Human Rights and Charity — Regulatory Challenges

This article is the fifth in a series on Poverty and Human Rights in Canada.

SUMMARY: This article addresses the regulatory challenges posed by human rights approaches to charity, focusing specifically on the charity/politics distinction. It develops a simple point, which is that Canadian charity law is currently ill equipped to apply the charity/politics distinction in the context of human rights advocacy.

RÉSUMÉ: Cet article aborde les défis en matière de réglementation qui sont posés par les approches fondées sur les droits de la personne en ce qui a trait aux organismes de bienfaisance. En mettant surtout l'accent sur la distinction entre organismes de bienfaisance et politiques, on développe un point très simple : la législation canadienne régissant les organismes de bienfaisance ne permet pas actuellement de faire la distinction entre organismes de bienfaisance et politiques dans le contexte de la défense des droits de la personne.

Human rights and charity

It is not surprising that charities generally, and relief of poverty charities specifically, often conceive of their charitable missions as human rights missions. Charity and human rights are fellow travellers in many obvious ways. Proponents of the two share, among other things, a belief in the intrinsic worth and dignity of every individual person, a commitment to redressing disadvantage, and a general sense of compassion for, and duty to, others. At a high level of abstraction, charity and human rights work are both ultimately concerned with the same thing: "doing good" – or so they are instinctively understood.

However, despite the overlap between charity and human rights, the two remain discordant in some key ways. Human rights entail enforceable claims or entitlements. This is what qualifies them as "rights." A rights-holder is, by definition, a person with an enforceable claim or entitlement to something from someone. In the specific context of constitutionally protected human rights, this plays out as rights-bearing citizens enjoying certain rights against the state. Charity, on the other hand, does not and cannot entail a right or entitlement to anything from anyone. Charity is about benefaction – the voluntary choice to share. A belief in the universal and intrinsic worth of every person might compel the charitably minded to feed and clothe the poor but only in an unenforceable moral sense.

Since the truly charitable act proceeds from the voluntary choice to share, bestowing charitable benefaction is no more the fulfilment of anyone's formal human rights than withholding it is a violation of them. This is precisely why some have criticized charity as an inferior way of securing the rights of citizenship in a democratic society.[1] Since charity can be lawfully withheld for any reason, it is not a right.

The more difficult issue is whether, or to what extent, the logic works in the reverse: if charity is not itself a human right, does it follow that charities approaching their missions as human rights missions are non-charitable? The mere fact that a charity conceives of and/or markets its programming as a vindication of human rights poses no incompatibility whatsoever with

charitable status, at least not when human rights are asserted as mere affirmations of the intrinsic worth and dignity of all persons. The situation is more complicated when charities invoke human rights as formal rights against the state, for example, where a charity draws on constitutionally protected human rights as a basis for advocating that the state be formally obligated to effect some change to law, policy or administrative practices. Once human rights are used in this way as advocacy tools, it becomes necessary to consider the distinction drawn by the doctrine of political purposes between charity and politics.

Charity versus politics

It is well established under Canadian law that any institution established or operated for the purpose of securing a change to law in Canada (or beyond), or to the policies or administrative practices of a domestic or foreign government, is political and thus non-charitable.[2] This does not categorically forbid charities from advocating for reform to law, policy or administrative practices of governments.[3] It does, though, prevent charities from engaging in this kind of advocacy to such an extent that reform can be regarded not as an incidental undertaking, but rather as a purpose. It follows that a charity risks being labelled "political" – and thus non-charitable – if it pursues its mission either solely or even predominantly by advocating that governments behave (or not) in some particular way.

The question for present purposes is how, if at all, things change when charities frame their advocacy as a defence of human rights. Given the overlap between charity and human rights, does human rights advocacy receive special treatment under the doctrine of political purposes?

The traditional legal stance has maintained that human rights advocacy is no more charitable than advocacy framed as merely preference for a specific policy (or policies). A well-known case in the UK, *McGovern v. Attorney General*,[4] concluded in 1982 that the human rights-oriented aims of the Nobel Peace prize-winning Amnesty International Trust, which included abolishing torture, were political rather than charitable. The House of Lords reasoned that, since Amnesty's stated purpose of abolishing torture could only be achieved through law reform, it followed, in the view of the Court, that Amnesty was expressly founded for the purpose of changing the law. The human rights orientation to Amnesty's mission made no difference because, on the reasoning of this decision, any purpose demanding law reform is necessarily political rather than charitable.

