THE LAW ON CHARITY AND ADVOCACY:

CURRENT ISSUES AND POSSIBLE SOLUTIONS

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And

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The Affiliation of Multicultural Societies and Service Agencies of BC (AMSSA) through the support of the Institute for Media, Policy and Civil Society

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Executive Summary

In response to Member Agencies' concerns with current laws on charity and advocacy, the Affiliation of Multicultural Societies and Service Agencies of BC (AMSSA) joined the Charity and Advocacy Project, through which the Institute for Media, Policy and Civil Society (IMPACS) is endeavoring to reform charitable status laws and practices. AMSSA received a grant from IMPACS to research among its Member Agencies to learn if they have encountered difficulties obtaining charity status, to discover how informed they are about the issues surrounding charity and advocacy laws, and to seek their input as to avenues to reform the laws. AMSSA conducted this research in the context of the review of the law of charitable organizations instituted by IMPACS, and divided the project in two stages:

1. In the first, a researcher, Libardo Amaya, was hired to meet with a sample of AMSSA Member Agencies to obtain their views on the procedural and substantive law problems they face when applying for charity status.

2. In the second, David Mossop Q.C. of the Community Legal Assistance Society developed a legal opinion on the obstacles faced by agencies in providing client services, and made legal reform recommendations to address those obstacles.

The Libardo Amaya report confirmed the view that current charity and advocacy laws negatively affects AMSSA Members Agencies. The findings of the report can be summarized as follows:

- Agencies seek charity status not only to gain the ability to issue tax receipts, but for the purposes of legitimacy or credibility in the eyes of governmental, non-governmental, and community organizations
- Many agencies do not obtain charity status because they engage in advocacy
- This denial relates to an outdated and limiting definition of charity
- The problem is compounded by some administrative problems; agencies feel frustrated about the complexity and the length of the application process.

The David Mossop Q.C. report briefly reviews the relevant law and case law in reference to the above problems and offers some recommendations, which are summarized as follows:

- To create a new class of charitable organization that allows small charitable organizations to engage in political activities provided that their issuance of charitable tax receipts does not exceed a dollar limit. This would require that the definition of political activities under the *Income Tax Act* be expanded to include lobbying government, demonstrations, press conferences, and generally attempting to influence government policy. The existing requirement that such activities be ancillary and incidental to an agency's charitable purposes will remain.
- Given the difficulties of developing a new definition of charity, a better approach would be to create an administrative tribunal with the power to define, on a case by case basis, what charity means in the modern sense. This tribunal will undertake appeals made by organizations to whom the Canada Customs and Revenue Agency (CCRA) denies charity status.

- On the administrative side, one way to deal with the complexity and lack of understanding of what charities do on the part of the CCRA would be to transfer the power to approve or disapprove charity applications to a department more sensitive to community needs, namely, Heritage Canada. The enforcement provision would remain in the CCRA. To deal with the lack of transparency and inconsistency in the process, a procedure manual should be available on the CCRA's web page with all the changes up to date. Also, to deal with the agency's concern about the lack of inconsistency with regards to their applications, a training course on the basics of charity law should be made available through educational institutions or other means and available on the internet across Canada for access by any community group.

While acknowledging the complexity of the issue, AMSSA is optimistic that the findings of the two reports will contribute to the quest of reforming the laws on advocacy and charity launched by IMPACS. AMSSA feels that the views of its Member Agencies along with the recommendations on the two reports will, at the very least, provide the basis to formulate alternative solutions to the issues arising from the charity and advocacy laws.

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First Part

Survey of AMSSA Member Agencies

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Introduction

"The truth is that today, charity status, or the ability to issue tax receipts is crucial to maintain some of our programs… I even would say, to the survival of some agencies…"

The immigrant settlement and multicultural serving Member Agencies of the Affiliation of Multicultural Societies and Service Agencies of BC (AMSSA), as well as other agencies in the Voluntary Sector, are confronted with a significant paradox. At a time the demand for services is increasing, government funding, --a primary funding source-- is decreasing. For many of our Member Agencies the current charity law magnifies this dilemma.

First, it prevents some from attaining or maintaining charitable status. Agencies, which are not registered as charities by the Canada Customs and Revenue Agency (CCRA) cannot issue tax receipts to encourage private donors to support their charitable activities. In addition, agencies without charity status are precluded from receiving grants from foundations and other non-governmental sources. As such, both services and fund raising initiatives are severely limited.

Second, fear of losing their charitable status significantly restricts the ability of agencies that have obtained it from engaging in activities, such as advocacy and public policy input. While these activities often support agencies' charitable purposes and their mandates and constitutions,[1] they are also activities which may be interpreted as unlawful for a 'charity' to undertake.

[1] "The Law of Advocacy by Charitable Organizations: Options for Change." Paper published by the *Institute for Media, Policy and Civil Society* as part of the Law on Advocacy and Charity Project.

