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

THE LAW OF ADVOCACY BY CHARITABLE ORGANIZATIONS

options for change

IMPACS

option 1

CLEARLY IDENTIFY WHAT CHARITIES CANNOT DO

A key element of the difficulties in this field is imprecision in the language used. The concepts of "partisan politics," "political purposes," "political activity," and "advocacy" are often blended and confused in an unhelpful way. It is worthwhile to look at each:

Partisan politics, according to the CCRA, involves direct or indirect support of, or opposition to, any political party or candidate for public office.

A key element of the difficulties in this field is imprecision in the language used.

Political purposes under the common law are not charitable and an organization established for any of the following purposes will be denied charitable status by the CCRA:

- to promote a political or socio-economic ideology;
- to support or oppose a change in the law or in government policy; or
- to persuade the public to adopt a particular attitude on socio-economic or political issues.

Political activities are undefined by the common law or ITA, but if these activities help a charity achieve its goals, and they meet the CCRA's 10% rule, they are permissible to the CCRA. The CCRA's 10% rule is that a charity can apply no more than about 10% of its resources to political activity.[1]

Advocacy. The CCRA recognizes four types of advocacy:

- Advocacy on behalf or individuals (e.g. a developmentally challenged person) is "usually" considered charitable.
- Advocacy on behalf of a group is "rarely charitable."
- Advocacy to change people's behavior can be charitable if it is "well-rounded" rather than "based on slanted, incomplete information and an appeal to emotions."
- Advocacy to change people's opinions "is unlikely to be charitable."

It has long been clear and widely accepted that charities should not use any of their resources for partisan political activities. Few, if any, leaders in the charitable sector disagree with this separation and restriction.

It appears that confusion has arisen as the distinction between "charity" and "partisan politics" has become blurred. Over time, this rather simple distinction has been complicated by the unfortunate addition of non-partisan activities and advocacy to the mix. Now non-partisan efforts by a charity to change a law that relates to the charity's valid charitable purposes can cause trouble with the CCRA. What has emerged has been described as a "terminological mine field," where the imprecise definitions outlined above are applied to a wide-range of activities by large numbers of very different charities. The results are confusion and undue restriction. The issue can be viewed as a technical problem that requires a technical correction.

1 Note that the CCRA's 10% rule has been called into question as a result of the Supreme Court of Canada's decision in *Vancouver Society of Immigrant & Visible Minority Women v. MNR*, [1999] 1 S.C.R. In "Federal Regulation of Charities – A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform," York University, 2000 at pp. 59-60, Patrick Monahan and Elie Roth argue that the Court's decision means that political activities that are "ancillary and incidental" to charitable purposes are themselves charitable, and properly not subject to a 10% limitation.

A simple technical correction to improve this field would be to amend the ITA to remove the clutter around "partisan politics" and "charity" by identifying those activities under the heading of "partisan politics" that charities should not engage in, and expressly prohibiting them. This would *not* require changes to the definition of charity or a major overhaul of existing regulatory practices. Rather, it would simply mean that once an applicant organization meets the current legal requirements to achieve charitable status, then it must not engage in the listed activities.

The issue can be viewed as a technical problem that requires a technical correction.

The list of prohibited activities should be modest – only partisan politics and illegal activities should be prohibited. The definition of partisan politics could consist of:

- direct or indirect support of, or opposition to, any political party or candidate for public office, and
- promoting a political ideology.

These two elements combine to capture activities that are properly beyond the scope of charity and best left to political parties and others, not charities.

With this approach the concepts of "political activity" and "advocacy" as currently enforced would become redundant, as would the 10% rule that limits non-partisan political activity. Charities would, by implication, be able to engage in advocacy related to their charitable purposes without restrictions. Advocacy, in all the forms described above, efforts to change laws, government policies or public behavior or attitudes, and full participation in public dialogue, would be recognized as legitimate activities by charities.

Charities would know what they can and cannot do, and enforcement would be greatly simplified. As a public policy approach, it would recognize the coherent and accepted principle that partisan politics and charity are, and should remain, separate.

