Charities – Advocacy and Lobbying
A Recognized Need for Legal Reform

Over the past three years, the two highest profile reports on the charitable sector, the February 1999 Broadbent Report, chaired by former NDP leader Edward Broadbent, entitled "Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector", and the August 1999 Report of the Joint Tables, entitled "Working Together. A Government of Canada and Voluntary Sector Joint Initiative" have provided valuable insights into the workings of the Canadian charitable sector. Among these insights, they each have documented the dire need for reform in the area of charitable advocacy – perhaps, more commonly referred to as "lobbying". This paper will review the findings of the Broadbent and the Joint Tables Reports, will review the law of advocacy for charities as established in the common law and by the Canada Customs and Revenue Agency (CCRA, formerly "Revenue Canada") and will look at Ontario's Lobbyist Registration Act, as well as examine some recent steps by the Canadian Centre for Philanthropy and others to clarify an area of law much in need of clarification, all with a view to understanding the present state of affairs with respect to Canadian charitable advocacy.

Charities and Non-Profit Organizations

Organizations that are established to serve charitable purposes and which do serve those purposes are deemed by the government to have public value. Such organizations are registered as charities under the Income Tax Act. These particularly registered companies are exempted from paying income tax. Moreover, this registration permits them to issue receipts to individuals and corporations, which receipts, in turn, can be claimed as tax credits (individuals) or deductions (corporations). Other advantages to registration include exemptions from some provincial incomes taxes (such as retail sales tax and corporate income tax, in Ontario, for example). Also, it is fair to say that charities are treated more generously under the goods and services tax system.

It is clear that there is a public policy goal at work in this system, namely, that of encouraging charitable giving. There exist problems, however. The best place to begin to understand these problems and to discover solutions for them is to begin with an understanding as to how the law defines charity. It may surprise some readers to know that there is no consensus concerning the definition of a charity.

When the word "charity" is used, most people have a general understanding as to what sort of an organization is being discussed. However, drafting tax law to support the charitable sector is another matter entirely. In fact, the law's definition of charity is restrictive and is being made more so. The average Canadian's colloquial understanding of the meaning of the word "charity" is not likely to be reflected in that law. Moreover, when we throw into the mix another class of organization, the "non-profit organization", more confusion tends to result.

These "non-profits" are less regulated than charities, yet they are often perceived by third parties to be registered charities. A non-profit organization need only have no intention of profit-making to receive certain advantages under the Income Tax Act, yet they cannot issue tax receipts for donations. Indeed, they are not charities and they do not have the legal advantages of charities. Let us proceed to some definitions to set the base for understanding the law's complexities.

Definitions

Non-profits are defined in the Income Tax Act, subs. 149(1)(l), as follows:

"…a club, society or association that, in the opinion of the Minister, was not a charity within the meaning of subsection 149.1 (1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof…."

What may come as a surprise to many Canadians, even those integrally involved in the not-for-profit sector, is that there is no definition of a charity to be found in the Income Tax Act, nor in any other statute, for that matter.

The origin of our definition of charity is the common law. Indeed, we can go back to an 1891 English judgement, made by the House of Lords, the penultimate appellate body in England and in Canada at that time, called Pemsel's Case, for our first working definition. It classified charity into four classes or categories, a categorization *still used today*. The four categories of charity were set out as follows:

(a) relief of poverty;
(b) advancement of education;
(c) advancement of religion; and
(d) other purposes beneficial to the community.

These categorizations, still used by the courts and by the CCRA, have kept the definition of "charity" in a static state. Unlike the evolution of the common law generally, the strength of which is its evolution with the changing social and economic reality, the evolution of charitable law has essentially stayed true to its nineteenth century definition.

Several tests have developed over time in the case law, tests designed to determine charitable status. The first test follows directly from Pemsel's Case. It is the "nature of the activity" test. Does a particular activity fit into one of the four categories? If so, the activity will likely be considered charitable in nature. A second test is the "public benefit" test. How many people benefit from the service offered? Is there a community benefit as opposed to a private benefit? In fact, the CCRA prefers the community-at-large to benefit from a service, rather than just a particular segment of the community. As an example, groups such as women's groups, race relations groups or environmental protection groups have experienced difficulty in achieving charitable status.

A third test used is one that requires the organization be established *exclusively* for charitable purposes and that those purposes be *precise* ones. The regulators do not favour mixed purposes. The readers may ask themselves whether the test used in this manner reflects reality.

Finally, for a clear definition of charity, it would be advisable and valuable to have a more transparent process of decision-making by the CCRA. Nothing could be further from the reality of the situation now. Indeed, the very groups applying for charitable status often do not understand why their applications are rejected. As well, the process will very likely take several months to complete. Certainly, the public at large does not understand the rationale of such a process.

It can safely be re-emphasized that the CCRA protects a restrictive definition of charity, likely a definition not at all like the broader definition of the term that most Canadians may feel comfortable holding. The restrictiveness of the definition has been made even more evident in the past decade of government fiscal retrenchment, forcing individuals and community groups to raise their own money for charitable purposes.