Causes of the Difficulties Obtaining or Maintaining Charity Status

"The government has little understanding of what charities do…" [2]

A study commissioned by the Institute for Media, Policy and Civil Society (IMPACS) found that outdated legal standards and lack of clear definitions and ambiguity in the charity and advocacy laws are the main causes of these problems.[3] On the one hand, there is no single source of the law, and the courts and the CCRA inconsistently apply their discretion when deciding applications for charity status. On the other, court decisions based on 16th century law severely narrow the parameters within which charities can put forth their viewpoints, both to the government and to the public. These findings concur with the conclusions of two previous reports commissioned by the federal government on Canada's voluntary sector: the Broadbent Panel and the Joint Tables Report.[4] As a result, the Voluntary Sector in general, and AMSSA in particular, consider that the law must be reformed.

The Quest for Change

"We need to agree on the changes. But we also need a strategy to get those changes implemented…"

Recognizing the need to change the law is one thing; agreeing on how to change it and then having those changes enacted by government legislation is another. One way to set off this needed process of change is to encourage debate between and within agencies about the issue and to build consensus regarding those changes. IMPACS has made its report available in an attempt to inform agencies about the issue, has put forth four options to change the current laws. IMPACS is also seeking input from the sector as to new options or the best option of those presented. In contribution to this effort, AMSSA is actively involved in finding feasible and

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[2] To maintain the anonymity of respondents, quotes from their answers will be used without citations.
[3] Bridge, Richard. "The Law of Advocacy by Charitable Organizations: The Case for Change." A report prepared for the Institute for Media, Policy and Civil Society. September 2000.
[4] These reports identify some of the issues in the voluntary sector, set out a range of options to be considered by both the government and the voluntary sector and a process for consideration and consultation. For more information on the Broadbent Panel Report see web version at http://www.web.net/vsr-trsb. For the Joint Tables Report refer to http://www.web.net/vsr~sb

appropriate options to reform the law. For this purpose AMSSA surveyed a representative number of its Member Agencies to determine how informed they are about the issue and to seek their input as to possible avenues for change.

The Member Agencies surveyed by AMSSA for this project provide a vast array of multicultural programs and immigrant services both in major urban centers (44%) and smaller communities (66%) around British Columbia. All participant agencies are well established, some with over 30 years in operation. Although they were selected based on a number of varieties such as regional representation,[5] size,[6] service types,[7] about half were found to have charitable status while the rest have been unable to attain it.

What AMSSA Member Agencies Had to Say About the Issue

The responses to the questions asked (see appendix A) and other general commentaries indicate that for all the agencies, attaining and/or maintaining charitable status is of paramount importance for two reasons. First the charity status enables them to raise funds from sources other than the government thereby increasing their independence of their operations. Second, the charity status gives them credibility and legitimacy in the eyes of governments, private donors, and the community they serve. Agencies with charity status stand better chances to be awarded government contracts for the provision of services as well as grants from non-government sources, and are better perceived and appreciated by the community.

As identified in the reports of IMPACS and the Broadbent and the Joint Tables reports, respondents indicated that denials or difficulties in getting the charity status were related to the activities mandated in their constitutions. Multicultural societies and smaller agencies promoting

[5] For purposes of organization and operation, AMSSA divides BC in five regions: the North, the Interior, the Fraser Valley, Lower Mainland, and Vancouver Island. The survey included agencies from each of these regions.

[6] The number of staff working for the sample agencies was the basis of categorizing an agency's size. Small agencies are those ranging between 3 to 10 staff members and large agencies are those ranging between 10 to 100+ staff members.

[7] Service type refers to the inclusion of agencies providing multicultural programs and immigrant services. No attempt was made to identify which multicultural groups or immigrant groups the agencies serve.

human rights, gender issues and anti-racism find it generally more difficult to obtain charity status than immigrant serving agencies. This confirms that advocacy is significantly restricted under the current law and/or that, given the lack of clarity in the language and definition of concepts, CCRA officials are likely to interpret advocacy as 'political activity.'

A lesser hindering factor contributing to problems of obtaining charity status is the format and the process of applying. Some agencies consider that a special knowledge or skill, which their officials lack, is required to complete the application process. Some also find that the process is somewhat secretive, with no clear, written reasons given by CCRA officials for denial of the charity status in some cases, and that even when reasons are given there is not an appeal process or administrative remedy than can be pursued. A change in the interpretative framework on the part of CCRA officials seems to have occurred somewhere during the past ten years as older agencies did not experience the same degree of difficulties getting their charity status. Nonetheless, current charity laws limit agencies that obtained their charity status years ago in their ability to amend their constitutions to better respond to the ever-changing societal needs.

The exact financial impact of having or not having charity status was difficult to quantify by the surveyed agencies. However, all respondents indicated that the impact of having charity status is greater than the present budgetary implications for the agencies. On one hand, as indicated above, charity status gives legitimacy and credibility. On the other, most respondents foresee an increase in the demand for their services parallel to a reduction of government services and funds, and see the charity status as an instrumental tool to incentive donors in future fundraising campaigns. Respondents had divided opinion when asked whether charity status was more important to some agencies than others. Some respondents believe that for agencies in the multicultural and social services sector charity status is more important because they are more dependent on donations than the immigrant-serving sector. In their opinion a country committed to multiculturalism must enable agencies to raise the funds needed to provide multicultural services. Others believe that the kind of agency does not matter, but consider that in light of the events of September 11 in New York, newer and smaller agencies will have a greater need for charity status than large, well established agencies. This is because donors will increasingly

consider their perception of the legitimacy of agencies to which they are considering donating money.

