

Political Activities: A Charitable Dilemma

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The widely reported decision of the Department of National Revenue to de-register the Manitoba Foundation for Political Studies has re-awakened fears in the charitable community that many activities now undertaken by registered charities will have to be abandoned.

The foundation in question is best known in Canada as publisher of *Canadian Dimension*, a left of centre magazine with a circulation of about 8,000. The Foundation in question has appealed the deregistration to the Federal Court of Appeal¹ the court of first instance in such cases. This case, when it is heard, will be the first public hearing on the question of what types of activities may or may not be carried on by a registered charity in Canada without endangering its registered status.

If the foundation loses, the first consequence will be that the deregistration will stand and that all its assets will have to be turned over to another registered charity or be forfeit to the Crown.² But the further implication if Revenue is successful is that a wide range of charities will have to examine their “educational activities” to determine whether such activities are compatible with the status of being a registered charity.

Legislative Background

It is generally accepted as a matter of common law that charities can indulge in some “political” activities if these are secondary to their charitable objectives. The *Income Tax Act*, however, appears to apply a somewhat more stringent test.

If a charity is to be registered as a charitable organization, it must devote all its resources to charitable activities.³ If it is to be a foundation, it must be “operated exclusively for charitable purposes.”⁴ In other words, it would appear that to be registered initially and to retain its registration, both charitable organizations and foundations must refrain from all forms of political activity. The problem, however, is that it is not at all clear what is meant by the term political activities.

The problem is exacerbated when one considers that “education” is a valid charitable undertaking. Where many charities may run afoul of the law as determined by Revenue Canada is in the fact that their educational undertakings may be “political” in nature. While it appears quite clear and beyond debate that it would be improper for a charity to support a particular political party, what happens if it undertakes a campaign of “education” which focusses on a political issue which in turn is part of the platform of a political party?

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Currently, the possibilities abound. For example, the question of liberalized abortions, foreign control, trade with allegedly repressive foreign regimes, the seal hunt, mandatory retirement, the quality of education, censorship, women's rights and the nature of the tax system all appear to be issues upon which a charity might validly comment while at the same time each of these subjects can be construed as being "political".

The difficulty which the charities face is to determine whether they can in fact comment on issues of pressing concern and if so, what form of comment is acceptable. And can the comment in question be termed "educational" rather than "political".

A Recent History

While ostensibly the problem has always been with us, the issue leaped into the limelight in early 1978 when Revenue Canada issued an Information Circular, IC 78-3 which purported to set out the law (and did in fact set out Revenue Canada's views) on what forms of activity were acceptable and what forms were unacceptable. The Circular in question is reproduced as an appendix to this article.

When the charities learned of the issuance of the Circular, the screams were loud and long as it appeared effectively to forbid virtually any comment about public issues. Even writing a letter to the editor of a newspaper seemed to be forbidden.⁵

The issue was raised in the House of Commons and in the Senate. Finally, Prime Minister Trudeau announced that the Circular was being withdrawn, but he commented that the withdrawal would be of no consequence. What he appeared to mean was that if the Circular merely restated the law as it was understood, the question of whether the Circular was "outstanding" or not made not a whit of difference. While he was probably correct in law, his attitude did seem to soothe the fevered charitable brows. Revenue Canada indicated that the Circular would be rewritten and issued again, but more than two years later, this has still not happened.

But there has been a marked change in Revenue Canada's policy on the issue of political charities from the pre-1978 period. In effect, Revenue appears to have been operating in the post-withdrawal period in a fashion much more stringent than was previously the case.

An example may be drawn from the author's own experience.

A charitable organization was created as a non-share Ontario corporation. Its objects were to press for a "return to basics" in the educational system. Nothing on the face of the Charter nor in the by-laws, nor in the material submitted to Revenue Canada indicated that it intended to use a "political route" to achieve its ends. Rather, it intended to "educate" the public to the nature of the curriculum in the schools and to let nature take its course.

Revenue Canada refused to register the charity on the grounds that its objects could not be attained without indulging in political activity. Representatives for the charity pointed out that to do so would be a violation of its charter, by-laws and the *Income Tax Act* and thus would not take place. Revenue officials countered that while all this was true, it was possible for the charity to do things which were in fact outside the law.

In other words, Revenue Canada put the onus on the charity to prove the negative, to prove that it would not break the law. The charity, of course, could not fulfil such an onus and registration was denied. An appeal was filed with the Federal Court of Appeal but the matter was “amicably” settled before the case was heard.

Others have indicated to the writer that they too have found that Revenue was taking a hard line on registering charities which Revenue felt might have political overtones.

This is how matters stood until the Manitoba Foundation situation arose.

Canadian Dimension

Much of the information about the deregistration of The Manitoba Foundation for Canadian Studies has been gleaned from the popular press because Revenue officials have refused public comment. It is known, however, that they were looking for an appropriate case to test their understanding about the legal scope of “acceptable” political activities.

