The Moral Imperative for Policy Advocacy, Part 2: Options for Reform

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Published in: *The Philanthropist* , Policy Advocacy

ISSN: 2562-1491

Date: March 29, 2016

Original Link: https://thephilanthropist.ca/2016/03/the-moral-imperative-for-policy-advocacy-part-2-options-for-reform/

Date of PDF Download: June 16, 2021

This is the second of three articles by Max Bell Foundation and their Senior Fellow, Dr. Roger Gibbins, addressing policy advocacy over the next few months.

SUMMARY: This article sees the declaration by the newly elected Government of Canada for a more open relationship with charities as a welcome opportunity and it proposes three strategic approaches. It concludes that the way forward is for the charitable sector to get itself organized to modernize its approach to Policy Advocacy and some next steps are recommended.

RÉSUMÉ: Dans cet article, on salue la déclaration du nouveau gouvernement du Canada qui désire des relations plus ouvertes avec les organismes de bienfaisance, et on propose trois approches stratégiques. On conclut que le secteur caritatif a intérêt à s'organiser pour moderniser son approche dans le domaine de la mobilisation au sujet des politiques, et on recommande quelques mesures à prendre.

In Part 1 of this series, I assert that Canadian charities have a moral imperative to engage in policy advocacy, and argue that imperative is not being adequately answered.

In this article, I explore options for reforming the regulatory regime governing policy advocacy by charities in the context of the recently elected federal government. [1]

The relationship between many charities and the Government of Canada became badly frayed in the years leading up to the 2015 election. A heated public debate that began in 2012 between a handful of federal officials and a number of environmental organizations was followed by a high-profile Canada Revenue Agency (CRA) audit project focused on "political activities" of

charities. [2]

Then came the Liberals' campaign commitment to clarify "the existing rules to clearly affirm and support the important role that charities can and should play in developing and *advocating* for public policy in Canada" (emphasis added). The commitment was subsequently embedded in Prime Minister Trudeau's mandate letter to the Minister of National Revenue:

[You will] allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors . . . . This will include clarifying the rules governing "political activity," with an understanding that charities make an important contribution to public debate and public policy. A new legislative framework to strengthen the sector will emerge from this process. [3]

The Liberals' campaign commitment and its reiteration in the mandate letter succinctly captured the core of what charities have long been seeking.

How should charities respond to this opportunity?

Three options come to mind. The first is that charities pursue business as usual, thus avoiding the risk that hastily designed reforms might inflict long-term damage on a complex relationship. The second is that charities pursue modest, incremental change to strengthen their advocacy roles within existing legal and institutional parameters. The third is that charities aim high, aspiring to recast the legal and institutional environment within which they pursue policy advocacy.

Option One: Business As Usual

Doing little beyond basking in the "sunny ways" of the new government certainly has appeal. If charities believed that Stephen Harper was the problem, they could now take the position that Justin Trudeau is the solution.

This passive response would require nothing from the charitable sector in terms of leadership, time, or resources. It would rest comfortably with a new government that is perhaps more ideologically aligned with the charitable sector than was its predecessor. It would also recognize that the great majority of charities are not active policy advocates and have little interest in becoming so. The charitable sector, therefore, would not be embarking on a reform crusade which might have limited appeal to its foot soldiers.

There are risks, however. Today's "sunny ways" may not endure, and we have historical evidence (Northcott, 2014) of a less than harmonious relationship between previous Liberal governments and charities. The new government may fail to act on its commitment if there is no sustained external pressure. Or they could proceed with a modernization agenda that only partially reflects the values and experience of Canada's 86,000+ charities, creating a regulatory regime that is no better (or possibly worse) than the status quo.

And, of course, governments will change eventually and this opportunity could get missed altogether.

Option Two: Modest, Incremental Reform

In Call to Arms, I make the case that charities make a valuable contribution to public life and, more specifically, to the Canada's public policy environment. Charities are, or could be, thought leaders on the public stage. However, advocacy by charities faces a number of external and internal constraints,[4] and the time is right to question whether such constraints could be loosened by modernizing the regulatory framework.

A common complaint among charities is the lack of legal and regulatory clarity as to what constitutes "political activity." Coupled with this is the difficulty in quantifying the resources spent on political activities, and therefore in determining whether one falls within the 10 percent allocation limit. When confusion reigns, so too does caution; the lack of clarity is intimidating, not permissive. More could be done to clarify policy guidelines with respect to advocacy (although to be fair the CRA has worked steadily to do this through education).

Another avenue for incremental reform would be to change how governments see charities. Rather than being understood as yet another regulatory responsibility and an unrelenting source of funding requests, charities could seek strategies to help government see them as partners and full collaborators (Philips & Smith, 2011:29). The challenge would be to extend this cultural change beyond the Liberals' campaign commitments with enough signal strength to penetrate either the administrative procedures of CRA, or court decisions about what counts as charitable. The charitable sector may need a principled statement from Parliament as a point of departure for legal decisions, and for more detailed discussions of the government-charities relationship.[5]

Relying on the evolution of the common law as it applies to charity may be the very definition of "incremental reform." Often described as a living tree, common law is not static. The possibility exists, therefore, that its evolution will open up greater space for policy advocacy. However, relying on this as a strategy for modernization is chancy at best. How the law gets shaped depends on what cases find their way before the courts and the judgments rendered. The process is uncertain, and it can be argued that Canada's court system has been very slow to advance charity law. [6].