Despite the denial of charity status for some agencies and the limitations imposed by the current laws on the activities of the agencies who have it, surveyed Member Agencies were ill-informed about the process and the issues surrounding charity and advocacy laws. This is in part because officials from Member Agencies did not have legal background or exposure to deal with the legalistic nature of the problems with the current laws, and in part because the CCRA does not give written or otherwise explicit reasons for denial of the status in some cases. Officials from agencies that had exposure to the materials published by IMPACS either did not have the time to properly review them or found them to be too cumbersome. The majority was not aware of the specific options for change presented by IMPACS (see appendix B). However, when given brief synopsis of the options and were asked to agree or disagree, they provided useful commentary. What follows is a summary of the major points raised in their responses.

AMSSA Member Agencies Views about "Options for Change"

There is a consensus as to the need to change the existing approach to advocacy and charity laws toward an approach that recognizes the importance and legitimacy of public policy input by charities. Or, as one respondent put it,

> *"There is a need to insist that we have a role in influencing policy decisions…"*

This need has been identified by, and is considered an "advantage" in all the options for change advanced by IMPACS.[8]

The majority of the representatives of AMSSA Member Agencies believe that changes should be adopted based on what will really solve problems over the long term, not based on what it is easier to enact into legislation. Changing definitions may be easier to achieve compared to creating a new category because definitions may not require going through Parliament. However, new definitions --even if they can be agreed upon, which some doubt-- may not give the flexibility needed in some organizations.

In evaluating IMPACS 'Option One' (Clearly Identify What Charities Cannot Do),[9] all respondents thought that it could be useful to identify what activities charities cannot engage in, but many were skeptical that consensus on the exact identification of such activities could be achieved. The suggestion made in this option by IMPACS that only partisan politics and illegal activities should be prohibited was found by the respondents to be somewhat simplistic. None of the respondents admitted to have partisan political purposes behind the services they provide, to practice partisan politics, or to have heard of any agency being denied or having lost their charity status because of partisan politics. Some expressed the concern that at times their agencies' activities can have the appearance of being political because of funding sources, requests by elected officials for input on policy issues, requests by media wanting to know stated agency positions on certain issues, or agency representatives participation in public speaking engagements. All agree that any list of prohibited activities may be limiting because there is great variety of activities and community needs. Also, new agencies may focus on designing their constitutions around this list of 'prohibited activities,' ignoring other important aspects of their organization or purpose.

Regarding 'Option Two' (Broadening the Definition of Education), all respondents consider education as an integral component of the policy input process, deem the current definition of education too narrowly focused, and agree on the broadening of the definition of education to include public policy input. Educating people about issues is important to advance charitable purposes, and it encourages debate and participation in the political process. Advocacy may be educational, therefore agencies should not be penalized for carrying out advocacy activities.

Similarly, with respect to 'Option Four" (Create A New Legislative Definition of "Charity"), all respondents agree. All recognize as charitable activity the promotion of tolerance and understanding between peoples of various nations and the promotion of the culture, language and heritage of Canadians with origins in other countries. Also, it is believed that the law should recognize that serving a particular group does not close the doors to the public at large, and that

[8] For more information see "The Law of Advocacy by Charitable Organizations: Options for Change."
[9] For more information about each of the options, refer to appendix "B"

by serving a group an agency serves the whole community. Solving social issues is always in the interest of the public good. However, about forty-four percent of the respondents expressed concern in relation to new definitions. Some consider that definitions are still subjective and this will continue to pose problems of clarity and definition. They also think that consensus on new definitions may be complicated to achieve and that unambiguous definitions may not be encompassing enough to reflect the needs and realities of a changing society.

With respect to 'Option Three" (Create a New Category of Tax Exempt Organization) opinion was divided. One third of the respondents think that a new category is a good opportunity to overhaul the whole system and introduce new definitions, rules and regulations. They also believe that a new category will allow more flexibility for agencies that do not fit the two existing categories: *charity* and *non-profit organization*. Twenty-two percent of respondents do not know much about the nuances of present categories to evaluate whether or not a new category is warranted, and tend to believe that a new category will make the process more complicated. Another twenty-two percent believes that it is better to work within what already exists, and consider that expanding or clarifying the definition of charity is the best option.

One idea voiced by many respondents during the interviews is to establish an appeal process or administrative remedy to seek redress in decisions from CCRA officials regarding charity status with which they disagree. It is believed that an appeal process or administrative remedy will significantly add more fairness to the process of applying for charity status. Agencies representatives will have a chance to be heard, verbally or in writing, during appeal processes

Conclusion and Recommendations

The need to reform or totally change present advocacy and charity laws is widely recognized. However, even though the current charity and advocacy laws have limiting effects on agencies with or without charity status, the roots of the problem were not well understood by most of AMSSA Member Agencies. Likewise, the majority was not aware or had not knowledge of the four options for change presented by IMPACS. After being given brief synopses of the options,

Member Agencies considered that they did not have the background knowledge about the issue or did not know enough about the specific options to make an informed decision as to which new option would be best.

