

THE EVOLUTION OF ADVOCACY AND POLITICAL ACTIVITIES BY CHARITIES IN CANADA: AN OVERVIEW¹

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INTRODUCTION

ADVOCACY HAS BEEN DEFINED AS THE ACT OF SPEAKING OR OF DISSEMINATING information intended to influence individual behaviour or opinion, corporate conduct, or public policy and law.² Many people believe that the act of advocacy as a form of free speech is an essential part of democracy.³

While many registered charities in Canada believe that they are either unable to participate in any public policy debates involving political issues or, alternatively, that they can participate completely unrestrained, both positions are incorrect. The reality is that registered charities can become involved in public policy debates as long as they do so within the limits imposed by Canadian law. This is an important distinction for Canadian registered charities interested in impacting their world.

The focus of this article is to briefly review the historical development of the Income Tax Act (ITA), the common law, and Canada Revenue Agency (CRA) policies in relation to the extent of advocacy and political activities that registered charities in Canada may become engaged in.

INCOME TAX ACT REQUIREMENTS REGARDING POLITICAL PURPOSES AND ACTIVITIES BY CHARITIES

While the Canadian Constitution⁴ establishes that charities are the jurisdiction of the provinces, the Constitution empowers the federal government to establish the federal tax system and have administration of the ITA. The ITA is the federal statute that governs taxation of the income of individuals, corporations, partnerships, trusts, and estates in Canada, and sets out the regulatory regime under which charities are required to be registered. There are two main benefits of acquiring the status of a registered charity: all income earned is exempt from income tax,⁵ and registered charities have the ability to issue donation tax receipts to their donors.⁶ As a result of these significant income tax benefits, the ITA imposes various limitations on the activities of registered charities. One of these restrictions is a limit on the extent to which a registered charity may become involved in political activities.

By way of background, under the ITA, there are three types of designations for registered charities, namely, charitable organizations, public foundations, and private foundations,

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which are separately defined and regulated.⁷ Under the ITA, a charitable organization must devote all of its resources to charitable activities carried on by the organization itself,⁸ while a charitable foundation must be constituted and operated exclusively for charitable purposes.⁹ As such, organizations that are organized solely or in part for political purposes would not be eligible for registration. However, the ITA does not define what is “charitable” or what is “political”; the courts have been left with this responsibility through developments in the common law.

Notwithstanding the prohibition on political purposes for charities at common law, the Notice of Ways and Means Motions in 1985 announced that registered charities would be permitted to engage in a limited amount of political activities as long as the activities were ancillary and incidental and substantially all of their resources were devoted to their charitable activities or purposes.¹⁰ The ITA was subsequently amended to reflect these legislative changes for charitable organizations and charitable foundations.¹¹ As well, subsection 149.1(1.1) of the ITA was also amended¹² to ensure that expenditures on political activities were not included as part of the disbursement quota requirements, since expenditures on political activities were not considered to be expenditures on charitable activities.¹³

While these amendments to the ITA permit charities to engage in some political activities to a limited extent, the Act still does not define what is “charitable” or “political.” Eligibility for charitable registration under the federal income tax regime is based on meeting the common law definition of charity, as developed through the courts. This common law definition is therefore vital to the Canadian charitable sector because there is no statutory definition to explain the terms “charity” or “political” within the ITA.

MEANING OF “POLITICAL PURPOSES” AT COMMON LAW

Since there is no definition of what is “charitable” or “political” under the ITA, eligibility for charitable registration is based on meeting the common law definition of charity, as developed in courts. The distinction between what is a political purpose and what is a charitable purpose in Canada has been the subject of considerable judicial deliberation over the years. This section of the article reviews the meaning of “political purposes” at common law and illustrates the apparent challenges in forming a clear definition.

In this regard, it is established law that trusts for political purposes are not charitable. The House of Lords in the leading case of *Bowman v. Secular Society, Ltd.*¹⁴ held that a trust for political purposes is not charitable, not because it is illegal, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. This principle was further clarified in *McGovern v. Attorney General*,¹⁵ which involved an organization attempting to promote the release of prisoners of conscience and the abolishment of torture and other degrading human practices. In brief, the court held that “political purposes” are not charitable and that they include promoting the interests of a political party, promoting changing the law in a country, or promoting changing government policies or decisions.