Advocacy

Understanding that there is confusion about the process of becoming a charity and ultimately about what a "charity" is, allows us to better analyze the world in which advocacy by charities is a serious issue.

Advocacy was defined by the August 1999 Report of the Joint Tables, as, "…the act of speaking or of disseminating information intended to influence individual behaviour or opinion, corporate conduct or public policy and law". (Page 50)

It follows that, as there is no single definition of charity in law, that there is no single source of law of advocacy by charities. The various sources of law include the common law categorization scheme, the Income Tax Act , and the administrative policies of the CCRA. Let us examine each of these sources of law and policy in turn.

The Common Law and Advocacy

Of certain facts, one can be sure. First, an organization with political objects is not one with charitable objects, even if significant public benefit results from an organization's advocacy. Political objects are not charitable ones. As the Courts regularly decide, they have no way of determining whether a proposed change in the law will benefit the public. Thus, the courts are unable to hold that a gift to secure the change is a charitable gift.

A second point of which to be sure is that the Courts have kept very separate and apart the concepts of advocacy and education. Advocacy is considered political, while education continues to hold its charitable status. Education must, however, be more than the mere provision of information.

Case law has repeatedly held that to be charitable, education must be objective in nature and an improvement of a human branch of knowledge.

While many recent cases have been very limiting of the definition along these lines, a very well-known, recent Supreme Court of Canada decision, the Vancouver Society of Immigrant and Visible Minority Women v MNR [1999] 1 SCR 169, expanded, somewhat, that narrow definition:

> "So long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance knowledge or abilities of the recipients – not solely to promote a particular view or political orientation, it may properly be viewed as falling within the advancement of education."

The Income Tax Act

As previously noted, the Act does not define charitable purposes. Instead, it offers provisions limiting political activities by charities. The subsection with which to be concerned is 149.1(6.2):

"For the purposes of the definition "charitable organization" in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and,

(a) it devotes part of its resources to political activities,
(b) those political activities are ancillary and incidental to its charitable activities, 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 organization shall be considered to be devoting that part of its resources to charitable activities carried on by it."

The real weakness of this subsection is that it does not define "political activities", nor does it define or quantify how much of an organization's activity will be "ancillary and incidental" to an organization's charitable (and, therefore, allowable) activities. So, organizations find it much more difficult to properly plan by quantifying their activities and expenditures as charitable or not.

The Canada Customs and Revenue Agency (CCRA) – Administrative Policies

While not actually having the force of law, these published administrative policies are used to determine how CCRA staff interprets the law. For example, IC 87-1 "Registered Charities – Ancillary and Incidental Political Activities" attempts to elucidate one of the shortcomings of the Act. CCRA categorizes political activities and tries to quantify limits on that activity.

The Income Tax Act, subsection 149.1(6.2) clearly prohibits partisan political activity, such as supporting one political party over another.

A second category of activity *will* be considered charitable, including the following specific inclusions of that category:

(a) representations to elected representatives or public servants to present facts, or even a charity's viewpoint;
(b) oral and written briefs containing factual information and recommendations to government bodies; and
(c) provision of information and non-partisan viewpoints to the media,

so long as the resources devoted to these actions are reasonable and are intended, "…to allow full and reasoned consideration of an issue rather than to influence public opinion or to generate controversy".

What is being described is a *very limited* form of advocacy. However, the dividing line between informing and influencing is unclear. In reality, that is the information that a charitable organization wants most of all.

Another category of political activity exists, comprised of, "…political activities allowed within expenditure limits". These are not charitable activities in and of themselves, but they are permitted within spending limits. Examples of this type of activity include the following:

(a) publications, conferences, workshops and other forms of communication which are produced by a charity to influence public opinion on political issues;
(b) advertisements, to the extent that they are produced to gain support from a charity's position on political issues and matters of public policy;
(c) public meetings or demonstrations held to gain support for a charity's view on matters of policy;
(d) mail campaigns, organized by the charity, for any of these purposes.

Spending Limits – The Oft-Confused "Ten Percent Rule"

Those familiar with the charity advocacy issue will be familiar with the "Ten Percent Rule". Originating in the same Information Circular 87-1, a quantifiable limit is put on political activities. It reads that the subsection 149.1(6.2) requirement that "substantially all" of an organization's resources be spent on charitable activities means "90 percent or more". It follows that only ten percent, "…of all the financial and physical assets of the charity as well as the services provided by its human resources" is the most that can be spent on political activities.

There is a second test in the Circular. It is the requirement that charities spend at least eighty percent (80%) of their receipted donations of the previous year on charitable activities. The only caveat here, and the source of much confusion, is that the activities just laid out in the third category (workshops, advertisements, public meetings, mail campaigns) *cannot* be included in the calculation of the 80% spending amount.

Even with these two tests delineated, problems remain. Canadians are still faced with the reality that advocacy cannot exceed ten percent of the charity's operations and with the requirement to separate advocacy from education (the latter having no limitation, of course).