While recommendations as to legal policy options for reform will be considered in the second part of this research project (prepared by Mr. David Mossop of the Community Legal Assistance Society), some considerations to make IMPACS' Charity and Advocacy Project more valuable to AMSSA Member Agencies and other agencies in the voluntary sector are put forth below.

- There is a need to promptly expand IMPACS database to fully inform agencies in the sector about the issues arising of current charity and advocacy laws. As of now about 25% of charitable organizations are included in IMPACS database, leaving 75% of agencies or organizations without information about the issue. While AMSSA is pleased to inform Member Agencies about the Charity and Advocacy Project on behalf of IMPACS, it may be more beneficial for agencies if the information is provided directly by IMPACS

- Agencies may be able to benefit more from IMPACS work on the issue, if they have a permanent way to obtain direct advice regarding the charity status application process. A good legacy of IMPACS' current effort to inform agencies about the issue could be the setting up of a permanent 'support center' or 'information line' to which they can address their questions and concerns regarding charity status. Another option could be having IMPACS train a number of leading agencies in the various fields of the voluntary sector to enable these agencies to provide support and expertise about applying for charity status to their partner agencies in the community.

- Finally, since most Member Agencies considered that charity status legitimized them in the eyes of the government bodies and foundations, an alternative approach to acquire 'legitimacy' would be greatly beneficial to agencies in the voluntary sector. For example, a 'Community Serving Agencies Bureau' could be created to register community-serving agencies and respond to public inquiries about the seriousness and legitimacy of a given agency.

Appendix "A"

Questions

1- Agencies sometimes are unable to obtain or maintain their charitable status. Have this agency experienced any difficulties attaining and/or maintaining charitable status? If yes, what has been the nature of these difficulties?
2- Based on your experience, what do you identify as the main factors contributing to this difficulty?
3- What is or has been the impact for this organization, if any, of not having or having been denied or having lost charitable status?
4- Do you consider that for some agencies charitable status is more important than for others? If so, for which agencies is more important?
5- The CAP has identified a need for clear guidance/definition as to the types of the activities charities may engage in to advance or support their charitable purposes. However, imprecision in the language used to define concepts such as 'partisan politics,' 'political purpose' and 'political activity' blurs the distinctions between 'charity' and 'partisan politics.' As such, the CAP suggests as option 1 to clearly identify, under the heading of 'partisan politics,' the activities that charities cannot do. Based on your experience, do you agree with the proposition that this is the cause, or one of the leading causes of the problem? Is option 1 an appropriate solution for this problem? Do you see any advantages/disadvantages on this option?
6- Under the current law, charities can engage in activities for the advancement of education. Education is deemed charitable if it is reasonably objective, that is, if it presents *all* sides of an issue and is formal and structured. Informally educating the public about an issue is often considered political activity, not an educational one. To correct this problem the CAP proposes, under option 2, to broaden the definition of education to include 'public policy input,' or strong, reasoned arguments made to the public in public policy issues. Do you agree? Do you see any advantages/disadvantages in broadening the definition of education? Is there any thing else that you consider necessary to include in a definition of education?
7- Another concept identified as creating some problems under the current law on charities and advocacy, is the concept of 'public good.' The current and underlying approach to consider an object or act as charitable is whether or not the purpose of the object or act is beneficial to the community at large. Because some agencies serve only a sector or group in their communities, they are denied charitable status or their status is rescinded. The CAP proposes, under option 4, to create a new legislative definition of charity, which allow agencies to contribute to the resolution of multicultural, ethnic or gender issues with a 'social capital' instead of 'public good' approach. Do you agree with this proposition? If yes, do you have any suggestions, which result in a more comprehensive definition of charity? If no, why?
8- The CAP has also proposed, as option 3, to create a new category of tax-exempt organization. The two most relevant characteristics of this new category would be the

unrestricted ability to engage in the legal influencing of public policies and the ability to issue tax receipts for donations. In your opinion, how feasible is this option?

9- Based in what you have learned during the course of this interview, in conjunction with your experiences in this or other agencies, can you think of other options that may resolve the issues surrounding the law on charity and advocacy more effectively or practically?

Appendix "B"

THE LAW OF ADVOCACY BY CHARITABLE ORGANIZATIONS: OPTIONS FOR CHANGE

The Problem

Canada's charities are faced with restrictions on their ability to engage in advocacy or to provide public policy input. They are restricted not only from engaging in broad public debate, but from debate on the issues or problems they are mandated to address. These restrictions apply to efforts to encourage changes to laws or government policies as well as efforts to influence community opinions or public behavior. These restrictions arise from a combination of vague provisions in the federal *Income Tax Act* (ITA), court decisions, and imprecise and unduly restrictive administrative policies and discretion of the Canada Customs and Revenue Agency (CCRA). As a consequence, charities must deal with several practical administrative difficulties, but most importantly, their voices are partially muted, and they are impeded from full participation in public policy discussion and debate. There are several options available to remedy this situation. One is the U.S. approach, which is described beginning at page 19 of "The Law of Advocacy by Charitable Organizations – The Case For Change." Four other options are examined here.

