C.A.)

The Court in this case decided that commercial activities carried on by this charitable foundation were acceptable on the basis that all proceeds went to further the principal objects of the foundation, the welfare of persons suffering developmental handicaps. The activity in question was the collection of

second hand items delivered to an unrelated business entity which in turn sold the items at retail stores. The charity received a fixed minimum amount and a percentage of profits over a set amount. A factor considered by the Court was that one of the objects of the charity was to raise money for its work with the disabled. On this basis, it held that the business activity was not an unrelated business and did not affect the foundation's charitable purposes.

Revenue Canada applied for leave to appeal this decision to the Supreme Court of Canada, but leave was denied.

***Polish Canadian Television Production Society v. M.N.R.*, [1987] 1 C.T.C. 319, 87 D.T.C. 5216 (F.C.A.)**

An organization with objects of advancing multiculturalism, in particular the Polish-Canadian community, was held not to be charitable. The court gave essentially no reasons for its decisions and declined to express a view as to whether such objectives are to be considered charitable within the terms of the *Income Tax Act*.

***Positive Action Against Pornography v. M.N.R.*, [1988] 1 C.T.C. 232, 88 D.T.C. 6186 (F.C.A.)**

A group involved in anti-pornography lobbying and distribution of educational material was found not to be charitable. The Court stated that it did not meet the test for advancement to education since the organization merely presented selected items of information. The benefit to the community test was not met either since the primary purposes and activities were political, and were not ancillary of incidental to other purposes. The decision includes the statement "[w]e are not called upon to decide what is beneficial to the community in a loose sense, but only what is beneficial in a way the law regards as charitable."

***Toronto Volgograd Committee v. M.N.R.*, [1988] 1 C.T.C. 365, 88 D.T.C. 6192 (F.C.A.)**

An organization devoted to promoting peace and understanding between Toronto and Volgograd in the U.S.S.R. through education, public awareness, exchanges and meetings was found not to be charitable. Although the Judge acknowledged that the Court is to consider prevailing circumstances and to look at eligibility in light of current societal conditions, the organization was disqualified under both the education and benefit to the community heads since its activities and objects were categorized as "no more than propaganda," being "education for a political cause, by the creation of a climate of opinion."

***N.D.G. Neighbourhood Association v. Revenue Canada*, [1988] 2 C.T.C. 14, 88 D.T.C. 6279 (F.C.A.)**

A community organization with focuses on social issues in the community, accessibility to community resources, development of educational facilities and services to the disadvantaged, was held not to be charitable, again on the grounds of political activity. The non-exclusive assistance to the disadvantaged negated the poverty head, while providing information and conducting letter writing campaigns were considered as not educational. The emphasis on lobbying efforts and "defending people's rights" made the organization too political for these activities to be incidental and ancillary. Because the organization "not only has activities beyond education but that it is in effect an activist organization" it failed to qualify as a charity.

***National Model Railroad Association v. M.N.R.*, [1989] 1 C.T.C. 89, D.T.C. 5133 (F.C.A.)**

Despite purposes that the Court found satisfactorily stated recognized charitable purposes (education and other purposes beneficial to the community), a national association promoting model railroads and

information of railways generally was found to have activities “too member-oriented to have a truly public character.”

***Everywoman's Health Centre Society v. Canada*, [1991] 2 C.T.C. 320, 92 D.T.C. 6001 (F.C.A.)**

A society with objects of providing “necessary medical services for women for the benefit of the community as a whole” and carrying on “educational activities incidental to the above” in the form of a free-standing abortion clinic was found to be eligible for registration as a charity. The Court analogized the legal health services provided to those of a hospital, and expressly disapproved Revenue Canada's position that benefit to the community could not be found in a controversial issue where no public consensus exist, saying public consensus is not an appropriate test. The Court also found there to be no hint that the Society would be engaging in political activity.

The Court's decision was that the “Society's purposes and activities at this point in time [i.e. the operation of the clinic] are beneficial to the community within the spirit and intendment, if not the letter, of the preamble to the *Statute of Elizabeth* and ... the Society is a charitable organization within the evolving meaning of charity at common law ...” and should be registered under the *Income Tax Act*.

This decision is important, not just for its stance on a controversial issue, but also by virtue of the use of language of public advantage, bringing into play the view that the test has changed to one of activities which are presumptively (*prima facie*, in legal terminology) of public benefit. [Blake Bromley “Contemporary Philanthropy – Is the Legal Concept of “Charity” Any Longer Adequate?” In D.W.M. Waters (Ed.) *Equity, Fiduciaries and Trusts* 1993, Carswell, 59-98].

***Canada UNI Association v. M.N.R.* [1993] 1 C.T.C. 46, 151 N.R. 4 (F.C.A.)**

An organization with objects of informing Canadians about the unique nature of

Canada, establishing communication between Canadians and enhancing appreciation and tolerance of linguistic and cultural differences, all with special emphasis on English- and French-speaking Canadians was held not to be a charity. The Court found the organization's objects and activities to be inherently political and virtually the same considerations applied as in the *Toronto Volgograd* case. The *Native Communications Society* case was found to be different because of the special position of natives in Canadian society.