The issue seems to be centred on the question of whether *Canadian Dimension* is “educational” or “political.” In this instance, Revenue is standing on its interpretation that to be educational (and thus acceptable) all sides of an issue must be canvassed. *Canadian Dimension*, as even a casual reader will find, takes an unrelentingly “socialist” position and does not give space to the “capitalist” position. On the other hand, there are many articles to be found in the pages of *Canadian Dimension* which are non-political, and thus, ostensibly, educational.

The editor of *Canadian Dimension* has been quoted in the press as saying that the deregistration is a “crude attempt at political censorship”, more a statement of his political approach than a reasoned view of the implications of the case. Yet there is no doubt that *Canadian Dimension* presented a fat target for those who were searching for a test case on the issue.

An article in the *Globe and Mail* stated that the letter announcing the deregistration said in part that “it would appear that its goal is not to educate the reader in the sense of training the mind in matters of political science, but to promote a particular ideology.”

The Ramifications

If *Canadian Dimension's* deregistration is upheld by the Courts, it may turn out that the test case is not as significant as some believe simply because the

magazine appears to be an extreme case and thus, any judgement may be viewed as being *sui generis*.

On the other hand, if Revenue Canada is successful, it will mean that one criterion set out in its withdrawn Circular has been upheld and the next likely step will be to try on some of the other tests set out. Further, given that *Canadian Dimension* is an extreme case, Revenue may start looking at harder cases to try to narrow down the parameters.

Some churches are seriously concerned that moral lectures (sermons) delivered by clergymen could become the basis for a possible deregistration.

But still other concerns have been expressed. Those who favour an "activist" approach by churches and other charities on public issues feel that if Revenue succeeds in this case, conservative members may use the threat of a loss of registered charitable status to browbeat the charities into official silence on matters of pressing public importance.

Thus, virtually all charities will have a vital interest in the outcome of this particular case. If the deregistration is overturned, some breathing space will have been won. If it is not, the charities will have to brace themselves for the next case on the judicial agenda, which probably will not be long in coming.

One way or another, it would appear that the only way in which Revenue Canada will be deterred will be by legislation which attempts to set out acceptable guidelines for charitable activity which take into account the realities of the 1980s and the role which responsible charities should play.

Footnotes

1. Income Tax Act, subsection 172(3). The very unusual requirement that an appeal be launched at this lofty level appears to be intended to discourage appeals. Indeed, in one such case where a Notice of Appeal was to be filed, Federal Court officials refused to accept the document until assured by the Department of Justice that the Appellate side was the proper forum for an appeal. How the Court of Appeal will take evidence in the first instance will be an interesting sidelight to this case.
2. Income Tax Act, subsection 149.1(16).
3. Income Tax Act, paragraph 149.1(1)(b).
4. Income Tax Act, paragraph 149.1(1)(a).
5. Information Circular 78-3, subparagraph 5(f).

APPENDIX

Information Circular No. 78-3: Registered charities: Political objects and activities.

1. The purpose of this circular is to explain to registered charities and to charities seeking registration the consequences of having objects and carrying on activities that are political in nature.

Consequence of Political Objects

2. (a) It is well established at law that an organization whose purpose is the attainment of a political object is not organized for a charitable purpose. Consequently, where the primary purpose of an organization seeking registration as a charity is clearly political, the application for registration will be denied.
(b) It is equally well established that an organization, whose primary purpose is clearly charitable but has a secondary or ancillary purpose which is stated to be political, does not fail to be recognized as charitable, in common law, because of its ancillary or secondary purpose. If such an organization applies for registration as a "charitable organi-

zation” as described in paragraph 149.1(1)(b) of the *Income Tax Act*, registration normally will be granted subject to the comment in 3(a) below. On the other hand, if such an organization is a “charitable foundation” under paragraph 149.1(1)(a) of the Act, the application for registration would fail since within the terms of that paragraph the applicant must be “constituted and operated exclusively for charitable purposes”.

Consequence of Devoting Resources to Political Activity

3. (a) A registered charity that is a “charitable organization” within the meaning of paragraph 149.1(1)(b) of the Act must devote all of its resources to charitable activities. In the context of that paragraph, “resources” means both physical and financial assets. The use by such a registered charity of its resources for a political activity would constitute a contravention of paragraph 149.1(1)(b) of the Act and could result in the revocation of its registration as a charity.
- (b) A “charitable foundation” under paragraph 149.1(1)(a) of the Act would likewise place its registration in jeopardy if it were to utilize its assets for political activities since that paragraph requires that the foundation be operated exclusively for charitable purposes.