Option One: Clearly identify what charities cannot do

A key element of the difficulties in this field is imprecision in the language used. The concepts of "partisan politics," "political purposes," "political activity," and "advocacy" are often blended and confused in an unhelpful way. It is worthwhile to look at each:

Partisan politics, according to the CCRA, involves direct or indirect support of, or opposition to, any political party or candidate for public office.

Political purposes under the common law are not charitable and an organization established for any of the following purposes will be denied charitable status by the CCRA:

- to promote a political or socio-economic ideology;
- to support or oppose a change in the law or in government policy; or
- to persuade the public to adopt a particular attitude on socio-economic or political issues.

Political activities are undefined by the common law or ITA, but if these activities help a charity achieve its goals, and they meet the CCRA's 10% rule, they are permissible to the CCRA. The CCRA's 10% rule is that a charity can apply no more than about 10% of its resources to political activity.[1]

Advocacy. The CCRA recognizes four types of advocacy:

- Advocacy on behalf or individuals (e.g. a developmentally challenged person) is "usually" considered charitable.
- Advocacy on behalf of a group is "rarely charitable."
- Advocacy to change people's behavior can be charitable if it is "well-rounded" rather than "based on slanted, incomplete information and an appeal to emotions."
- Advocacy to change people's opinions "is unlikely to be charitable."

It has long been clear and widely accepted that charities should not use any of their resources for partisan political activities. Few, if any, leaders in the charitable sector disagree with this separation and restriction.
It appears that confusion has arisen as the distinction between "charity" and "partisan politics" has become blurred. Over time, this rather simple distinction has been complicated by the unfortunate addition of non-partisan activities and advocacy to the mix. Now non-partisan efforts by a charity to a change a law that relates to the charity's valid charitable purposes can cause trouble with the CCRA. What has emerged has been described as a "terminological mine field," where the imprecise definitions outlined above are applied to a wide-range of activities by large numbers of very different charities. The results are confusion and undue restriction. The issue can be viewed as a technical problem that
requires a technical correction.

A simple technical correction to improve this field would be to amend the ITA to remove the clutter around "partisan politics" and "charity" by identifying those activities under the heading of "partisan politics" that charities should not engage in, and expressly prohibiting them. This would *not* require changes to the definition of charity or a major overhaul of existing regulatory practices. Rather, it
would simply mean that once an applicant organization meets the current legal requirements to achieve charitable status, then it must not engage in the listed activities. The list of prohibited activities should be modest – only partisan politics and illegal activities should be prohibited. The definition of partisan politics could consist of:

1 Note that the CCRA's 10% rule has been called into question as a result of the Supreme Court of Canada's decision in *Vancouver Society of Immigrant & Visible Minority Women v. MNR*, [1999] 1 S.C.R. In "Federal Regulation of Charities – A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform," York University, 2000 at pp. 59-60, Patrick Monahan and Elie Roth argue that the Court's decision means that political activities that are "ancillary and incidental" to charitable purposes are themselves charitable, and properly not subject to a 10% limitation.

- direct or indirect support of, or opposition to, any political party or candidate for public office, and
- promoting a political ideology.

These two elements combine to capture activities that are properly beyond the scope of charity and best left to political parties and others, not charities.

With this approach the concepts of "political activity" and "advocacy" as currently enforced would become redundant, as would the 10% rule that limits non-partisan political activity. Charities would, by implication, be able to engage in advocacy related to their charitable purposes without restrictions. Advocacy, in all the forms described above, efforts to change laws, government policies or public behavior or attitudes, and full participation in public dialogue, would be recognized as legitimate activities by charities. Charities would know what they can and cannot do, and enforcement would be greatly simplified. As a public policy approach, it would recognize the coherent and accepted principle that partisan politics and charity are, and should remain, separate.

ADVANTAGES:
• This approach would recognize the importance and legitimacy of public policy input by charities and would allow greater latitude than the current approach.
• Minor legislative or regulatory changes would be required.
• The rules would be simple and clear, making compliance by charities easy.
• CCRA's regulatory role would be simplified.
• It would recognize the well-established distinction between partisan politics and charity.
• "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules would be eliminated.
• Consensus among charities would likely develop in support of this option.

DISADVANTAGES:
• The absence of quantitative limits on non-partisan political activities could be a problem.
• Some charities may redirect resources to non-partisan political activities to the detriment of their primary work.

Option Two: Broaden the definition of education

The four common law categories of charity are: relief of poverty; *advancement of education*; advancement of religion; and other purposes beneficial to the community, not falling under the previous categories. Much of the difficulty around the issue of advocacy by charitable organizations involves confusion
as to whether activities are permissible as advancement of education or prohibited political activity. Generally speaking, the Courts and the CCRA have considered activities to be educational in this context if they involve a formal training of the mind or formal instruction, or if it improves a useful
branch of human knowledge. Another element of the "education v. politics" quandary is addressed in this passage from the draft CCRA policy paper "Registered Charities: Education, Advocacy and Political Activities":
To be considered charitable, an educational activity must be reasonably objective. This means all sides of an issue must be fairly presented so that people can draw their own conclusions. It is a question of the degree of bias in an activity that will determine if it can still be considered educational. The materials of some organizations have such a slant or predetermination, that we

