Viewpoint

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Freedom of Speech and Charitable Organizations*

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A few months ago, Walter Cronkite, who brought the news of the tumult of the 1960's into the homes of Canadians and Americans as anchorman for the CBS Evening News, described what has happened to the activists of the Sixties in this way: "Most of them are out there driving around on this night, going to the supermarket, worrying about whether or not they should buy a second car. Those that aren't are the really unfortunate ones, permanently affected by the narcotics so prevalent at the time. They're out there drifting around, and we still haven't heard from them. I worry about what will happen when we do".

Mr. Cronkite's view of what has happened to the idealists of the Sixties reflects a message being driven home constantly by the media: that the time for change has passed, that the activism of the Sixties was wasted, and that the idealists of the Sixties are now self-satisfied, complaisant consumers. Nothing could be further from the truth than this picture of Sixties idealists as either dope-crazed degenerates or self-satisfied members of the consumer society.

The reality is that the social turmoil of the Sixties transformed many social institutions, among them those in the voluntary sector. The activists are no longer in the streets, but neither are they guzzling beer before their television sets. They helped to transform charitable organizations from service organizations into advocates for social change. Having assisted in this transformation, they are now members and supporters of, or on the staffs or boards of directors of, public-interest organizations which not only help to alleviate poverty and provide education, but which also advocate social change. In their relationship to governments, these people and their organizations demand more than the opportunity to present the occasional brief to a Royal Commission.

For the most part, this new role for voluntary organizations is a good thing. The institutionalization of these energies promotes stability and channels idealism through responsible organizations.

* This *Viewpoint* was developed from Mr. Swaigen's presentation to a conference on Relating to Government sponsored by The Canadian Centre for Philanthropy, November 29, 1983.

Unfortunately, one institution which has not changed is the law relating to charitable activities and the federal government's approach to activism. The current law does not reflect the changes in voluntary activities in the public interest which have come about over the past two decades.

The law encourages certain kinds of voluntary activities beneficial to the community by granting to organizations that engage in them the right to issue receipts for donations that give the donor a deduction from income tax. The organizations are also exempt from income tax. Without these rights, it is very difficult for any public interest organization to survive.

However, to obtain these advantages, a public interest group must be registered as a charitable organization or a charitable foundation under the *Income Tax Act*. The *Income Tax Act* does not explain what it means by "charity" or "charitable". Instead, the definition comes from an 1891 court's categorization of a long list of worthy causes in the preamble to an English law passed in 1601.[1] According to the judicial decisions interpreting the preamble of this law, a "charity" is a trust for the relief of poverty, for the advancement of education, for the advancement of religion, or for *other purposes beneficial to the community*.

The Canadian and British courts still use this definition[2] when interpreting the term "charity" in statutes like the *Income Tax Act*. In determining whether the "objects" or "purposes" for which a group is formed are "charitable", the Saskatchewan Court of Appeal ruled in 1951[3] that "trusts for the attainment of political objects have always been held not to be valid charitable trusts". This statement of the law has been adopted several times by Canadian courts, and, unless and until the Supreme Court of Canada rules otherwise, this would seem to be the law in Canada (subject to the *Canadian Charter of Rights and Freedoms*, to which I shall refer later).

Secondly, unless the purposes of an organization are the relief of poverty, the advancement of education, or the advancement of religion, the group must show that its purposes are beneficial to the community to qualify as a charity. This is the category under which many advocacy organizations can claim charitable status. However, the courts have held that if a fund benefits only a small group of people, the group does not constitute the "community".[4] The courts have ruled that lobbying for changes in legislation is not charitable because no one can be sure that a particular change in the law will in fact benefit the "community".[5] Similarly, if an organization raises funds purely for use by its own members, this is not considered beneficial to the "community".[6]

Some courts have also ruled that funds used primarily to benefit animals or to preserve nature for its own sake are not beneficial to the community.[7] It would appear that an organization devoted to preserving parklands for recreation would be serving a purpose beneficial to the community, but an organization devoted to preserving parkland in its natural state and restricting public access might not be considered charitable.

One current example of the debate over what is beneficial to the community is the attempt by the Ontario Public Trustee to prevent charitable foundations from giving grants to amateur sports organizations. The Public Trustee claims that

groups such as the Canadian Track and Field Association, the Sports Fund for the Physically Disabled, and Commonwealth Games of Canada Inc. do not qualify to receive charitable funds because the money is used to benefit their members—promoting the career of individual athletes—rather than society. Judge Sidney Dymond of the Ontario Surrogate Court has ruled that organizations whose main objective is promotion of an amateur sport involving pursuit of physical fitness sufficiently benefit the community to fall within the definition of "charity". However, the Public Trustee has served notice that he is appealing this decision to the Ontario Court of Appeal.*

How to Obtain Charitable Status

Obtaining charitable status involves submitting an application to Revenue Canada and obtaining registration as a charitable foundation or organization from that department. To qualify, a charitable organization must devote all its resources to charitable activities, and a charitable foundation (a charitable organization that gives money to other charitable organizations) must be operated *exclusively* for charitable purposes.