However, much has changed in the decades since this decision. I will confine my comments here to two related developments: (1) recognition by the Canada Revenue Agency (the CRA) that upholding human rights can be charitable in CRA Guidance CG-001[5] and (2) the holding of the UK First-Tier Tribunal in *The Human Dignity Trust v. The Charity Commission*.[6]

Upholding human rights - CRA Guidance CG-001

In CRA Guidance CG-001, the CRA takes the position that "upholding human rights" is charitable when it involves "activities that seek to encourage, support, and defend human rights that have been secured by law, both in Canada and abroad."[7] According to the CRA, this includes efforts "to clarify the status of particular rights."[8] However, it is no longer charitable, in the view of the CRA, once this morphs into advocacy for the "establishment of new legal rights at the domestic or international level."[9] The implication is that the boundary between charity and politics, at least in the specific context of human rights advocacy, parallels the boundary

between clarifying the status of existing rights and establishing new rights, respectively.

In some instances, it will be readily apparent on which side of this divide a charity's human rights advocacy falls. For example, a relief of poverty charity advocating for, say, the adoption of specific economic rights through a constitutional amendment to the *Charter of Rights and Freedoms,*[10] or legislative reform to human rights codes, would seem to be advocating for new human rights and thus acting non-charitably – at least in the view of the CRA.[11] But what if the charity instead opts to work within the existing framework of human rights by advocating in favour of progressive interpretations of protected human rights?

For example, a relief of poverty charity might advocate before a court or legislature that an existing right protected under the *Charter of Rights and Freedoms* can be interpreted as imposing a positive obligation on the state to take specific steps to alleviate poverty. How should such advocacy be characterized? Is advocating in favour of a progressive interpretation of an existing right tantamount to the establishment of a new right (and thus political) or merely the clarification of an existing right (and thus charitable)?

The answer to this question is of considerable importance to charities pursuing their missions as human rights missions. If testing new interpretations of existing rights is merely to clarify the status of particular rights, it follows that charities enjoy an enormous freedom to advance their charitable missions through exploratory human rights advocacy. To be sure, practically every charity that has to date been found to have a political purpose under Canadian law could reframe its advocacy for reform as exploratory human rights claims under existing sources of human rights law, for example the *Charter of Rights and Freedoms*, human rights codes and international treaties to which Canada is a party. If such advocacy falls within the charitable purpose of upholding human rights, it follows that charities can avoid being characterized as political not necessarily by avoiding advocacy, but by carefully framing advocacy as a defence of human rights.

So far no Canadian court has specifically considered whether (or when) human rights advocacy is exempt from the doctrine of political purposes. However, the recent decision of the UK First-Tier Tribunal in *The Human Dignity Trust v. The Charity Commission*[12] contemplates an enormous (arguably excessive) latitude for charities to engage in human rights advocacy.

The Human Dignity Trust v. The Charity Commission

To facilitate discussion of the holding in *The Human Dignity Trust v. The Charity Commission* ("*Human Dignity*") it is important to provide some background context surrounding the charity/politics distinction, specifically the rationale behind this distinction. The distinction between charity and politics, as rationalized by courts, rests almost entirely upon an appeal to "neutrality."[13] In brief, courts have posited that they must remain neutral on whether political purposes do – or do not – meet the public benefit requirement for charitable status. Notions of parliamentary supremacy are at the heart of this reasoning. Courts should not comment on the public benefit of law, policy or administrative reform, so the reasoning goes, because this would inject them into what is the exclusive law- and policy-making domain of legislatures.

So it is not that advocacy for law, policy or administrative reforms are specifically found to be non-charitable on the basis that they necessarily lack public benefit. The non-charitableness of political purposes instead results from the failure of courts to make *any* finding – in favour of, or

against – the public benefit of such purposes. Since "no comment" on the issue of public benefit is inadequate for charitable status, non-charitableness is the result by default. Very little would be lost if we summarized these cases as establishing that political purposes are by definition those purposes in relation to which courts have posited they must maintain a neutral stance on the presence or absence of public benefit.

This reasoning does not require that charities avoid advocacy *per se,* but rather incentivizes them to frame their advocacy in ways that strategically sidestep the perceived need for neutrality. If deference to Parliament is what leads to the need for a neutral stance regarding public benefit, and if a neutral stance regarding public benefit is what leads to the political label, then the political label can be evaded by sidestepping the need for deference to Parliament. One obvious strategy is for charities to reframe advocacy for reform as human rights advocacy. Given the legitimate role that courts play in the interpretation and enforcement of human rights, it would be difficult for courts to sustain the idea that they are categorically forbidden from commenting on the presence or absence of public benefit in the context of human rights advocacy. Even accepting the dubious proposition that deference to Parliament normally requires that courts maintain a neutral stance on the merits of advocacy causes,[14] it clearly does not here.

