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# Charitable Sector Gradually Adjusting to a New Regulatory World that Allows Unlimited Engagement in Public Policy Dialogue

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*Editor's note: This is the [first piece in a series about advocacy](#) work in our sector. How charities and non-profits engage in policy and political advocacy has been an important topic of conversation for some time, and one *The Philanthropist* has engaged in through past writing, including a short series in 2016. The recent legislative change removing limits on the amount of public policy advocacy permitted at Canadian charities presents a good opportunity to revisit this issue and see how organizations are adapting to this new regulatory reality. Additionally, the current COVID-19 crisis underscores the sector's vital role in this space and illustrates the importance of continuing to build capacity so we can do this meaningful work. Our ability to be advocates, both as individual organizations and as a collective, is more important than ever.*

When the Toronto Foundation released its 14th [Vital Signs](#) report last October, the influential annual survey of the city's key socio-economic indicators contained a few new features. While in previous years the report included existing research from a range of civil society organizations, the 2019 edition featured a deeper dive, with assessments of data that aren't readily available. It included more than 600 citations, drew on interviews with more than 100 people and referenced almost 300 reports.

But, as Julia Howell, the foundation's vice president of community engagement, points out, the key difference from previous reports was its stance: unlike earlier years, it compiled policy ideas generated by the service and community organizations that contributed to the report – a discrete

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but notable change. “In the past, we would never have included policy recommendations,” she says. “We would have been concerned about crossing the line.”

Meanwhile, in Alberta, the Pembina Institute, which has spent [much of the past year](#) in the crosshairs of Jason Kenney’s United Conservative Party, made a similarly subtle change in its structure. Like a number of environmental organizations, the clean energy advocacy group, on the advice of its lawyers, had operated for several years as a two-headed entity: a non-profit arm, that carried out its advocacy work, and a foundation, that administered Pembina’s charitable work and issued tax receipts to donors. It’s a model used by other groups, including Earthroots, an environmental advocacy organization originally known as the Temagami Wilderness Society.

Simon Dyer, Pembina’s executive director, says his board opted to collapse the two entities last January, meaning that the group now operates entirely as a registered charity. The bifurcated structure, he says, was no longer necessary.

In BC, EcoJustice, a charity that mounts court challenges related to environmental issues, has in recent months begun fundraising to add two or three more people to its law and policy reform group, which oversees its advocacy work. While EcoJustice’s main focus remains litigation, Executive Director Devon Page says that bulking up its policy shop will make the group more effective. “We can better achieve our mission by being engaged with public officials about law reform without worrying about an arbitrary constraint.”

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Why the change? In all three cases, these moves can be seen as early evidence that Canada’s charitable sector is adjusting – very gradually – to a new regulatory world in which the Canada Revenue Agency (CRA) no longer concerns itself with the time and money charities dedicate to “political activities.”

The question is, do these individual examples indicate a pivot in the way Canadian charities engage in public policy dialogue, or are they outliers?

This question may be evolving very rapidly. When I first reported this story early in the new year, there wasn’t much evidence to suggest a sea-change. But then the COVID-19 pandemic hit, and individual charities, especially those delivering vital services to vulnerable individuals and communities, became much more outspoken about what they would need from governments in order to survive and continue doing the work they do. For many groups, it now seems, political advocacy is no longer a communications strategy or an engagement tool; it’s become a matter of survival.

None of this comes naturally. For decades, registered charities had to adhere to the so-called “10% rule” for political activities; those that exceeded the threshold – a tenth of all expenditures – could lose their charitable status. For the vast majority, which don’t do any advocacy, the rule made no difference. Others that do rarely came close to the 10% threshold, so adhering to the rules simply meant tracking hours diligently, says Child Welfare League Executive Director Rachel Gouin, who had to comply with the law during her seven-year stint as director of

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research and public policy for the Boys and Girls Clubs of Canada. “I was never stressed about it.”

But over the past five years, a shift in the political climate, combined with a landmark legal ruling in 2018, upended that status quo. As of January 2019, the CRA formally replaced the 10% rule with the *Public Policy Dialogue and Development Activities by Charities* guidance, aka [PPDDA](#).

The regulatory reform couldn't be clearer: “As long as a charity's PPDDAs are carried on in furtherance of its stated charitable purpose(s),” CRA says, “the Income Tax Act places no limits on the amount of PPDDAs a charity can engage in. In this context, a charity may devote up to 100% of its total resources to PPDDAs that further its stated charitable purpose.”

The new law, in effect, has eliminated the administrative overhead involved in tallying up staff time and figuring out whether the CRA might deem something as ordinary as a press conference or a tweet as political activity. In some organizations, the new rule produced a financial dividend.

News of this shift has spread very gradually. “We were in such a routine that it took time to realize we didn't have to do it anymore,” reflects Gavin Charles, policy team lead at the Canadian Council for International Co-operation, which is both a charity and the umbrella organization for Canadian aid agencies. Adds Gouin, “I wonder how many people understand fully all the different changes.”