can no longer reasonably consider them as educational. Also, to be educational in the charitable sense, organizations must not rely on incomplete information or appeal to emotions. Even in a classroom setting, promoting a particular point of view is not educational in the charitable sense. Thus, courses, workshops, and conferences may not be charitable if they ultimately seek to create a climate of opinion or to advance a particular cause. The subjectivity and practical difficulties of administering charity law under these principles are considerable. To illustrate, should a church be expected to present differing religious views or the atheist perspective in order to retain charitable status? Or should an organization dedicated to reducing alcoholism be required to advance merits of alcohol consumption? Not likely. However, some organizations are scrutinized thoroughly, some say excessively so, by the CCRA along these subjective and imprecise lines. A option for change in this field would involve expanding the definition of charitable education to expressly include "public policy input," or strong, reasoned arguments on public policy issues. This could include a quantitative limit (e.g. half of a charity's educational activity can consist of "public policy input") or it could be unlimited.

ADVANTAGES:
• This approach would recognize the importance and legitimacy of public policy input by charities, and allows greater latitude than the current approach.
• Minor legislative or regulatory amendment would be required.
• "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules would be eliminated.
• Resistance from government would likely be minimal compared with larger scale reforms.

DISADVANTAGES:
• Some charities may redirect resources to public policy input to the detriment of their primary work.

Option Three: Create a new category of tax exempt organization

This option was recently advanced by Professor Kernaghan Webb of Carleton University.[2] It would involve creation, through changes to the ITA and regulations, of a new category of organization between non-profit organizations (NPOs) and charities. Webb proposes that organizations in this category be called "registered interest organizations" (RIOs), and that they have the following attributes:

a) exemption from taxation (like NPOs and charities);
b) registration (like charities, but unlike NPOs);
c) an unrestricted ability to engage in the influencing of public policy, as long as the objectives and means are legal (like NPOs, but unlike charities);
d) the ability to issue tax receipts for donations (like charities, but unlike NPOs); and
e) a rate of deduction for donations that is different from that available for charities, possibly equivalent to the deduction available to corporations for lobbying expenses at the average effective tax rate.

The existing rules (e.g. the 10% rule) could remain unchanged for the charity category. Webb suggests higher public disclosure requirements for RIOs and charities regarding efforts to influence public policy. He also suggests that this new category could be filled by requiring NPOs or charities that spend over a certain amount on influencing public policy to file a return as an RIO.

ADVANTAGES:
• This approach would recognize the importance and legitimacy of public policy input by NPOs and charities and allow greater latitude than currently provided to charities, and new tax advantages to some NPOs.
• It would be consistent with past legislative reforms that gave "deemed-charity" status to Canadian Registered Amateur Athletic Associations and National Arts Service Organizations, both of which can issue tax receipts.
• It would allow flexibility regarding the tax treatment of RIOs in relation to charities and other recipients of tax advantages.

DISADVANTAGES:
• Compared to options 2 and 3, this would require considerable legislative and regulatory reform.
• Distinguishing between "charities" and "RIOs" could be contentious and problematic, particularly for organizations that deliver traditional charitable services and engage in public policy input.
• The rules of public policy input for those organizations in the charity category would still be inadequate.
• This category could be used to restrict access to the full charity category.

2 See *Cinderella's Slippers? The Role of Charitable Tax Status in Financial Canadian Interest Groups,* Vancouver, BC: SFU-UBC Centre for the Study of Government and Business, 2000.
Option Four: Create a new legislative definition of "charity"

The ITA does not define charity. Instead, the common law definition mentioned above (relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community) is relied upon. This common law approach has its origins in legislation passed in Elizabethan England and case law from the Victorian era. Indeed, the year 2001 is the 400th anniversary of the *Statute of Uses, 1601*, the foundation upon which charity law in common law jurisdictions is built. While the courts have permitted the definition to evolve and expand somewhat, it is, in the opinion of many observers, badly dated, inadequate and in need of a thorough legislative overhaul and modernization.
Codification of the common law is appropriate when the latter lacks clarity or has not kept pace with social change. Charity law meets both criteria for codification.
Creating a modern and comprehensive definition of charity for the ITA would be a major national public policy undertaking. In Australia, which shares our common law tradition and problems in the field of charity law, the national government has formed a "Charities Definition Inquiry" to examine modernization of the field. This work may provide a benchmark for Canada. Such an overhaul in Canada would invite changes in several areas, including the treatment of multiculturalism issues under charity law, the concept of "social capital," and of course the rules governing advocacy. It would be possible to clarify in a new definition that advocacy for public

benefit related to a charitable objective is itself a charitable activity, for which there are no restrictions.

ADVANTAGES:
• This approach would recognize the importance and legitimacy of public policy input by charities and allow greater latitude than the current system.
• This approach would require a full public debate of the broad issues of charity, and could resolve a number of problems in the field, in addition to the advocacy issue.
• "Advocacy chill" and self-censoring by charities fearful of violating the current unclear rules could be eliminated.

DISADVANTAGES:
• Such a broad initiative could be slow and divisive, with consensus difficult to obtain.
• The scope and complexity of the task may deter government from tackling it.
• There is concern that the results of yet another Canadian Royal Commission may not be implemented.