Option Three: Aim High

To optimize the contribution charities make to the design and implementation of public policy, we may need a new institutional relationship between charities and the state. While regulatory oversight will be essential as long as charities receive tax advantaged support, the CRA may not be the best regulatory interface.

Removing regulatory oversight from the CRA and clarifying the permitted roles of charities in policy advocacy might improve transparency and reduce friction between charities and government. Rather than working within the logic and constraints of the *Income Tax Act,* a new regulator could develop a more collaborative logic. Issues of charitable status — both granting and revoking — could be placed definitively beyond the reach of the government of the day, as could the determination of compliance with legislated constraints on "political activities." Conflicts would not go away, but they could be significantly de-politicized.

Canadians are familiar with arm's-length regulation through such bodies as the Canadian Radio-television and Telecommunications Commission (CRTC) and the National Energy Board (NEB). Not surprisingly, therefore, there is public support for a similar format when it comes to the charitable sector. The *2013 Talking About Charities* survey (Lasby & Barr, 2013:103) asked

respondents what type of entity should be responsible for “watching over the activities of charities.” Among the three choices presented, 62% of respondents opted for an independent organization or agency that is not part of either the government or the charity; 23% opted for a government agency; and 12% would leave oversight in the hands of boards of directors.

However, public opinion rests on a very limited knowledge base; the regulatory status quo is poorly understood within the charitable sector, much less by the general public. International comparisons could shed some useful light on the potential creation of stand-alone regulatory agencies which operate collaboratively with governments.

There has been a continuing interest in moving the regulation of charities out of the CRA and the *Income Tax Act.* For example, the 1999 report of the Broadbent Panel on Accountability called for a legislated definition of charity, a new compact or Canadian Accord similar to the legislative initiative in the UK, and moving CRA’s regulatory role to an independent commission similar to the Charity Commission of England and Wales. In 2000, Drache and Hunter proposed that a Charity Tribunal replace the Charities Directorate within CRA. DeSmog Canada recommended the creation of a Canadian Charities Commission in a 2015 report issued by the Faculty of Law at the University of Victoria, and Cullity (2014:29-30) notes that the Charity Commission of England and Wales is far more liberal than the CRA with respect to the definition and treatment of political activities.

For all the arguments in favour, the creation of a new regulatory agency and regime is unlikely in the near future, since doing so would be anything but simple:

- From a constitutional perspective, responsibility for “charitable property” is provincial. The federal government has become the de facto regulator because of its taxing authority, and the tax benefits received by charities. Moving the regulation of charities outside of the current (tax) regime would entail federal-provincial-territorial negotiations.

- The removal of charities from the CRA would mean opening up the *Income Tax Act* well beyond minor amendments.

- There could be a difficult and noisy debate about what groups should come under the new regulatory regime, and there would be an inevitable flood of court challenges as groups fought their exclusion or inclusion as charities.

- Oversight is only part of the relationship problem; the other part comes from the service delivery relationships between charities and governments, and the fear of biting the hand that feeds. These relationships cannot be off-loaded to an independent body, as they relate directly to the expenditure of public funds and the pursuit of government policy objectives

Pursuing this kind of significant reform would mean Canadians would face a wild and woolly debate. The federal government, along with 13 provincial and territorial governments, would be embroiled with 86,000+ charities along with thousands of groups who are not now registered but might seek charitable registration under a new regime. For the government to even consider moving in this direction, there would have to be a compelling and urgent case for modernization, one still to be developed and promoted by the charitable sector.

A related and perhaps preliminary step in a modernization strategy would be to seek a parliamentary declaration on the contribution of charities to Canadian public life. For example, the short-lived Accord that emerged from the Broadbent Panel included the principle that "the independence of voluntary sector organizations includes their right, within the law, to challenge public policies, programs, and legislation and to advocate for change." The legislative enactment of this principle would provide the current regulator with additional direction, and could form the foundation for separate charities legislation apart from the *Income Tax Act*.

Such a declaration would be a significant step forward and would be relatively easy to do when compared to the establishment of a new regulatory body and framework. However, the key word is *relatively.* International experience (Harding, 2011) illustrates just how tough legislative or legal reform can be. Cullity (2014:50) for one is not optimistic: "Given the intractable nature of the subject and its tortuous history, and the deficiencies in the legal analysis that the courts have considered appropriate, it is understandable that indications of any legislative will to embark on a redefinition of charity have been lacking."