The 1985 decision of *Scarborough Community Legal Services v. The Queen*¹⁶ was the first judicial commentary on the question of political activities in Canada. The organization

was established to operate as a community legal clinic, but the court felt their activities involved “sustained” efforts to influence the policy-making process. The court accepted the organization’s argument that there is a difference between an organization’s “primary and incidental purposes,” in that an organization should not lose its charitable status “because of some quite exceptional and sporadic activity in which it may be momentarily involved.” However, the organization’s application for charitable status was denied because its political activities were found to constitute an essential part of its actions and were not only “incidental” to some other of its charitable activities.

Following the *Scarborough Community Legal Services* decision and the subsequent amendment of the ITA in 1985 referred to above, there were a series of cases between 1985 and 2002 that dealt with various aspects of political purposes and activities. A common theme examined in these cases was whether the purposes and activities in question were charitable as advancing education or whether they were in fact “political.”

In the 1988 case of *Positive Action Against Pornography v. M.N.R.*,¹⁷ the court held that the purpose of the organization was to achieve social change and, therefore, was political in nature rather than constituting a purpose for the advancement of education.¹⁸ Similarly, in the 1988 decision of *N.D.G. Neighbourhood Association v. Revenue Canada*,¹⁹ a neighbourhood association to assist the urban poor was held to be non-charitable because its activities were primarily of a political nature and were found not to be in support of the advancement of education.²⁰

Several controversial decisions dealing with abortion brought contrasting judgments in the 1990s. In one decision, the operation of an abortion clinic was held to be charitable as opposed to political on the grounds that the organization was established for the dispensation of healthcare to women in need of an abortion.²¹ The court found that its purpose was not to alter the law with respect to abortion or to promote the “pro-choice” view. However, in the 1998 decision of *Human Life International in Canada Inc. v. M.N.R.*,²² the court denied charitable status to an organization opposed to abortion and held that swaying public opinion on the abortion issue was not advancement of education nor beneficial to the public.²³

The first case in which the Supreme Court of Canada considered and discussed the issues of “political purposes” and “political activities” was the seminal 1998 decision of *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*²⁴ In that case, the court clarified that political purposes and activities that are merely ancillary and incidental to charitable purposes are themselves charitable. Subsequent to this decision, a number of cases were decided on the basis that even though the objects of the organization were within the definition of “education,” such activities constituted political activities that were not ancillary or incidental to the organizations’ charitable activities.²⁵

CANADA REVENUE AGENCY ADMINISTRATIVE POLICIES

Over the years, Canada Revenue Agency (CRA) has released a number of publications regarding its policies on the extent of political activities that may or may not be conducted by registered charities. Prior to 1978, CRA had been fairly tolerant of charities engaging in political activities.²⁶ However, CRA released several publications between

1978 and 1987²⁷ that the charitable sector at that time felt were overly restrictive. These publications, though, were withdrawn and replaced by the current CRA policy, *Policy Statement CPS-011*, "Political Activities,"²⁸ which was released on September 2, 2003 ("2003 Policy"). This Policy was the result of over two years of collaborative dialogue between the Government of Canada and the broader voluntary sector. A comprehensive reform and consultation process began in 1998 under a joint initiative called the Voluntary Sector Initiative. The Voluntary Sector Roundtable eventually released a report in 1999 that delineated three areas requiring strategic investment and attention in relation to improving the regulation, administration, and accountability of charities and other nonprofit organizations.²⁹

In 2001, an Accord was signed between the Government of Canada and the voluntary sector.³⁰ The Accord set out the common values, principles, and commitments that were to shape the future practices of both the voluntary sector and the federal government. Also, through the Advocacy Working Group, which was one of two voluntary-sector-only working groups of the Voluntary Sector Initiative, a number of helpful papers and reports were released in 2002. Numerous papers and articles were released around the same time advocating for reform to expand the ability of charities to engage in advocacy and political activities.³¹

As part of this consultation and reform process in the early 2000s, there were key policy considerations put forward by various groups in support of expanding the limits on charities to engage in political activities. One argument in favour of expanding these limits was that charities play a valuable role in ongoing public policy debates by providing input and effective representation of the broader public interests. Also, many in the charitable sector felt a sense of unfairness since businesses could engage in political actions, make political contributions, and be offered tax reliefs. Another key argument supporting the expansion of these limits was that freedom of expression in the Canadian Charter of Rights and Freedoms was being infringed.