ADVANTAGES:

- This approach would recognize the importance and legitimacy of public policy input by charities and would allow greater latitude than the current approach.
- Minor legislative or regulatory changes would be required.
- The rules would be simple and clear, making compliance by charities easy.
- CCRA's regulatory role would be simplified.
- It would recognize the well-established distinction between partisan politics and charity.
- "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules would be eliminated.
- Consensus among charities would likely develop in support of this option.

DISADVANTAGES:

- The absence of quantitative limits on non-partisan political activities could be a problem.
- Some charities may redirect resources to non-partisan political activities to the detriment of their primary work.

the problem

Canada's charities are faced with restrictions on their ability to engage in advocacy or to provide public policy input. They are restricted not only from engaging in broad public debate, but from debate on the issues or problems they are mandated to address. These restrictions apply to efforts to encourage changes to laws or government policies as well as efforts to influence community opinions or public behavior.

These restrictions arise from a combination of vague provisions in the federal *Income Tax Act* (ITA), court decisions, and imprecise and unduly restrictive administrative policies and discretion of the Canada Customs and Revenue Agency (CCRA). As a consequence, charities must deal with several practical administrative difficulties, but most importantly, their voices are partially muted, and they are impeded from full participation in public policy discussion and debate.

There are several options available to remedy this situation. One is the U.S. approach, which is described beginning at page 19 of "The Law of Advocacy by Charitable Organizations – The Case For Change." Four other options are examined here.

THE CHARITIES AND ADVOCACY PROJECT: AN INTRODUCTION

The Charities and Advocacy Project is a partnership between the Institute for Media, Policy and Civil Society [www.impacs.org] and the Canadian Centre for Philanthropy [www.ccp.ca].

The project works in collaboration with the Working Group on Advocacy of the Voluntary Sector Initiative [www.vsi-isbc.ca], and with the direction of the following advisory committee: Bronwyn Drainie; Bruce Clemenger; Bruce Tate, National Anti-Poverty Organization; Cyndi Harvey, Volunteer Alberta; David Driscoll, VanCity Community Foundation; Debbie Field, Foodshare – Metro Toronto; Ed Broadbent; Gary McPherson, Canadian Centre for Social Entrepreneurship, University of Alberta; Gordon Floyd, Canadian Centre for Philanthropy; Karen Takacs, Canadian Crossroads International; Laurie Rektor, Voluntary Sector Initiative; Nathan Gilbert, Laidlaw Foundation; Monica Patten, Community Foundations of Canada; Marlene DeBoisbriand, United Way/Centraide of/de Canada; Megan Williams, Canadian Conference for the Arts; Penny Marratt, Health Charities Council of Canada ; Peter Dawe, Canadian Cancer Society; Ratna Omidvar, Maytree Foundation; Richard Bridge; Shauna Sylvester, IMPACS; Stephen Legault, WildCanada.net.

The Charities and Advocacy Project acknowledges the extensive work of Richard Bridge in researching and compiling this Options Paper and acknowledges and thanks those that reviewed and gave input to the first draft: Margaret Mason, Gordon Floyd, Shauna Sylvester, John Walker, Stuart Wulff, David Driscoll, Richard Mulcaster, Colleen Kelly, and Laird Hunter.

The goals of the first phase of the project, which runs from December 2000 to December 2001, are:

i) to inform Canadian voluntary groups about the current law governing charities; and
ii) to facilitate a dialogue between groups across the country (including ethnocultural and refugee serving groups) to determine if there is a consensus position on what new legislation should look like.

Depending on the results of the national dialogue, the project may continue in 2002 with the goal of seeking changes to the law.