This very issue came before the UK First-Tier Tribunal in *The Human Dignity Trust v The Charity Commission*.[15] At issue in this case was the charitableness of a trust – the Human Dignity Trust ("HDT") – established and operated to engage in constitutional human rights litigation. Specifically, HDT brought constitutional challenges against laws criminalizing same-sex relationships in various jurisdictions around the world. The Charity Commission took the position that HDT (among other things) had a political purpose. HDT maintained that it was established for the charitable purpose of advancing human rights.[16] The UK First-Tier Tribunal concluded that HDT was charitable at law. On the charity/politics distinction, the Tribunal reasoned as follows:[17]

It seems to us that the constitutional process involved in *interpreting and/or enforcing* superior constitutional rights might, on one analysis, be seen as *upholding the law of the state* concerned rather than changing it…

The premise for this reasoning was that the usual concerns over preserving neutrality do not apply in the context of human rights-based advocacy because there is a "legitimate role for the court in interpreting and enforcing superior constitutional rights."[18] In the view of the Tribunal, the usual concerns over the institutional neutrality of courts are "limited to the consideration of a specific constitutional context in which there is a separation of powers with Parliamentary supremacy."[19]

Given the fundamental nature of the rights at stake in *Human Dignity*, concerns over mere policy preferences masquerading as specious human rights claims were muted in that case. But even still, the Tribunal's reasoning contemplates a remarkably low threshold for a human rights-based exemption from the rule against political purposes. To be sure, the Tribunal reasoned that "interpreting and/or enforcing" human rights is charitable.[20] While "enforcing" human rights confines this kind of advocacy to well-established understandings of rights (and thus has the potential to filter out political agitators), the same cannot be said of merely "interpreting" human rights. The Tribunal's seeming acceptance of the charitableness of "interpreting" human rights suggests that it is charitable to participate in the interpretive process through

which the content of human rights is discovered. On this view, the particular interpretations of human rights advanced by applicants for charitable status are not controlling considerations. What appears to matter most is that the meanings of human rights are being discovered through participation in the interpretive process.

Regulatory challenges posed by human rights advocacy

The issues dealt with in *Human Dignity* will inevitably come before the courts in Canada. How will Canadian courts respond? Will they adopt the same reasoning and effectively exempt human rights advocacy from the usual rules restricting political advocacy? Should they?

If Canadian courts follow *Human Dignity*, they should do so with the candid acknowledgment that they would be formalizing a rule under which charity law would treat human rights-based advocacy more leniently than practically all other forms of advocacy. More specifically, they would be affirming that the reference point for determining whether any given institution is acting charitably or politically would not, as is currently the case, be whether, and if so, the extent to which, reform was being advocated, but would instead be the particular basis on which charities advocated reform. Reforms advocated as human rights claims would be charitable and all other forms of advocacy would remain at risk of being labelled political.

This would raise some intractable regulatory challenges.

A broad exemption for human rights advocacy would ultimately undermine the rule restricting political advocacy by charities. This is not to suggest that human rights are themselves political. It would, though, be naïve to ignore that practically any reform could be framed as a specious or exploratory human rights claim. We can agree that apolitical conceptions of human rights are possible without having to rule out the possibility that politically motivated conceptions of human rights are also possible. One might say that the craft of rights interpretation draws on the ability to distinguish the two. So if the charitableness of all advocacy couched as a defence of human rights is uncritically accepted by Canadian courts, human rights advocacy will enable a sweeping exception to the doctrine of political purposes. The law cannot simultaneously accept that purposes necessitating law reform are political but human rights advocacy is unquestionably charitable. The latter proposition all but ensures that the former will in the fullness of time be robbed of practical relevance.

Given the sustained criticism that the doctrine of political purposes has attracted,[21] the above concern might ring hollow. If the doctrine of political purposes lacks consensus, why should we care if an exemption for human rights advocacy has the potential to undermine the doctrine? One reply is that an exemption for human rights-based advocacy will predictably result in charities disproportionately pursuing reform through human rights litigation before courts. This is because judicial review before courts is the traditional process through which human rights are interpreted and enforced. But judicial review is the least democratic and least participatory form of lawmaking. So even accepting that the rules against political advocacy by charities should be relaxed, it is not obvious that this is the form of advocacy we should aspire to enable to the exclusion of others.