The resulting 2003 Policy represented a welcomed expansion of what CRA had traditionally considered political activities. In particular, it acknowledged the Accord's observation of the need for the federal government to openly engage the voluntary sector. It also recognized the sector's criticism of CRA's previously restrictive view, which prevented the charitable sector from informing the public about issues of concern or participating adequately in the process of developing public policy.³²

The 2003 Policy provides guidance in clarifying the difference between political and charitable purposes. The following is a brief summary of the key provisions of the 2003 Policy.³³ The 2003 Policy echoes the law in the *McGovern* case in that it states that political purposes are those that seek to:

- further the interests of a particular political party; or support a political party or candidate for public office; or
- retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.³⁴

Even if a charity does not have an express political purpose, its activities will be exam-

ined in order to determine if it has adopted an unstated collateral political purpose.³⁵ In this regard, if the charity is carrying out an activity that becomes predominant and is no longer subordinate to one of its stated charitable purposes, CRA may determine that the charity is pursuing an unstated collateral political purpose, an unstated non-charitable purpose, or an unstated charitable purpose.

In order to clarify what activities are political in nature that may or may not be conducted by charities, the 2003 Policy categorizes such activities into three types, namely, charitable activities that are permitted without limits, prohibited partisan political activities, and permissible non-partisan political activities to which charities can only devote a limited extent of their resources.³⁶ A few of the highlights of each type are set out below.

Charitable activities. Many charities will need to communicate with the public or public officials at some point in carrying out their purposes. The 2003 Policy recognizes that these forms of communication can be considered charitable activities, subject to certain limitations. They include public awareness campaigns, communicating with an elected representative or public official, and releasing the text of a representation to the public.

Prohibited activities. While charities can conduct activities that further their charitable purposes, they cannot engage in partisan political activities, even if these activities may further their charitable purposes. In this regard, paragraphs 149.1(6.1)(c) and 149.1 (6.2)(c) of the ITA prohibit charities from engaging in those political activities that “include the direct or indirect support of, or opposition to, any political party or candidate for public office.” The 2003 Policy provides that a partisan political activity involves the direct or indirect support of, or opposition to, any political party or candidate for public office.³⁷

In addition, a charity must not single out the voting pattern on an issue of *any one* elected representative or political party; but it may provide information to its supporters or the public on how *all* the Members of Parliament or the legislature of a province, territory, or municipal council voted on an issue connected with the charity's purpose.

Permitted activities. Paragraphs 149.1(6.1)(a) and (b) as well as 149.1 (6.2)(a) and (b) of the ITA permit charities to devote part of their resources to political activities that are ancillary and incidental to their charitable purposes, as long as the activities are non-partisan. As such, between the two extremes of charitable activities that charities may engage in without any limits and partisan activities that charities are not permitted to engage in at all, there is a spectrum of permitted activities that are political in nature, which the 2003 Policy defines to be “political activities.”

While a charity may engage in political activities, it is still required under paragraphs 149.1(6.1) and (6.2) to devote *substantially all* of its *resources* to charitable purposes and activities. CRA usually considers “substantially all” to mean ninety percent or more of a charity's total resources. This leaves no more than ten percent of a charity's total resources available to be expended on political activities. In view of the fact that smaller charities may experience a greater negative impact by the 10% rule, CRA is prepared to provide more flexibility for smaller charities, increasing the allowable limit up to 20% for charities with less income.³⁸

ll registered charities are required to expend a portion of their assets annually in accordance with a disbursement quota, which is a prescribed amount that registered charities must disburse each year. Since subsection 149.1(1.1) of the ITA provides that expenditures on political activities by a registered charity are not considered to be amounts expended on charitable activities, charities cannot use the amounts they devote to their political activities to help them meet their disbursement quota. Therefore, they should check to make sure they will have no difficulty meeting their quota before considering any expenditure on political activities.³⁹

ROOM FOR IMPROVEMENT?

