Viewpoint:

Crossing the Line from "Charitable" to "Political"

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This edition of *The Philanthropist* contains Paul Michell's excellent review of the origins and current status of the "political purposes doctrine". Coincidentally, it appears at a time when there is renewed interest in the relationship between political and charitable purposes, both in the charitable sector and in public debate more generally.

That debate was sparked by a full-page advertisement placed in the *Globe and Mail* of November 19, 1994 by a group called Human Life International (HLI). According to the advertisement, and to a subsequent article in the *Globe* (December 2, 1994), Revenue Canada is about to revoke HLI's charitable status and that of the Childbirth By Choice Trust (CBCT). Both organizations are concerned with abortion; HLI can be described as a "pro-life" group, CBCT as "pro-choice". The principal purpose of HLI's advertisement is to raise money for a court challenge to the revocation.

The HLI advertisement makes a number of arguments. One claim is that Revenue Canada's action represents "a direct assault on freedom of religion and freedom of speech". This is clearly nonsense. Revenue Canada cannot, and does not, do anything to hinder religious belief or practice or the speech of anybody. All it does in this context is to decide whether speech will be funded by the public purse. The misleading nature of this claim is revealed by HLI's failure to secure the support of civil liberties advocates.[1] A second, equally insupportable statement, is that "[s]tripping HLI of its charitable status will give Revenue Canada a foot in the door to attack any educational, religious or other non-profit group". Revenue Canada has "a foot in the door" already, the power and indeed the duty to decide whether an organization's purposes are charitable; it cannot and does not "attack" groups except when they no longer pursue charitable purposes.[2]

HLI's third claim, the only one pertinent to the legal issues at stake, is that its activities are charitable. According to its advertisement it is a "non-profit, Catholic educational organization", it provides "[f]rom a Christian perspective...educational research and information on traditional family life and values", and it offers "material help to families and children in need". Do these activities make HLI charitable?

An answer to this question must begin with a clear understanding of the law of charity. Charitable organizations must pursue charitable purposes. These include the relief of poverty, the advancement of religion and the advancement of education. It is perfectly possible for an organization primarily devoted to a charitable purpose to take part in activities that are political, provided those activities are only ancillary to its principal, charitable, purpose. These principles are easy enough to state, but they do not in themselves decide concrete questions; in particular, they do not tell us where the line is to be drawn between an organization that pursues charitable purposes partly through political activities and one where the political activities become too great an aspect of what the organization does, converting it from charitable to noncharitable. The Toronto Humane Society, for example, may lend some support to an organization bent on legislative restrictions on animal research, but it may not make this activity a significant part of what it does.[3]

From the information available in the two issues of the *Globe* cited above it is clear that HLI engages in a variety of activities, some clearly charitable under the current law, some clearly not charitable, and some either very much on the margins or unclear in the description. In the first category one would have to put the provision of "material help to families and children in need" as an aspect of the relief of poverty, working with children sold into sexual slavery and assisting prisoners (other purposes beneficial to the community), and various activities aimed at promoting Roman Catholicism (advancement of religion). In the second, noncharitable category, would be the distribution of "pro-life...educational material" that is intended to influence legislators. This includes sending postcards to MPs "showing the severed head of a well-developed foetus held between a pair of forceps",[4] an activity not mentioned, of course, in the advertisement. The fact that it provides some of its pro-life propaganda abroad does not stop that activity being considered political activity for the purposes of Canadian charities law.[5] Finally, we have some vaguely phrased activities about which more needs to be known. These include the provision of "pro-family educational material" and of "health-related information".

What Revenue Canada had to decide, and what the Federal Court of Appeal will have to decide, is whether the political activities of HLI have become of sufficient importance to make it essentially an organization devoted to political rather than charitable purposes. It is not possible at this juncture to know what the answer to this question will, or should, be. But four comments are worth making about this process and about the law in this area.

First, as already noted, it does not advance the debate to try to characterize it as one of freedom of speech or religion. That is simply irrelevant to the issue of which kinds of purposes should attract tax deductions for contributions to their

pursuit. If the Court bought that argument there would be no basis on which Revenue Canada could refuse an exemption to any advocacy or any activity carried out by a religious group. Here it should be remembered that the law of charity, through the political purposes doctrine, expressly makes distinctions between types of speech. Thus for the Court to conceptualize this as a freedom of speech issue, and to hold that Revenue Canada may not continue to make such a distinction, would be for the Court effectively to abolish, for religious groups, the rule that charities should not pursue political purposes.[6] If the Court did that we would probably see all kinds of advocacy groups "get religion". And perhaps in the long run, with the Court having told the government that it may no longer distinguish between political and other purposes when dealing with religious groups, we will see legislation removing the advancement of religion entirely from the purposes considered charitable. Some people would see this as a desirable result, but presumably HLI would not.