Nor is the change just about streamlined reporting. By some accounts, this policy reform – now in its first full year – marks a philosophical turning of the page in terms of the way charities can speak to both governments and the public at large

Critics like Toronto tax lawyer Mark Blumberg warn that the end of the 10% rule could usher in an era of more conspicuously political charities modeled on US think tanks bankrolled by wealthy philanthropists with hardcore views and a desire to influence decision-makers. He cites the case of a [wealthy banking heiress](#) who used much of her US\$500 million inheritance to bankroll militantly anti-immigrant advocacy groups – a sustained investment that found a political patron in the era of Donald Trump. But such developments don't happen overnight, Blumberg adds. “We will know in five to 10 years what is the impact of this change.”

While the age-old prohibition on charities participating in partisan activities remains in effect (although it's not explicitly cited in the Income Tax Act), Canadian civil society groups no longer have to fret about how much of their time and resources are devoted to advocacy and organizing. They don't have to waste time, as Howell points out, figuring out how to deploy euphemisms to mask the expenditures used to support these activities. “I feel like people have gotten to a place where we'll all be a little more grown up now,” she says. “We can have more grown-up conversations and we don't have to worry about the tone of our communications with government.”

Bruce MacDonald, CEO of Imagine Canada, believes it's too early to tell if the PPDDA era will trigger sudden changes in the way charities – both advocacy-oriented groups and those

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involved in service delivery – carry out their work. He says he hasn't seen many instances of charities changing their budgets or approaches as a result of the new rule. "This is a big ship to turn."

Other experts add that long-standing financial relationships between service-oriented charities and the governments that fund them still discourage the former from being more outspoken about policy reform. Absent a "paradigm shift," says Peter Elson, an adjunct assistant professor of community development at the University of Victoria, "I think you're going to see the status quo."

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In Commonwealth nations, charity law traces back to a 1601 act of parliament, passed after British MPs moved to clamp down on the misuse of funds donated to charitable trusts. Charities at the time were seen as a means of reducing the tax burden associated with delivering relief to the poor. But the [Statute of Charitable Uses](#) set out a long list of other eligible activities, including relief for the elderly and injured veterans, funds for schools, infrastructure, orphanages, and jails, support for tradespeople, and the "redemption" of former convicts.

Westminster's legislative framework endured for almost three centuries, until an 1891 legal ruling streamlined the purposes of charity to include the relief of poverty, the advancement of education, the advancement of religion, and the advancement of other purposes beneficial to the community. As a [2011 paper](#) by George Williams, dean of the law school of the University of New South Wales, notes, subsequent legal rulings made it clear that charitable donations couldn't be used for "the attainment of political objects," including the promotion of changes in the law.

In the intervening years, common law and layers of regulation produced various interpretations of this principle in the UK, Australia, and New Zealand. The Canadian government's answer was the 10% rule, which ensured that most of the money raised by charities would be used for charitable activities and not political activities.

Canada's regulatory environment also featured ambiguities in the interpretation of the phrase. The CRA, for example, didn't regard funds spent on meetings with elected officials or appearances before parliamentary committees as political activities, but other forms of advocacy or organizing could be counted – for example, a media release following a deputation to Parliament. "Canada was at the far end of being restrictive," says Susan Phillips, a professor at Carleton University's School of Public Policy and Administration. (The vast majority of Canadian charities, including those with a strong advocacy orientation, didn't come close to the 10% threshold.)

Legal pressure on such restrictions began to build in the 2000s, Phillips says. In 2006, [Aid/Watch](#), an Australian development watchdog group, had its charitable status revoked in response to a campaign that sharply criticized the Australian government's policies. That decision, Williams writes, sent "shockwaves" through Australia's charitable sector, producing a chilling effect on advocacy.

After a series of appeals, Australia's highest court ruled that Aid/Watch's campaigns were not only protected by constitutional guarantees of freedom of expression but could also be seen as

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consistent with the longstanding principle that charities may be engaged in furthering community welfare. The act of “agitation” for political change, the court held, should be seen as benefiting Australian society. “The Aid/Watch case represents a good outcome for Australian democracy,” Williams commented. “It means that a range of charitable organizations can take part in public debate with greater freedom and confidence.”

Phillips also points to a [2014 ruling](#) involving Greenpeace New Zealand, which had applied for charitable status but was turned down by the Charities Registration Board. After a series of appeals, New Zealand’s high court ordered the board to reverse its decision, arguing that “a political purpose exclusion should no longer be applied in New Zealand.” Phillips says both countries have had more liberalized rules governing the political activities of charities ever since these rulings. (Greenpeace Canada remains a [non-profit](#), not a registered charity.)

The evolution in the legal environment in Australia and New Zealand contrasted sharply with political developments in the UK and Canada. In Britain, politically-connected charity regulators [pressured](#) the venerable Joseph Rowntree Charitable Trust over grants it made to an organization that sought to rehabilitate former Guantanamo Bay inmates.