Following the release of the 2003 Policy, there were a number of articles published regarding what work charities may do within the confines of the Policy in order to continue having an impact on government policy debate while furthering the charitable purposes that they have been established to pursue.⁴⁰

However, there continue to be sentiments from the charitable sector suggesting the need to push for reform to improve the conditions under which charities may engage in political activities. For example, it has been pointed out that the 2003 Policy, though an improvement, is still not ideal, when compared to the level of political activities allowed by charities in England and Wales, which activities are recognized to be valuable contributions to policy making. Political activities in those countries are permitted as long as they do not become a charity's dominant activity, i.e., a 49% rule.⁴¹ Others in the sector continue to push Canadian Parliament to take action to define what is charitable and thereby clearly define what charities can and cannot do in relation to advocacy.⁴²

Not all of the concerns raised in the consultation and reform efforts in the early 2000s have been addressed. For example, the decision of whether a purpose or activity is "political" continues to be decided by the courts without guidance from Parliament, and charities continue to be subject to the 10% restriction on the extent of its resources that can be utilized for political activities. However, the 2003 Policy clearly is an improvement over CRA's previous policies. For example, it provides much clearer guidance on the types of "political" activities that can be engaged in, as well as evidencing administrative discretion in expanding the 10% to 20% for small charities, etc. In a recent article, it has been pointed out that "the resulting policy made few fundamental changes but clarified the policy, allowing charities to realize that CRA regarded much of what had been called advocacy as, in fact, charitable activities designed to further the organization's charitable purposes" so that "[t]he issue has attracted little attention or comment in recent years."⁴³ The fact that there have been no cases involving the issue of political purposes or activities by charities in Canada since the release of CRA's 2003 Policy suggests that the 2003 Policy has achieved a balanced approach in addressing this debate in Canada, at least for the time being.

NOTES

- 1 This article is a synopsis of a paper entitled “Charities Speaking Out: The Evolution of Advocacy and Political Activities by Charities in Canada” (October 2010) presented at New York University Law School on October 28, 2010, available at <http://www.carters.ca/pub/article/charity/2010/tsc1029.pdf>. The authors would like to thank Kate Robertson, B.A. LL.B., Student-At-Law, for her assistance in the preparation of this article.
- 2 Voluntary Sector Initiative, “Improving the Regulatory Framework-Supplementary Paper A-Education, Advocacy and Political Activity,” Working Together: A Government of Canada/Voluntary Sector Joint Initiative – Report of the Joint Tables (2000).
- 3 *Ibid.*
- 4 Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1984, App. II, No. 5.
- 5 Paragraph 149(1)(f) of the ITA.
- 6 Individuals who made donations to registered charities may claim non-refundable tax credits pursuant to the rules set out in section 118.1 of the ITA, and corporations that made donations to registered charities may claim tax deduction pursuant to the rules set out in section 110.1 of the ITA.
- 7 See their definitions in subsection 149.1(1) of the ITA.
- 8 See paragraph (a) in the definition for “charitable organization” in subsection 149.1(1) of the ITA: “charitable organization” means an organization, whether or not incorporated, (a) all the resources of which are devoted to charitable activities carried on by the organization itself.
- 9 See definition for “charitable foundation” in subsection 149.1(1) of the ITA: “charitable foundation” means a corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization.
- 10 An Act to Amend the Income Tax Act [and other legislation], S.C. 1986, c. 6, s. 85(2), enacting s.149.1(6.1) and (6.3) of the 1952 ITA applicable to 1985 and subsequent taxation years (s. 85(3)). See also M.L. Dickson, “Recent Tax Developments,” *The Philanthropist*, Vol. 6, No.1 (1986) 55, at 55.
- 11 Paragraphs 149.1(6.1): Charitable purposes [limits to foundation’s political activities] – For the purposes of the definition “charitable foundation” in subsection (1), where a corporation or trust devotes substantially all of its resources to charitable purposes and (a) it devotes part of its resources to political activities, (b) those political activities are ancillary and incidental to its charitable purposes, and

(c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, the corporation or trust shall be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.

Paragraphs 149.1 (6.2): Charitable activities [limits to charity's political activities] – ...; in essence, identical to above.

12 Paragraphs 149.1(1.1): Exclusions [deemed non-charitable] – For the purposes of paragraphs (2)(b), (3)(b), (4)(b) and (21)(a), the following shall be deemed to be neither an amount expended in a taxation year on charitable activities nor a gift made to a qualified donee:

(b) an expenditure on political activities made by a charitable organization or a charitable foundation.

13 Failure of a charity to meet its disbursement quota for the year by expending a sufficient amount on charitable activities may be cause for revocation.

14 *Bowman v. Secular Society, Ltd.* [1971] A.C. 406 (H.L.).

15 *McGovern v. Attorney General* [1982] 3 All E.R. 439.

16 *Scarborough Community Legal Services v. The Queen* [1985] 1 C.T.C. 98, 85 D.T.C. 5102 (F.C.A.).

17 *Positive Action Against Pornography v. M.N.R.* [1988] 1 C.T.C. 232, 88 D.T.C. 6186 (F.C.A.).