***Briarpatch Inc. v. Her Majesty the Queen*, [1996] 2 C.T.C. 94 (F.C.A.)**

This was the first case involving a full hearing of a decision by Revenue Canada to de-register a charity. The organization, which had objects including communications, media access, educational workshops and breaking down barriers, with a focus on low income people, had as its main activity the publication of a magazine, “Briarpatch.” The Court agreed with Revenue Canada that the society's activities were no longer charitable and ordered the charity de-registered. The Court said that there was not sufficient “continuity, structure and analysis” to qualify as education in the sense of training the mind. It also found that there was no purpose beneficial to the community in general by way of analogy to the *Native Communication Society* case since the focus of the magazine was not exclusively of direct relevance to the poor. The comment on the special constitutional status of native people was confirmed.

***Vancouver Regional FreeNet Association v. M.N.R.*, [1996] 3 C.T.C. 102 (F.C.A.)**

A “Freenet” association with purposes including the development and operation of a free, publicly accessible community computer utility, education of the public in the use of computer telecommunications and related objects was held to be eligible for registration as a charity. The Court reached this decision by analogizing the “information highway” to

the highways and other public works referred to in the *Preamble*. Thus, despite the new test possibly evident in the *Everywoman's Health Centre* case, the Court has reverted to the “spirit and intendment” of the 1601 statute for its authority.

***Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, 2 C.T.C. 85 (F.C.A.)**

A society with objects of providing educational forums and workshops to immigrant women to help them find employment, and carrying on incidental and ancillary political activities and raising funds for these purposes, was held not to be eligible for registration as a charity. The Court once again limited the scope of the *Native Communications Society* case, based upon the special constitutional status of aboriginal peoples, and declined to find that the society's services to groups protected by the *Canadian Charter of Rights and Freedoms* brought it within equivalent constitutional grounds. The decision was largely based on what the Court characterized as indefinite and vague purposes and activities, which did not clearly identify the recipients as persons in need of charity as opposed to those in need of help. The Court repeated the principle that laudable community services are not necessarily charitable at law and activities and objects of general public utility are not always charitable in the legal sense.

In February, 1999, the Supreme Court of Canada upheld the Federal Court of Appeal decision on the same grounds – the purposes were too vague and indeterminate to permit the Society to qualify for charitable status under the fourth head of *Pemsel*. While the decision takes a rather narrow approach to the facts at issue, it does urge substantial reform of charitable law by Parliament, and it takes a broader, more modern view, of education than earlier cases.

***Alliance for Life v. M.N.R.*, [1999] CarswellNat 625 (F.C.A.)**

This case again illustrates the difficulty of distinguishing between education and political advocacy. It involved an organization that was de-registered by Revenue Canada on the basis that its educational activities were in fact efforts to promote its political views on pro-life issues in order to influence public attitudes. The Federal Court of Appeal agreed with Revenue Canada, but apparently with some difficulty. After reviewing the organizations activities, Stone J.A. stated:

While it is true that some of the materials therein may be viewed as scientific or certainly not as particularly one-sided, little attempt is made to promote genuine debate on such important issues as abortion and euthanasia but, rather, to advocate strong opposing positions ... I do not find in much of the disseminated materials any real desire to ensure objectivity. It is not, in my view, farfetched to regard the bulk of these materials as “political.”

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NOTES

- ¹ For an example of critical judicial comment on this field see the decision of Strayer J.A. of the Federal Court of Appeal in *Human Life International in Canada Inc. v. The Minister of National Revenue*, (1998) F.C. 202 (C.A.). An example of scholarly criticism comes from Arthur B.C. Drache, Q.C. in *Canadian Taxation of Charities and Donations* (Toronto: Carswell, 1999). At page 1-15 he states that "the problem of charities and political activity [which includes advocacy] has been a serious one for at least ten years."
- ² In late 1999, Revenue Canada changed its name to "Canada Customs and Revenue Agency." For the sake of familiarity and ease, "Revenue Canada" is used in this paper.
- ³ For a succinct discussion of advantages and disadvantages of registered status, see Donald J. Bourgeois, *The Law of Charitable and Non-profit Organizations*, 2nd Ed. (London: Butterworths, 1995) at pp. 177-178.
- ⁴ *Income Tax Act*, R.S.C. c.1 (5th Supp.), s. 149(1)(l).
- ⁵ See the summary entitled "What's in a Name 'Non-Profit, Charitable or Voluntary'" in "Working Together – A Government of Canada/Voluntary Sector Joint Initiative," Report of the Joint Tables, August, 1999, p. 16.
- ⁶ An excellent and recent summary of the nature and scale of the voluntary sector is found in "Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector" Panel on Accountability and Governance in the Voluntary Sector, Final Report, February, 1999, p. 13. Note that the statistics summarized above include hospitals and institutions of higher learning, which account for 56 percent of the employment in the sector.
- ⁷ *Ibid.*
- ⁸ An example is the Enterprising Non-profits Program established by the VanCity Community Foundation. It is designed to help members of this sector develop entrepreneurial skills to survive and prosper in this new, more difficult environment.
- ⁹ The Broadbent Panel Report is available at <http://www.web.net/vsr-trsb>.
- ¹⁰ The Joint Tables Report is available at <http://www.web.net/vsr-sb>.
- ¹¹ Supplementary Paper A, "Education, Advocacy and Political Activity," p. 1.
- ¹² *The Commissioners for the Special Purposes of the Income Tax Act v. Pemsel* [1891] A.C. 531 (H.L.).
- ¹³ *Ibid.*, p. 583.
- ¹⁴ The preamble's charitable purposes include: "The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."
- ¹⁵ Bourgeois, *supra*, p. 12.
- ¹⁶ *Ibid.*, p. 13.