The "Options for Change" paper is designed to spark and guide discussion at cross-Canada dialogues in the fall of 2001, and to generate submissions from groups and individuals by November, 2001. Readers should also consult "*The Law of Advocacy by Charitable Organizations*" an IMPACS background and research paper written by Richard Bridge, available from IMPACS or by downloading it from www.impacs.org.

option 2

BROADEN THE DEFINITION OF EDUCATION

The four common law categories of charity are: relief of poverty; *advancement of education*; advancement of religion; and other purposes beneficial to the community, not falling under the previous categories.

Much of the difficulty around the issue of advocacy by charitable organizations involves confusion as to whether activities are permissible as advancement of education or prohibited political activity. Generally speaking, the Courts and the CCRA have considered activities to be educational in this context if they involve a formal training of the mind or formal instruction, or if it improves a useful branch of human knowledge.

Expand the definition of charitable education to expressly include "public policy input," or strong, reasoned arguments on public policy issues.

Another element of the "education v. politics" quandary is addressed in this passage from the draft CCRA policy paper "Registered Charities: Education, Advocacy and Political Activities":

> To be considered charitable, an educational activity must be reasonably objective. This means all sides of an issue must be fairly presented so that people can draw their own conclusions. It is a question of the degree of bias in an activity that will determine if it can still be considered educational. The materials of some organizations have such a slant or predetermination, that we can no longer reasonably consider them as educational. Also, to be educational in the charitable sense, organizations must not rely on incomplete information or appeal to emotions. Even in a classroom setting, promoting a particular point of view is not educational in the charitable sense. Thus, courses, workshops, and conferences may not be charitable if they ultimately seek to create a climate of opinion or to advance a particular cause.

The subjectivity and practical difficulties of administering charity law under these principles are considerable. To illustrate, should a church be expected to present differing religious views or the atheist perspective in order to retain charitable status? Or should an organization dedicated to reducing alcoholism be required to advance merits of alcohol consumption? Not likely. However, some organizations are scrutinized thoroughly, some say excessively so, by the CCRA along these subjective and imprecise lines.

A option for change in this field would involve expanding the definition of charitable education to expressly include "public policy input," or strong, reasoned arguments on public policy issues. This could include a quantitative limit (e.g. half of a charity's educational activity can consist of "public policy input") or it could be unlimited.

ADVANTAGES:

- This approach would recognize the importance and legitimacy of public policy input by charities, and allows greater latitude than the current approach.
- Minor legislative or regulatory amendment would be required.
- "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules would be eliminated.
- Resistance from government would likely be minimal compared with larger scale reforms.

DISADVANTAGES:

- Some charities may redirect resources to public policy input to the detriment of their primary work.

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option 3

CREATE A NEW CATEGORY OF TAX EXEMPT ORGANIZATION

This option was recently advanced by Professor Kernaghan Webb of Carleton University.[2] It would involve creation, through changes to the ITA and regulations, of a new category of organization between non-profit organizations (NPOs) and charities. Webb proposes that organizations in this category be called "registered interest organizations" (RIOs), and that they have the following attributes:

This option would involve creation of a new category of organization between non-profit organizations (NPOs) and charities.

a) exemption from taxation (like NPOs and charities);
b) registration (like charities, but unlike NPOs);
c) an unrestricted ability to engage in the influencing of public policy, as long as the objectives and means are legal (like NPOs, but unlike charities);
d) the ability to issue tax receipts for donations (like charities, but unlike NPOs); and
e) a rate of deduction for donations that is different from that available for charities, possibly equivalent to the deduction available to corporations for lobbying expenses at the average effective tax rate.

The existing rules (e.g. the 10% rule) could remain unchanged for the charity category.

Webb suggests higher public disclosure requirements for RIOs and charities regarding efforts to influence public policy. He also suggests that this new category could be filled by requiring NPOs or charities that spend over a certain amount on influencing public policy to file a return as an RIO.

ADVANTAGES:

- This approach would recognize the importance and legitimacy of public policy input by NPOs and charities and allow greater latitude than currently provided to charities, and new tax advantages to some NPOs.
- It would be consistent with past legislative reforms that gave "deemed-charity" status to Canadian Registered Amateur Athletic Associations and National Arts Service Organizations, both of which can issue tax receipts.
- It would allow flexibility regarding the tax treatment of RIOs in relation to charities and other recipients of tax advantages.