Revenue Canada may scrutinize the written statement of objects of an organization seeking charitable status and it is current practice to put a statement in the objects to the effect that the organization will not engage in any activities other than charitable ones. If the group already exists and has a "track record" Revenue Canada can also look at its past activities. In fact, the application requires an applicant to state not only what its objects are, but what activities it intends to carry out.

If the Minister refuses to register an applicant, the decision may be appealed to the Federal Court of Appeal. A failure to notify the applicant of a decision within 180 days after filing is also deemed to be a refusal to register and is subject to appeal to the Federal Court of Appeal.

Once an organization has attained charitable status, its registration can be revoked under the following circumstances:

1. when the charity applies to the Minister in writing for revocation of its registration;
2. when the charity ceases to comply with the requirements of the *Income Tax Act* for its registration;
3. if the charity fails to file an information return;
4. if the charity issues a receipt for a gift or donation otherwise than in accordance with the *Act* or regulations, or that contains false information; or
5. if the charity fails to keep proper books and records.

* See "Recent Tax Developments", *The Philanthropist*, Summer (August) 1983, p. 46 and Winter 1984, p. 69 for a discussion of the *Laidlaw* case.

If the Minister intends to de-register a charity, the *Income Tax Act* requires him first to give written notice. The revocation does not take effect until 30 days after the mailing of the notice. Although the *Income Tax Act* does not say so, there is little doubt that the "fairness doctrine" enunciated by the Supreme Court of Canada in the *Nicholson*[8] case requires the Minister to give the charity reasons for his intention to revoke and an opportunity to be heard before revocation. After revocation, the charity has a right to appeal the Minister's decision to the Federal Court of Canada.

Despite this right to appeal to the court, it is important to take advantage of the prior opportunity to make submissions to the Minister for two reasons. First, it is much easier to influence a decision that is not yet final than to change one that has already been made. Secondly, it costs a lot less to influence the Minister's decision through persuasion, pressure, or a combination of the two, than to argue a case in the courts.

For the same reason, it is very important to file the necessary information returns and to keep proper books and records. If your organization is at all controversial and if there is any danger of de-registration, it is much easier for the Minister to de-register for your failure to do the paper work than because you are engaging in activities which are felt to be outside the scope of the definition of "charity". It is also much more difficult to get back charitable status once it has been revoked than to prevent its revocation.

It is apparent from section 168 that there are three main ways to lose charitable status:

- by failing to do the proper paperwork;
- by engaging in activities that do not fall within the common law definition of "charity"; and
- by giving money to another organization for purposes that do not fall within the definition of "charity".

Previous issues of *The Philanthropist* have dealt at length with the question of which activities are "charitable" under the law and which are not. In the Bibliography of this article I have suggested further reading.

As you may know, the case law is confusing and contradictory. The best available description of what you can and cannot say and do is the infamous Revenue Canada information circular 78-3, *Registered Charities: Political Objects and Activities*. This circular described a "political object" as an "ultimate intention to influence the policy-making process of any level of governments". It defines "political activities" as any activities "designed to embarrass or otherwise influence a government to take a stand, change a policy, or enact legislation for a purpose particular to the organization carrying on the activity". The list of activities deemed political and unacceptable is very restrictive. Nevertheless, it is probably no more restrictive than the common law and in some ways may even be more liberal than the judgments in some of the cases. Indeed, as Henry Intven notes, in a recent issue of *The Philanthropist* (see Bibliography), "it has been held

in a minority of cases that promotion of *any* change in the law will deprive an otherwise charitable purpose of its charitable nature".

The circular, which purported to be merely an interpretation of the existing law and not a restriction or directive by the Department (although the Minister of the day refused to say what cases his advisors had considered) is not objectionable as a statement of the common law. It is objectionable because there was no great demand, as far as I am aware, for an interpretation of the common law at the time this circular was issued, and the motives of the Department in issuing it are therefore suspect, and because the common law cases are no longer an acceptable guideline for charitable activity in a modern society.

However, if one wants to be reasonably certain that an organization's charitable status will not be affected by advocacy activities, compliance with the circular is a good way of doing so, as it is unlikely, even though the circular has been withdrawn, that the federal government would attempt to revoke the registration of anyone who stays within its very restrictive limits.

It is also important to note that the federal government has stated clearly in the circular that charities are free to express their views about social change. They are not free to apply any pressure or attempt to embarrass government as a method of advocating those views.

I would suggest that there is at least one exception to this "rule". Nowhere in the circular is public interest litigation mentioned. Increasingly in recent years, public interest groups have taken to the courts to promote social change. Indeed, since the early years of the civil rights movement those seeking social change have brought test cases as a means of clarifying the law. As the purpose of the courts is not to determine whether a particular government policy is reasonable or enlightened but to determine whether a specific law is valid or invalid and whether a government agency has acted within the law in carrying out its duties, litigation ostensibly does not put pressure on government to change in any way except to act within the law.