But the most fundamental challenge posed by human rights advocacy is that it invites, if not necessitates, a re-imagination of the charity/politics distinction. The holding in *Human Dignity* ultimately rests on the correct, but not especially helpful, finding that courts need not

remain neutral as to the merits of competing interpretations of human rights. As we have seen, this enabled the conclusion that the neutrality rationale normally relied upon by courts to explain the charity/politics distinction does not necessarily apply in the context of human rights. While there is merit to this reasoning, it misses the point.

Human Dignity does not offer a principled reason to explain why and/or when human rights advocacy should enjoy special treatment in the law of charity. Instead, it exposes a fault line underlying the charity/politics distinction. Having historically emphasized a procedural impediment – the need for neutrality – to the charitableness of political purposes, courts have not, to date, provided much, if any, guidance for those advocacy organizations – such as human rights institutions – in relation to which the need for neutrality is either altogether absent or muted. If Parliamentary supremacy was the impediment to purposes such as law reform qualifying as charitable, then how do we draw the distinction between charity and politics once that impediment is removed?

Superficial appeals to the legitimate role that courts play in the interpretation and enforcement of human rights leave this question unanswered. True, courts need not remain neutral on the relative merits of competing interpretations of human rights. But this does not somehow displace the need to determine whether any given human rights organization actually possesses the character of a charity. It is in relation to this issue that the absence of a substantive basis for distinguishing charity from politics has now become readily apparent. What is needed is something currently absent from charity law: a principled and substantive explanation for the charity/politics distinction. The continued absence of such an explanation will frustrate the law's ability to distinguish charitable from non-charitable human rights advocacy.

[1] See N. Brooks, "The Tax Credit for Charitable Contributions: Giving Credit Where None is Due" in J. Phillips, B. Chapman and D. Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada* (Kingston: McGill-Queen's University Press, 2001), 457 at 474.

[2] See, for example, A. Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 Alberta Law Review 871; L. A. Sheridan, "Charitable Causes, Political Causes and Involvement," (1980) 2(4) Philanthropist, 5; P. Michell, "The Political Purposes Doctrine in Canadian Charities Law" (1995) 12(4) Philanthropist; James Phillips, "Crossing the Line from "Charitable" to "Political"" (1995) 12(4) Philanthropist 33-37; Ontario, Law Reform Commission, Report on the law of charities (1996), chapter 18, Specific Areas of Regulatory Concern: Fundraising, Investments, Political Activity, and Privileges, online: Mount Royal University.

[3] One of the fundamental challenges posed by the doctrine of political purposes is that there is no bright line rule for determining precisely when advocacy activities become purposes in themselves. For the Canada Revenue Agency's administrative position on this issue, see "Political Activities," Canada Revenue Agency, CPS-022, September 2, 2003.

[4] *McGovern v. Attorney-General* [1982] 1 Ch. 321.

[5] See "Upholding Human Rights and Charitable Registration", Canada Revenue Agency, CG-001, May 15, 2010.

[6] CA/2013/0013.

[7] *Supra* note 5, section 3.2.

[8] *Ibid*.

[9] *Ibid*.

[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter of Rights and Freedoms*").

[11] *Supra* note 5, section 7.1.1.

[12] *Supra* note 6.

[13] For a detailed explanation, see A. Parachin "Charity, Politics and Neutrality" (2015-2016) 18 Charity Law & Practice Review 23-56.

[14] One notable flaw with this proposition is that it takes for granted that finding public benefit in a particular advocacy organization is tantamount to endorsing to Parliament (and the public at large) the specific reforms sought by that organization. This assumption was specifically called into question in *Aid/Watch Incorporated v. Commission of Taxation* (2010) 241 CLR 539. A majority of the High Court of Australia reasoned at paragraph 45 that public benefit may be found not in the discrete reform being advocated by a charity but rather in the public debate fostered by that charity's participation in the democratic process.

[15] *Supra* note 6.

[16] In the UK, the advancement of human rights is a charitable purpose under para 3(1)(h) of the *Charities Act 2011*, 2011 c. 25.

[17] *Supra* note 6 at para 99 (emphasis added).

[18] *Ibid*., at para 96.

[19] *Ibid*., at para 96.

[20] *Ibid*., at para 99.

[21] See, for example, *supra* note 2 and note 13.