Here, Stephen Harper’s Conservatives in the early 2010s set up a political activities audit group within CRA – a move that produced a chilling effect on advocacy-oriented charities. In 2015, the Liberals ran on a promise to end those audits. After winning a majority, their campaign pledge was included in ministerial mandate letters. In September 2016, the government established an expert panel to investigate the policy governing the political activities of charities.

While the expert panel was doing its work, a small advocacy group in Ottawa, Canada Without Poverty (CWP), moved to challenge the conclusions of a CRA political activities audit that found the organization had exceeded the 10% threshold. Because CWP was focused entirely on shifting the political climate within which policies about hunger, housing, and poverty are promulgated, the audit found that virtually all its activities contravened the Income Tax Act rules.

Lawyers for CWP, however, argued that the charity had never represented itself as doing anything other than using donations to advocate for political change. The case made its way to the Ontario Superior Court of Justice. The court [ruled](#) in July 2018 that CWP “has a right to effective freedom of expression” which wasn’t limited by Section 1 of the Charter.

The federal government opted not to appeal, and then adopted the [recommendations of the expert panel](#), which issued its report just months after the CWP ruling. The upshot, says Phillips, is that Canadian charities can now be more transparent about their advocacy activities. “There’s an advantage to be able to show that’s what you’re doing.”

Yet Canada’s move away from explicit restrictions on the political activities of charities differs in two important ways from what happened in Australia. First, the CWP case didn’t reach the Supreme Court, which means it’s possible that another government, with different views on the political activities of charities, could find a way to re-open the case, or one like it, and seek a definitive decision.

Second, the reasoning in the CWP case, unlike Aid/Watch, is limited to issues of freedom of expression. In the Aid/Watch case, the Australian high court established a clear connection between the advocacy – “agitation” – carried out by a charity and the health of Australian

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democracy generally. By raising money to advocate for policy reform, the Australian justices ruled, charities are fulfilling a core duty that's been central to the legal framing of philanthropy law for more than 400 years: they're involved in an activity that benefits the community.

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In the lead up to last fall's federal election, many in the charitable sector were shocked when news reports surfaced about a strange warning issued by an Elections Canada official. Given that People's Party of Canada leader Maxime Bernier had expressed doubts about climate change, Elections Canada cautioned organizations about discussing the issue in advertising because such messaging could be interpreted as a partisan attack on the party. Some charities also grew concerned that registering as a third party during the campaign period, as Elections Canada requires of organizations that spend money to get their message out, would be seen by CRA as evidence of partisanship.

Government officials soon put out a clarification. "Registering as a third party means that the charity will be subject to reporting requirements and spending limits on its election advertising activities with Elections Canada," noted a document prepared by tax officials for Imagine Canada. "For CRA's purposes, however, a charity would not jeopardize its charitable status solely on the basis of this registration."

MacDonald, however, worries about the ripple effect of this episode. "Those who were nervous [about engaging in political activities] and were starting to feel better got nervous again. Is it safe to go back into the pool?"

For Alberta charities, the Kenney's government's inquiry into the flow of foreign funding into the province's philanthropic sector seemed to double down on the ambiguities related to the contradictions in the post-10% rule era and tougher third party advertising rules in the Elections Act. "It hasn't been helpful to be subject to a misinformation campaign," says Pembina's Dyer. But, he says, the organization will continue to work with government, the energy industry, and the academic sector to advance solutions and research on climate change. (Dyer points out that government lawyers involved in Alberta's court challenge to the federal carbon tax actually cite Pembina research in their legal briefs.)

It's worth noting that for thousands of other Canadian charities, from giant hospital and university foundations to tiny local amateur sports groups, the high-voltage debate over PPDDAs and political activities is almost entirely beside the point. What's more, for service delivery charities – from affordable housing providers to home care agencies – the main challenge in speaking out about policy was always much more about biting the hand that feeds than running afoul of CRA's rules, observes Devika Shah, executive director of Social Planning Toronto. "That's exactly what the concern is." She adds that government grants to such groups are intended to be spent on service delivery, not advocacy.

Even for those charities that might dip their institutional toes in the world of public discourse, she adds, a great deal of confusion remains about what is and is not partisan. "There's this huge gap in understanding as to what is allowable and what is not allowable."

In fact, Elson argues that it's unlikely that individual charities will become more directly outspoken in coming years because of the conventions of policy discourse in Canada (and

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elsewhere). When they seek advice or feedback, he notes, governments are far more likely to listen to sector-wide groups – from industry associations to federated organizations – that are seen to be speaking credibly on behalf of the interests of their members. He cites examples like the Ontario Nonprofit Network, which is not a charity but has become increasingly influential since it was founded in 2007. He also cites the example of the BC Non-Profit Housing Association, which took over contract negotiations with the provincial government on behalf of its many smaller members. “These organizations provide a collective voice,” says Elson.

For all these other dynamics, Howell nonetheless believes that the end of the 10% rule, and the associated stigmatization of non-partisan political activity, will gradually produce a more empowered charitable sector. Five years from now, she predicts there will be more evidence of cultural change and transparency. “We will finally be able to embrace the reality that government is an essential partner [to the charitable sector] and a lever that needs to be pulled.”