DISADVANTAGES:

- Compared to options 2 and 3, this would require considerable legislative and regulatory reform.
- Distinguishing between "charities" and "RIOs" could be contentious and problematic, particularly for organizations that deliver traditional charitable services and engage in public policy input.
- The rules of public policy input for those organizations in the charity category would still be inadequate.
- This category could be used to restrict access to the full charity category.

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2 See *Cinderella's Slippers? The Role of Charitable Tax Status in Financial Canadian Interest Groups*, Vancouver, BC: SFU-UBC Centre for the Study of Government and Business, 2000.

IMPACS CHARITIES AND ADVOCACY PROJECT: "OPTIONS FOR CHANGE" WORKSHEET

your turn . . .

Note what you feel are the pros and cons of each option. Make suggestions to improve them, or recommendations to help make them "do-able". Add more sheets or a separate submission if you like.

If possible, please rank the options in order of preference.

1. Clearly Identify What Charities Cannot Do

2. Broaden the Definition of Education

3. Create a New Category of Tax Exempt Organization

4. Create a New Legislative Definition of "Charity"

5. Other Options (please describe)

WHO'S SPEAKING?

Optional. (If you would rather not be quoted publicly, please say so.)

❑ Individual
❑ Group or Organization
Description (name of organization, number of people represented)

STAYING IN TOUCH

Registered dialogue participants will automatically receive updates on this project. If you are not registered, or if you know someone else who would like to receive information, please add contact information below or email brendad@impacs.org.

Aussi disponible en français.

option 4

CREATE A NEW LEGISLATIVE DEFINITION OF "CHARITY"

The ITA does not define charity. Instead, the common law definition mentioned above (relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community) is relied upon. This common law approach has its origins in legislation passed in Elizabethan England and case law from the Victorian era. Indeed, the year 2001 is the 400th anniversary of the *Statute of Uses, 1601*, the foundation upon which charity law in common law jurisdictions is built.

While the courts have permitted the definition to evolve and expand somewhat, it is, in the opinion of many observers, badly dated, and inadequate.

While the courts have permitted the definition to evolve and expand somewhat, it is, in the opinion of many observers, badly dated, inadequate and in need of a thorough legislative overhaul and modernization. Codification of the common law is appropriate when the latter lacks clarity or has not kept pace with social change. Charity law meets both criteria for codification.

Creating a modern and comprehensive definition of charity for the ITA would be a major national public policy undertaking. In Australia, which shares our common law tradition and problems in the field of charity law, the national government has formed a "Charities Definition Inquiry" to examine modernization of the field. This work may provide a benchmark for Canada.

Such an overhaul in Canada would invite changes in several areas, including the treatment of multiculturalism issues under charity law, the concept of "social capital," and of course the rules governing advocacy. It would be possible to clarify in a new definition that advocacy for public benefit related to a charitable objective is itself a charitable activity, for which there are no restrictions.

ADVANTAGES:

- This approach would recognize the importance and legitimacy of public policy input by charities and allow greater latitude than the current system.
- This approach would require a full public debate of the broad issues of charity, and could resolve a number of problems in the field, in addition to the advocacy issue.
- "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules could be eliminated.

DISADVANTAGES:

- Such a broad initiative could be slow and divisive, with consensus difficult to obtain.
- The scope and complexity of the task may deter government from tackling it.
- There is concern that the results of yet another Canadian Royal Commission may not be implemented.

conclusion

The need for change in this field is widely recognized and any of the four options addressed above would be an improvement over the status quo. If consensus can be built within the voluntary sector as to which form the change should take, the likelihood of overcoming inertia and achieving reform will be greatly increased.

We are interested in exploring other options, and welcome your ideas. Please call or write to Brenda Doner, Coordinator of the Charities and Advocacy Project, with your suggestions or for further information:

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