Conclusions and Next Steps

In Call to Arms, I conclude that the relationship between charities and the Canadian state has been damaged, although not broken beyond repair, and that a major tune-up is in order. At the very least, the sub-optimal relationship is badly out of date. It is framed by a legal order well past its best-before date, one more aligned with the 19th century than with the contemporary political environment and the appropriate place of charitable advocacy within that environment. It is restrictive rather than facilitative. We need, I would argue, a new relationship between the Government of Canada and charities that includes new terms of engagement for policy advocacy that reinforce the important role of charities in the contemporary public policy world.

Who should drive this transformation, and who should provide the resources to do so? Here we confront a frustrating irony. Advocates such as myself call for greater action across many fronts while seeming to ignore that a characteristic of the charitable in Canada "is a lack of sector infrastructure, notably the national umbrellas, federations, and research organizations that serve, coordinate, and represent their member interests" (Philips, 2011:218). In short, the sector "lacks decent lobbying capacity to mount any campaign for reform," including reforms that would strengthen the advocacy voice of the sector!

The charitable sector can build the case for reform and help create momentum, but ultimately it is governments that will have to act, and it would be unrealistic to expect rapid action from a new government. Reforming charities law and tax policy would be difficult and contentious, and would not be a high priority compared to the issues of economic management, Aboriginal relations, national security, health care, tax reform, and childcare.

But if we conclude that a structural problem does exist, that the system is indeed broken to the point that Mr. Harper's departure will not provide a fix, then the challenge remains as to how any government can be convinced to make it a priority to modernize the charities regime.

A modernization agenda will not emerge from within the federal government. [7] It will have to be driven from the outside, and it is not clear that the sector is willing or able to take on the task. Those charities most chagrined by the "political activities" audits may now direct their energies to their core issues, whether climate change or poverty reduction or what have you, which will

overshadow the need to change the *Income Tax Act*. Perhaps unwittingly, Mr. Harper has been the Grand Marshall of the modernization parade, and it is uncertain what will happen now that he has left the field.

Fortunately, this is not all bad news. Patience may buy charities good will with the government while also providing them time to get organized:

- we need time to recruit champions to lead the modernization charge.
- the charitable sector lacks a consensus proposal to present to the federal government. Yes, we can dust off the proposals from the Broadbent Panel, but they will have to be evaluated, updated, and walked through the community.
- the case for greater policy advocacy will have to be strengthened and refined. Although the *Talking About Charities* surveys indicate a good deal of abstract public support, this has to be tested with the larger electorate.
- the argument may be encountered that policy advocacy is less necessary now because under the big tent Liberal government, everyone is already inside the tent. Advocacy could be seen as irrelevant or even suspect.
- the government will demand that any proposal or set of proposals be tested against the community so that it will not be caught up in firefights with charities or provincial governments.
- there will be a need to link the modernization of charity legislation to the middle-class constituency that dominates Liberal rhetoric.
- linkages will have to be forged between the modernization agenda and the government's democratic reform agenda.

Further, it is difficult to imagine public enthusiasm for such a distracting initiative by the new government. The public case for modernization, and for major changes such as the removal of charities regulation from CRA, has not been made. Moreover, the charitable sector itself is a long way from agreeing on the need for and nature of reform. A sensible approach by government would be to say, "Come back in a decade when you have your act together, when we have the economy back on course and international terrorism has been defeated." The country at large is not ready for a "big" debate on the relationship between charities and the Canadian state, and thus smaller steps may seem to offer greater promise.

And yet, if the argument made in Call to Arms is convincing, there is no choice but to embrace the opportunity provided by the Liberal win, and to aim high. Justin Trudeau's government has opened the door to a new relationship between charities and the government of Canada, and it would be a missed opportunity - a once in a generation opportunity - if charities fail to walk through the open door, if they resist this call to arms.

What, then, are the next steps? Max Bell Foundation is hosting a consultation on these issues in the spring of 2016. An in-person event will be held in May in Calgary designed to explore and firm up a modernization agenda. In parallel with that event, the Foundation is soliciting input on modernization options, and to that end a short questionnaire has been linked to this article. Readers are invited to wade into what should be an exciting and important debate on the future relationship between charities and the Canadian state.

(Please note that the survey is now closed.)

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Endnotes

[1] Both contributions draw heavily from Roger Gibbins, Call to Arms: Policy Advocacy and Canadian Charities. Calgary: Max Bell Foundation, 2016.

[2] See http://thephilanthropist.ca/2015/07/a-chilly-time-for-charities-audits-politics-and-preventing-poverty

[3] The identical wording was one of the 27 priorities laid out in the Prime Minister’s mandate letter to the Minister of Finance.

[4] For a discussion of internal constraints on policy advocacy, see Call to Arms, Chapter 4.

[5] In the UK the 1998 Compact on Relations between Government and the Voluntary and Community Sector did just that, creating a principled framework upon which a new relationship could be built.

[6] See http://thephilanthropist.ca/2009/12/overview-from-canada-modernising-charity-law/

[7] The absence of any reference to modernization in the 2016/17 federal budget is a concern in this respect.