Although it would theoretically be possible for government to threaten charities which bring such cases before the courts with de-registration, any such attempt to limit access to the courts would, in my opinion, be highly inappropriate.

At the present time, therefore, it is apparent that the objects and activities which a charity can undertake are extremely circumscribed by nineteenth century interpretations of a seventeenth century statute. All of this is likely to change, however, under the Canadian *Charter of Rights and Freedoms*.

Section 2 of the *Charter* guarantees everyone freedom of opinion and expression, including freedom of the press and other media of communication. This is stated to be a fundamental freedom.

The threshold qustion is whether the term "everyone" means only individuals or also extends to other legal entities such as corporations. At the present time, it is not necessary to incorporate to be registered as a charity but an unincorporated association may not have any legal rights under the *Charter*. However, the paper work is similar for registration and for incorporation and it is not difficult to obtain

corporate status. If the term "everyone" includes corporations, it may be difficult for the federal government to restrict the way in which incorporated registered charities express their views.

These freedoms are guaranteed "subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society". "Law" almost certainly includes doctrines developed by the courts as well as statements in statutes and regulations. Thus, if the restrictions on charitable objects and activities prescribed by the British government in the seventeenth century and by the courts in the nineteenth and early twentieth centuries can still be considered reasonable in the late twentieth century, Revenue Canada can severely restrict freedom of expression. However, I would suggest that to prove that such limits on freedom are reasonable, the federal government would have to show the harm to society that would result from allowing broader objects and activities.

In light of the proliferation of advocacy programs which have made valuable contributions to the protection of the environment, the advancement of women's, minorities', and workers' rights, the betterment of the mentally and physically handicapped, and the protection of civil liberties, it would be difficult to argue that it is reasonable to curtail the freedom of expression of organizations carrying out advocacy programs.

In addition, section 12 of the *Charter* states that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment". Although this section does not appear to be as clearly applicable, an argument might be made that de-registration of charities for engaging in political activities or other activities not exclusively charitable is an excessive, Draconian, and unnecessary treatment. It is also very unusual treatment since individuals have the right to lobby and businesses are even allowed to deduct the costs of lobbying from their income taxes. It seems strange that the same statute, the *Income Tax Act*, on the one hand encourages lobbying for self-serving purposes by providing for a deduction of lobbying expenses by business and on the other hand discourages lobbying for altruistic purposes by providing for de-registration of charitable organizations which lobby. De-registration is particularly cruel since it not only deprives the organization of its exemption from income tax and its right to issue tax receipts but also strips it of all its assets, which must be turned over to another registered charity or forfeited as a special penalty tax to the Crown. It amounts to a death penalty for the organization.

In conclusion then, the law as it now stands is hostile to aggressive attempts to achieve social change. It needs to be changed in a manner similar to that proposed by the National Voluntary Organizations (NVO) which have proposed that the *Income Tax Act* be amended to include definitions of charitable objects and charitable activities. The NVO has suggested the following provisions:

1(a) For the purposes of this *Act* charitable objects include:

  (i) assistance to a disadvantaged person or group of persons;

  (ii) advancement of religion;

(iii) advancement of education;

(iv) advancement of health;

(v) conservation of the natural environment;

(vi) other purposes beneficial to the community, including cultural and social development or improvement of the physical and mental wellbeing of the community.

(b) In this section: the meaning of "disadvantaged" includes, but is not limited to, a lack of opportunity to participate fully in the life of the community due to geographical, environmental, economic, racial, ethnic, health, sex, age or disability factors.

2. "Charitable activities" means all activities carried on in Canada or in the international community by a charitable organization in furtherance of its charitable objects, except those activities set out in Section 3.

3. The following activities shall not be considered charitable:

(a) incitement to sedition or violence;

(b) the support or opposition, financial or otherwise, of a political party or candidate at any level of government;

(c) the acquisition or expenditure of money or anything of value for the benefit of any member of the charity.

I would add to this only one reservation: although I agree strongly that charities should not be fronts for politicians or political parties, I think that a distinction should be drawn between supporting a politician or political party and supporting a particular initiative of a politician or political party. For example, if the government introduces a bill to give greater protection to the environment or if a member of an opposition party introduces a private member's bill for the same purpose, a charitable organization devoted to the conservation of the natural environment should be free to praise and support that initiative.

FOOTNOTES

1. *Special Commissioners of Income Tax* v. *Pemsel*, 3 T.C. 53.

2. For example, see *Co-operative College of Canada and Turnbull* v. *Saskatchewan Human Rights Commission*, [1976] 2 W.W.R. 84 and *Hobson* v. *M.N.R.* (1959), 59 D.T.C. 211.

3. *Re Patriotic Acre Fund*, [1951] 2 D.L.R. 624 at 634.

4. Footnote 2, *supra*.

5. *Bowman* v. *Secular Society Limited*, [1917] A.C. 406 at 442 and *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1948] A.C. 31 at 50 and 62.

6. Footnote 3, *supra*, at 630.

7. Pettit, P.H., *Equity and the Law of Trusts*, London, Butterworth, 1974, pp. 167-193.

8. *In Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

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