18 The organization was established to provide educational material to the public concerning the issue of pornography.

19 *N.D.G. Neighbourhood Association v. Revenue Canada* [1988] 2 C.T.C. 14, 88 D.T.C. 6279 (F.C.A.).

20 The organization was established to defend people's rights, promote letter writing campaigns, provide a forum to exchange ideas, and to advocate for tenant's rights.

21 *Everywoman's Health Centre Society v. Canada* [1991] F.C.J. No. 1162.

22 *Human Life International in Canada Inc. v. MNR*, [1998] 98 D.T.C. 6196 (F.C.A.).

23 The organization was established to protect the unborn, elderly and handicapped, to promote true Christian family values, to encourage chastity, and to teach natural family planning, by conducting lectures, seminars and conferences and publishing a variety of literature advocating its points of view.

24 *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* [1999] 1 S.C.R. 10.

25 For example, *Alliance for Life v. M.N.R.*, 99 D.T.C. 5228; [1999] 3 C.T.C. 1 (F.C.A.), *The Challenge Team v. Revenue Canada*, 2000 D.T.C. 6242; [2000] 2 C.T.C. 352 (F.C.A.), and *Action by Christians for the Abolition of Torture v. The Queen*, 2003 D.T.C. 5394 (F.C.A.).

26 Peter R. Elson, "A Short History of Voluntary Sector-Government Relations in Canada," *The Philanthropist*, Vol. 21, No.1 (2007) 36, at 59.

27 Information Circular 78-3, "Registered Charities: Political Objects and Activities" and Information Circular 87-1, "Registered Charities – Ancillary and Incidental Political Activities."

28 Canada Revenue Agency, Policy Statement CPS-022, "Political Activities," September 2, 2003 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>).

29 On August 28, 1999, the Joint Tables released their joint report, *Working Together, A Government of Canada/Voluntary Sector Joint Initiative*.

30 Voluntary Sector Initiative, An Accord Between the Government of Canada and the Voluntary Sector, 2001 (online: http://www.vsi-isbc.org/eng/relationship/pdf/the_accord_doc.pdf).

31 For example: Peter Broder, "The Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process," *The Philanthropist*, Vol.17, No. 3 (August 2001) 3; Richard Bridge, "The Law Governing Advocacy by Charitable Organizations: The Case for Change," *The Philanthropist*, Vol. 17, No. 2 (2000) 2; Laurie Rektor, "Advocacy – The Sound of Citizens' Voices-A Position Paper from the Advocacy Working Group," Voluntary Sector Initiative Report <http://www.vsi-isbc.org/eng/regulations/reports.cfm> (September 2002); IMPACS, "Charities: Enhancing Democracy in Canada," IMPACS (2003); Deborah J. Lewis, "A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education," 25 *Queen's Law Journal* 679-712 (2000).

32 CRA 2003 Policy, *supra* note 26 at section 2.

33 For full details, see Canada Revenue Agency Policy Statement, *supra* note 26.

34 CRA 2003 Policy, *supra* note 26 at section 4.

35 CRA 2003 Policy, *supra* note 26 section 5.

36 CRA 2003 Policy, *supra* note 26 at section 6.

37 CRA 2003 Policy, *supra* note 26 at section 6.1.

38 *Ibid.*

39 CRA 2003 Policy, *supra* note 26 at section 11.

40 Richard Bridge, "Innovation and Problem Solving: a Bolder, More Active Role For Community Foundations," Institute for Media, Policy and Civil Society - Community Foundations of Canada (January 2004); Richard Bridge, "Helping Charities Speak Out: What Funders can Do," *The Philanthropist*, Vol. 20, No.2 (2005) 153 (Bridges 2005); and Elizabeth Mulholland, "New Ways to Keep Up our End of the Policy Conversation," *The Philanthropist*, Vol. 23, No. 2 (2010).

41 Bridge 2005, *Ibid* at 155 and 156.

42 For example, Andrew Kitching, "Charitable Purpose, Advocacy and the Income Tax Act," Library of Parliament-Law and Government Division (February 28, 2006); Rob Rainer, "Charities should not be politically muzzled," *The Lawyers Weekly* Vol. 27, No. 27 (November 16, 2007).

43 Bob Wyatt, "Overview From Canada: Modernizing Charity Law," *The Philanthropist*, Vol 22, No.2 (2009) 59, at 67.