Conclusion

The need for change in this field is widely recognized and any of the four options addressed above would be an improvement over the status quo. If consensus can be built within the voluntary sector as to which form the change should take, the likelihood of overcoming inertia and achieving reform will be greatly increased. We are interested in exploring other options, and welcome your ideas.

For further information or if you have any suggestions please contact:

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THE LAW ON CHARITY AND ADVOCACY:

CURRENT ISSUES AND POSSIBLE SOLUTIONS

Part 2

Reforming the Law

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REFORMING THE LAW OF CHARITIES

Background

AMSSA has received a grant from IMPAC to review the law of charity under the *Income Tax Act*. This review is to be undertaken from the point of view of immigrant service and multicultural agencies.

AMSSA developed a two-prong approach to this grant:

A researcher, Libardo Amaya, was hired to meet with immigrant and multicultural agencies to obtain their views on the procedure and substantive law problems they face when they apply for charitable tax status under the *Income Tax Act*.

The second stage was for David Mossop Q.C. to write a legal opinion on the legal obstacles and to make law reform recommendations.

All of the above was to be done in the context of the review of the law of charitable organizations instituted by IMPAC.

Libardo Amaya Report

This report supports the view that charities feel frustrated by the process. They consider the process complicated and time consuming. Many charities apply for such charitable tax status for the purposes of credibility and obtaining additional sources of money. The Libardo Amaya Report suggests there are three major problems:

1. One is the requirement that charities not engage in lobbying.

2. This issue concerns the general definition of charity.

3. Finally, the groups feel frustrated about the complexity and delay caused by the present administrative system.

What we will do is review the relevant law and case law in reference to the above problems and suggest solutions. Our suggested reforms are not limited to the options presented by IMPAC, but rather go outside of those suggestions. Finally, it should be noted that these three problems are not departmentalized but rather are interrelated.

Advocacy & the Law of Charity

Charity Law Generally

The *Income Tax Act* refers to charity and charitable organizations, but does not define that term. Instead to find the meaning of charity we have to look at the common law. The leading case is *Commissioners for Special Purposes of the Income Tax Act v. Pensel* [1891] A.C. 531 where Lord MacNaghten states as follows:

> *Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the proceeding heads.*

Charity Law and Advocacy

The Courts, early on in the development of the law of charities, had to consider whether organizations were charities if they attempted to influence governmental policies or seek changes of the law. The Courts in an early stage decided that it was not charitable to attempt to intervene directly in partisan political process and, in addition, it was not charitable to attempt to bring about changes in the law or to persuade the public to adopt a particular attitude towards social, political or economic issues.

The starting point for this legal doctrine can be seen in the case of *Bowman v. Secular Society* [1917] A.C. 406. The most frequent reason given for this is the courts are not in a position to say which changes of the law would be for the public benefit. See the *Bowman* case. That legal doctrine has been applied to the *Income Tax Act* with certain changes. Subsections 149.1(1.1), 149.1(6.1) and 149.1(6.2) of the ITA allow a registered charity to devote some its resources to ancillary and incidental political activities, provided they are not partisan in nature.

The difficulty is that most modern community based organizations engage in some form of advocacy as described above and, in fact, consider it a very important part of their activities. It is almost impossible for community based organizations not to engage in the type of political activity or advocacy which is prohibited under the laws of charities. (Unless it is ancillary or incidental). In fact, many community based organizations contain such purposes in their constitution and bylaws when the organization is incorporated. The difficulty is, these purposes are prohibited by the *Income Tax Act* because the general law of charities is incorporated into the *Income Tax Act*. Thus these groups do not get their charitable tax status.

No doubt organizations with access to money or volunteer lawyers can get around this problem by limiting the amount and type of political activity. Alternately, the organization can split the charitable from the non-charitable activities and set up separate organizations for both. These organizations can operate separately and lawfully provided the charity does not give the non-charity money. However, these sophistications are beyond the reach of many community based organizations. The very groups that registration was meant to help are left out in the cold. In

addition, this whole process takes time which results in many groups giving up in their attempts to get charitable tax status.

However, even if the group gets registered the problems do not stop there. Registered charities do not know with certainty what activities are acceptable. Can they participate in a demonstration? Lawyers will always advise caution. The case law is far from clear. The result is a chilling effect on charities.

There is a final frustration; it is one of proportionality. It is important to realize that registration under the *Income Tax Act* is required no matter how much money one plans to issue receipts for. It maybe that the charitable organization receives all or a sizable amount of its money from donations from private individuals or companies. However, it may be that the organization receives very little money from donations and issues very few receipts. We can think of women=s organizations who help low income women who engage in lobbying activities. These organizations are typically funded in a substantial way by the various levels of government. They may receive the bulk of their money this way. They seek charitable tax status in order to receive supplemental sums of money. By the way of an example, you may have an organization receiving $200,000 to $300,000 from governmental sources and hoping to raise maybe $2,000 to $5,000 additional sums of money through charitable tax receipts. However, that organization is treated the same way as an organization that receives the vast majority of the monies through charitable tax receipted money. This is the over reach of the *Income Tax Act*.

Advocacy and Reform: The Need for Balance

Reform cannot take place in a vacuum. It must be undertaken taking into consideration the interests of various stake holders. Let us discuss those interests.