- ¹⁷ Frances K. Boyle in "'Charitable Activity' Under the Canadian Income Tax Act: Definition, Process and Problems" a background paper for the Voluntary Sector Roundtable, 1997 p. 21.
- ¹⁸ *Ibid.*, p. 25.
- ¹⁹ *Bowman v. Secular Society*, [1917] A.C. 406 at 442 (H.L.), as quoted by Bourgeois, *Ibid.*, at 25.
- ²⁰ *Briarpatch Incorporated v. Her Majesty the Queen* [1996] 2 C.T.C. 94.
- ²¹ *Toronto Volgograd Committee v. The Minister of National Revenue*, [1988] 3 F.C. 251.
- ²² *N.D.G. Neighbourhood Association v. Revenue Canada*, [1988] 2 C.T.C. 14, 88 D.T.C. 6279 (F.C.A.).
- ²³ *Positive Action Against Pornography v. M.N.R.*, [1988] 1 C.T.C. 232, 88 D.T.C. 6186 (F.C.A.).
- ²⁴ *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R., para. 168, 169.
- ²⁵ Appendix A to the Circular is not reproduced here.
- ²⁶ The second draft of the Revenue Canada publication "RC4107E – Registered Charities: Education, Advocacy and Political Activities," described below, contradicts Information Circular 87-1 and states that "the safe harbour" provision "is calculated on a yearly basis. It does not apply to an amount averaged over two or more years." But, uncertainty comes back in the next paragraph of the second draft, which says: "to decide whether political activity is infrequent and short-term, we usually look at the organization's history over several years."
- ²⁷ Revenue Canada's website is: <http://www.cera-adre.gc.ca/E/pub/tg/rc4107eq/rc4107de.pdf>.
- ²⁸ Supplementary Paper A, "Education, Advocacy and Political Activity," p. 2.
- ²⁹ Boyle, *supra*, p. 28.
- ³⁰ *Globe & Mail*, Monday, December 13, 1999, comment section.
- ³¹ As cited in N. McClintock, "Public Policy, Public Funds" (1993) *Front & Centre*, Vol. 2, No. 2, accessible at <http://www.ccp.ca/information/documents/fc41.htm>.
- ³² Boyle, *supra*, p. 30.
- ³³ Hyland, *supra*, p. 25.
- ³⁴ This summary of American experience relies heavily on an excellent paper by Thomas A. Troyer entitled "What the Non-Specialist Needs to Know About the Lobbying Rules for Charities – An Explanation of the new Rules" originally prepared for a program presented by the ABA Tax Section, May 18, 1991, and reproduced by Independent Sector, A National Forum to Encourage Philanthropy, Volunteering, Not For Profit Initiative and Citizen Action, Washington, D.C. (website: <http://www.indepsec.org>). Another helpful source for this information is a report entitled "Lobbying Expenditures" found on the IRS website: <http://www.irs.gov/prod/forms/pubs/pubs/p5570108.htm>.
- ³⁵ This material is from a brochure published by "Independent Sector." Their website is cited in note 33.
- ³⁶ *Supra*, p. 1.
- ³⁷ *Supra*, p. 3.
- ³⁸ Boyle, *supra*, p. 17.
- ³⁹ *Ibid.*
- ⁴⁰ Report of the Charity Commissioners for England and Wales for 1997, p. 1.
- ⁴¹ Lester M. Salamon, *The International Guide to Nonprofit Law*, (Toronto: John Wiley & Sons, 1997) p. 62.
- ⁴² *Ibid.*, p. 114.
- ⁴³ *Ibid.*
- ⁴⁴ *Ibid.*, p. 243.
- ⁴⁵ *Ibid.*, p. 194.
- ⁴⁶ *Ibid.*
- ⁴⁷ *Supra*, p. 71.
- ⁴⁸ See Supplemental Paper A – "Education, Advocacy and Political Activity," p. 3.
- ⁴⁹ Peter W. Hogg, *Constitutional Law of Canada*, student edition, 4th (Scarborough: Carswell, 1998) p. 831.
- ⁵⁰ See Hyland, *supra*.
- ⁵¹ *Ibid.*, p. 48.
- ⁵² *Ibid.*, p. 49.
- ⁵³ *Alliance for Life v. M.N.R.* [1999] CarswellNat 625 (F.C.A.).

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