The Joint Tables Report of August 1999 distills all of this law down as follows:

- education must not amount to promotion of a particular point of view or political orientation, or to persuasion, indoctrination or propaganda; and
- a charity cannot have political purposes, but it may devote some of its resources to political activities as long as:

    - they are non-partisan, they remain "incidental and ancillary" to the charity's purposes; and
    - substantially all (ninety percent) of the charities' resources are devoted to charitable activities. (Joint Tables Report, p. 50)

Where Do We Go From Here?

Both the Broadbent Panel Report and the Joint Tables Report call for reform. Both agree that the ten percent rule has to be amended or regarded as an approximate guideline. The Broadbent Panel concluded that the government implement the following reforms:

> "Reaffirm and maintain the legitimacy of space for non-partisan political activity. While partisan activities should continue to be forbidden, the right to bearing a public witness on an issue affecting the very purpose of a charitable organization should be affirmed.
>
> …the 90/10 rule has to be regarded as only an approximate standard since allocations under it are extremely difficult for a registered organization to calculate or Revenue Canada (CCRA) to measure. The important tests are that the rule not be applied in an arbitrary or unduly restrictive manner." (Page 71)

Charter of Rights and Freedoms - Freedom of Expression, S. 2(b)

Does the future hold a decision by the Supreme Court of Canada that affirms advocacy by charitable organizations as a constitutionally protected freedom of expression right? If a 1999 Federal Court of Appeal decision is any indication, the answer is likely to be in the negative.

In Alliance for Life v MNR [1999] CarswellNat 625 (FCA), a charity lost its charitable status (the greatest fear of the organization, naturally) on the grounds that it was too political. The Appellant was a group called Alliance for Life, which, as its name suggests, was an anti-abortion, anti-euthanasia, pro-life organization. Many of the materials that it distributed were not necessarily one-sided propaganda, but were scientific evidence. However, the Court did not agree that it should have public funding in the form of tax exemption as it was too political:

> "With respect to the Charter argument…the basic premise of the Appellant is untenable. Essentially, its argument is that a denial of tax exemption to those wishing to advocate strong opinions is a denial of free expression on this basis."

> "The Appellant is in no way restricted by the Income Tax Act from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held."

In the result, the organization was de-registered by Revenue Canada on the basis that its educational activities were, in reality, efforts to further its pro-life political views.

In sum, one can ask oneself whether it is a benefit to society that charitable organizations do not easily participate in public debate about the issues closest to them. The government cannot prohibit a group from speaking, but, through tax policy, it can effectively silence a group with the very real threat of de-registration.

The Lobbyist Registration Act - Ontario

Another piece of legislation that must be included and analyzed to understand the law in this area in Ontario is the Lobbyist Registration Act, 1998, which came into force in 1999. It applies to businesses, non-profit organizations as well as charities. A "lobbyist" is a lobbyist regardless of organization under this law.

Any person who communicates with public office holders in the Province of Ontario must file a return with the Registrar.

Three types of lobbyist are included, including consultants, in-house lobbyists for persons and partnerships and in-house lobbyists for organizations.

Lobbying is defined very broadly to include influencing a public office holder to change legislation, regulations, programs, to award grants, contributions or financial benefits.

Filing is mandatory for lobbyists (or for the most senior officer of an organization) within time periods set out. The maximum penalty for not filing is $25,000. As that is a maximum amount, there is discretion that may be exercised in the imposition of fines. Certainly, that discretion would be so exercised such that the maximum fines would not be imposed regularly. However, the real threat of significant fining exists.

Section 6 of the Act sets out what has to be recorded by an organization with an in-house lobbyist, including a description of the organization's business, the officers and directors of the organization, any amounts of government funding received by the organization, the names of persons who gave $750.00 or more toward lobbying efforts, the name of each in-house lobbyist employed by the organization, both the subject-matter and the techniques of lobbying used by the organization, and more.

Most interestingly, volunteers appear to be exempt from the legislation. In fact, this exemption (or, oversight) may make it worthwhile involving senior volunteers in some lobbying roles, if registration and reporting requirements for smaller organizations become burdensome.

Charities must be aware of the legal limits and ramifications of lobbying. By its very nature, lobbying is an attempt to influence *political* decision-making. We know that if the lobbying is incidental and ancillary to the charitable objects of the organization, that there are likely no concerns under the Income Tax Act or the common law application. However, going beyond the limits reviewed in this paper, or failing to file under the Lobbyist Registration Act, 1998 in Ontario, may subject the charity to fines or even charitable de-registration.

Concluding Thoughts

This brief review of the findings of our two comprehensive Reports concerning the charitable sector, specifically with respect to the law of advocacy or lobbying was designed to stimulate interest in the topic. (Hopefully, this writer did not merely succeed in adding to the confusion in the area.) The look at the common law, including the origins of the very definition of "charity" hopefully gave a bit of background to the subject debate. Both highly respected Reports agree that there exists a dire need for reform in the area. Perhaps this paper will give rise to more questions than answers, but hopefully it also cut through some of the technicalities of the legislation, enabling us to consider normative and constructive approaches to finding solutions to the problems raised.

This article is not intended as legal advice, or as an exhaustive review of the law in this area. It is written for informational purposes only, for the membership of the Ottawa Region CAGP and is not to be reprinted. Before any legal decisions are made, please consult with a legal professional.

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