Second, and this is a similar point, HLI is very unlikely to get anywhere by basing its arguments on the idea that since it provides "educational material" or "information", it somehow comes under the charitable purpose of "the advancement of education". That would be tantamount to saying that any group advocating a cause can be charitable so long as it provides what it considers to be "information" to the public or to the legislature. By this standard the Parti Quebecois' "information" on the international law regarding the right to secession is educational material and therefore its provision is a charitable purpose. Not only is this a self-evidently ridiculous position, it is one that has been clearly rejected by the Federal Court of Appeal. The Court stated in *Positive Action Against Pornography* that "the presentation to the public of selected items of information and opinion on [a]...subject...cannot be regarded as educational in the sense understood by this branch of the law". That is, education was "the improvement of a useful branch of human knowledge and its dissemination", not the mere provision of information.[7]

Third, we should bear in mind the criticism made of the current law in Paul Michell's article, particularly that there is, at times, a lack of coherence to a legal regime which at one and the same time permits purposes which "advance religion" and prohibits those that are "political". Take those activities of HLI which purport to "advance family values", that is, which seek to persuade people, legislators and societies as a whole to adopt a certain way of thinking about a variety of issues to do with abortion, marriage, child-rearing, gay and lesbian rights, etc. Can we say that the propagation of ideas in this area, or of the entire notion that we should return to self-described "family values", is not "political"? The Christian Coalition and the Reform Party, among others, have surely made this a "political" issue. Yet the law of charity says that pursuing these themes is not a political purpose when done by a religious group but is a political purpose when done by secular organizations. This may indeed be a

valid distinction since religion encompasses much more than rite and dogma and invariably includes the propagation of values. My point is not to argue that religions should necessarily be restricted to spiritual matters if they wish to receive tax exemptions, but simply to note that HLI's arguments provide support for one of the points made by Michell.

My fourth point derives from the third, but is broader. It may well be time for Ottawa to undertake a thorough review of the principles by which it gives public money in the form of tax credits to a whole host of organizations designated by traditional Anglo-Canadian law as "charitable". There is talk of an assault on the charitable tax credit itself, talk that obviously has the voluntary sector very concerned.[8] If Ottawa is worried that it loses too much tax revenue in this way, reform of the system would surely be preferable to wholesale elimination of the tax credit. That is, the meaning of "charity" for tax purposes should perhaps be returned to first principles—support for food banks, homeless shelters, etc.[9]

The result, of course, would not only be that groups like HLI would be de-registered to the extent that their purposes do not conform to a new and limited range of what is charitable, so would many other organizations which pursue a wide range of purposes now considered charitable. Exactly how far-reaching any reform would or should be is a subject much too broad for this comment. My point here is that the debate over the tax credit is taking place, and the kinds of problems raised by HLI's alleged abuse of its religious status may well have added fuel to the fire.

FOOTNOTES

1. *Toronto Globe and Mail*, December 2, 1994.
2. The same principles apply to either side of the debate, of course. If CBCT is also principally concerned to advocate a certain legal regime on the abortion question, then it should suffer the same fate as HLI under the current law.
3 *Re Public Trustee and Toronto Humane Society* (1987), 40 D.L.R. (4th) 111 (Ont. H.C.). For a general distinction between "charitable purposes" and a charitable organization's "activities" see M. Cullity, "The Myth of Charitable Activities" (1990), 10 *Estates and Trusts Journal* 7.
4. *Globe and Mail*, December 2, 1994.
5. *McGovern* v. *Attorney-General*, [1982] Ch. 321, cited with approval in *Positive Action Against Pornography* v. *Minister of National Revenue* (1988), 49 D.L.R. (4th) 74 (Fed. C.A.).
6. The same would in fact be true for any charity, not just a religious charity.
7. *Supra*, footnote 5, at p. 80.

8. See "How will Canada pay for its charities?" by Martin Connell of The Canadian Centre for Philanthropy, *Globe and Mail*, November 29, 1994.
9. See a similar suggestion in S. Robillard, "Defining Religion" (1991), 45 *Conveyancer* 150 at 154: "...let them be tested by their deeds rather than their words". The most recent extensive English discussion of charities law does actually consider whether religion should be removed from the list of charitable purposes: *Charities: A Framework for the Future* (London: HMSO, 1989). While the idea was rejected, it is perhaps significant that it was even given serious consideration. [On narrowing the scope of what is considered charitable, see also D. Baker, "Rethinking Charity" (1991), 10 *Philanthrop.* No.1, p. 33.]