Political Objects

4. (a) An object normally is said to be “political” if its ultimate intention is to influence the policy making process (as opposed to the administrative process) of any level of government, viz. federal, provincial or municipal. In this context, an organization whose object is to promote a change in the law or to promote the maintenance of an existing statute is considered to operate for a political objective. Likewise, an organization whose purpose is the furthering of the views of a particular political party is pursuing a political purpose. “Political” also is an objective which is to be achieved through political action, for example, an organization formed to promote temperance by securing legislation to reduce the consumption of alcohol (even though the courts have held that the promotion of temperance otherwise is a charitable object).
- (b) On the other hand, an organization for the education of the public in forms of governments is for the advancement of education, and so charitable, provided, of course, that it does not promote one particular political principle.

Political Activities

5. An activity is considered political if it is designed to embarrass or otherwise induce a government to take a stand, change a policy, or enact legislation for a purpose particular to the organization carrying on the activity. Some of the more prevalent activities undertaken by organizations are discussed below. It is to be noted, depending upon how they are accomplished, that some are acceptable activities by a registered charity while others are not.
- (a) Presentation of Briefs
 - (i) Because of their expertise in their respective fields, certain registered charities, in response to a written request from a legislative body or an appointed commission, submit briefs to governments, commissions or committees. Although these presentations usually contain recommendations for action, the presentation of briefs, in these circumstances, is considered an acceptable activity by the registered charity.
 - (ii) It is also considered acceptable for a registered charity to present a brief spontaneously, without invitation, to governments, commissions or committees, setting out its views on matters of concern and merely recommending corrective measures, provided it does not undertake a program to promote its recommendations.
- (b) Representations
 - (i) Written or oral representations by a registered charity to its own elected representative, i.e. Member of Parliament, Member of Legislative Assembly or Municipal Councillor, to the involved Minister of the Crown or the pertinent public servant are also looked upon as an acceptable activity on condition that such representations are limited to presenting the organization’s interests and point of view and otherwise do not attempt to influence legislation.
 - (ii) Written or oral representations to all or mostly all Members of Parliament or Ministers of the Crown, as part of a campaign to influence intended or specific legislation, is a political activity and as such cannot be properly carried on by a charity that wishes to maintain registered status.
- (c) Lobbying—This type of activity, which by definition is an organized campaign to influence members of a legislative body to vote or act according to the special interest of a group, is political in nature and must not be undertaken by a registered charity either directly or through professional lobbyists.
- (d) Public Demonstrations—The holding of public events to attract public support,

recruit new members, raise funds, explain purposes and programmes, and generally publicize the organization and its charitable activities is an acceptable activity of a registered charity, but if the purpose of the demonstration is to embarrass or apply pressure upon a government it is considered a political activity.

(e) **Form Letters**—A registered charity may carry on a mail campaign to attract public support, recruit members, raise funds, and explain its charitable objectives and proposals but it may not use this device for a non-charitable purpose, for example, to solicit the public to write letters of protest to their elected representatives.

(f) **Letters to Editors**—A letter-to-the-editor campaign may be used by a registered charity to explain its purposes and programmes, recruit members and raise funds but may not be used to air political views or attempt to sway public opinion for or against a political issue.

(g) **Publications**—A registered charity may publish a magazine, a review or a newspaper, etc. on a political subject provided that an impartial and objective coverage is given to all facets of the subject matter. Coverage of only one viewpoint is a political activity since it represents the political principles of one faction in particular. The same comment applies to newspaper advertisements.

(h) **Conferences, Workshops**—Conferences, workshops, symposia and other like activities where subjects of political content are presented and discussed, are considered acceptable activities of a registered charity provided that their purpose is to present to the public all sides of a political question so that the public can make its own informed decision.

(i) **Support of a Political Party**—The support, financial or otherwise, of a political party or a candidate at the federal, provincial or municipal level is a political activity and must not be undertaken by a registered charity.

(j) **Political Activities Carried on Through Other Bodies**—A registered charity must ensure that the application of its resources is not diverted, even on a temporary basis, to the benefit of another organization which has a political orientation. This comment applies generally to all registered charities but particular vigilance must be exercised by those registered charities who operate outside Canada.

(k) **Political Activities Outside Canada**—The general principles outlined in this circular apply equally to activities carried on outside Canada by a Canadian organization which is a registered charity.

6. **“Education” vs “Political” Activity**—In the comments above concerning objects and activities, it is indicated that objects and activities can be considered charitable under the head of the advancement of education notwithstanding the political content of the subject matter. There are certain essential elements which must be present in this type of activity:

(a) The objective must be to instruct through stimulation of the mind rather than merely to provide information;

(b) The subject matter must be beneficial to the public;

(c) The benefits must be available to a sufficiently large segment of the population;

(d) The interests of individuals must not be promoted;

(e) The theories and principles advanced must not be pernicious nor subversive;

(f) The principles of one particular political party must not be promoted; and

(g) An unbiased and impartial view of all factors of a political situation must be presented.

7. Where further advice is required, complete details of the question may be forwarded in writing to:

Attention: Charitable and Non-Profit Organizations Section
Department of National Revenue, Taxation
400 Cumberland Street
Ottawa, Ontario K1A 0X5