Community groups, particularly small groups, seek two basic goals. They want to engage in political lobbying in the widest sense, including demonstrations and affecting public opinion. At the same time they are willing to accept limitations, provided the limitations are certain and reasonable.

The Canada Customs and Revenue Agency (CCRA) is a stake holder too. They want a system that is easy to administer. Uncertainty in the law results in CCRA taking a conservative approach. CCRA prefers a mathematical approach that is easy to interpret and apply.

Finally, there is a public interest that is represented by Parliament. Should charities have carte blanche to engage in political lobbying? Some people say so. However, politicians do not want rivals to their political parties.

Suggested Reforms to the law

A New Class of Charitable organization

My suggested reform is two fold in nature. Political activities should be defined in the *Income Tax Act* to include lobbying government, demonstrations, press conferences and generally attempting to influence government policy. The existing requirement that such activities be ancillary and incidental remain.

A new class of charitable organization called the *Small Charitable Organization* (ASCO@) would be created. This SCO would be allowed to engage in political activities provided it fitted within the new definition and did not exceed a dollar limit. In other words, they could advocate for the changes in the law, or attempt to influence public opinion with no restrictions. However, such an organization would continue to be an SCO provided it did not issue charitable tax receipts for a dollar figure over $20,000 per year or other dollar figure. This would ensure that only SCOs could attempt to influence governmental policy and would prevent the creation of rather large charitable organizations who had devoted their time exclusively to that purpose. Existing prohibition against political activities would continue for the large organizations. However they would benefit from the new definition.

This system would allow small organizations to engage in advocacy. It would set a figure that the community and CCRA could understand and adhere to. No doubt some protection would be needed to prevent the spinning off of SCOs that were controlled by the same group of persons.

A New Definition of Charities

Many of the groups felt that a new definition of charities was needed. This they felt would solve some of the problems now associated with applying for and obtaining charitable tax status. There are three basic approaches to this situation.

The first approach is the present approach. That is, we allow the courts on a case by case basis to interpret and apply the common law on charity to modern circumstances. This has served us up to this point in time. There are two basic problems with this process. It assumes that charities, particularly small charities, will be able to afford lawyers or obtain lawyers to do the appeals to court. It is very difficult for charities to do this. The second assumption is the court will interpret the law of charities in a progressive and enlightened manner. Recently the Supreme Court of Canada had to deal with the law on charities. Instead of taking a progressive view, they took a more traditional view. See *Vancouver Society of Immigrant and Visible Minority Women v. MNR* [1999] 1 S.C.R. 10.

The second approach is to develop a new definition of charities. This would require a consensus among the various stakeholders including community based organizations. This is unlikely to

happen and for that reason the Parliament and the Government would be reluctant to sponsor and approve such legislation. This is not a feasible alternative.

The third approach is perhaps the best approach and that is to create an administrative tribunal composed of people who have legal training and people who have community based experience. They would be given the power to define on a case by case basis what charity means in the modern sense. What is envisaged is that this would happen when people made their applications to the CCRA regarding their status as charities under the *Income Tax Act*. If the CCRA disapproved or refused their charitable tax status, the organization could appeal to this new administrative tribunal. It would be run on a rather informal basis. This would reduce the cost to community based organizations. Of more significance is that this new tribunal would be given the jurisdiction to determine what the law on charity meant in the modern sense of the word. We therefore wouldn=t be shackled with the traditional approach which is adhered to by our courts and their application to modern circumstances. We do not define discrimination but leave it to an administrative tribunal to define on a case by case basis set up under the *Human Rights Act.* The same should hold true for charities.

Dealing with Administrative Problems

There are a number of administrative problems that have come up from the report of Libardo Amaya. These include administrative culture, complexity of the process and training.

Administrative Culture

One must never forget that the CCRA is primarily concerned with the collection of taxes on behalf of the Government of Canada. Most of the departments within the CCRA are devoted to this purpose. A difficulty arises in regards to the Charitable Division. It performs two basic purposes; One is the registration of charities which effectively means the giving away of government money. The other is the enforcement of the charitable tax provisions under the *Income Tax Act.* The community groups would like a much more sensitive registration process. A suggestion would be to take out the registration process from the CCRA and transfer it to another department, namely, Heritage Canada, which would be more sensitive to community concerns. The enforcement provision would remain in Revenue Canada.

Complexity of the System

Community groups have indicated they are concerned about the complexity of the registration process. There is a general lack of transparency in the process. There is no manual now in the hands of the CCRA with regards to the registration process. They are in the process of putting a manual together. This manual should be available on the CCRA=s website with all the changes up to date. This would help community groups who are mostly unsophisticated in their registration process. In addition, on the website, sample applications could be put up showing what is expected in the application process. No doubt permission of the organization that has been registered under this system would be required. There is a reluctance in the CCRA to do something like this because of the cultural aspect as explained above. This is another reason why the registration process should be taken out of the CCRA.

Training

There is a concern in the community groups about the lack of consistency with regards to their applications. One giant step in this process would be for the CCRA to contact local educational institutions to develop a core curriculum in Charity Law so that members can take the course. In addition, this course could be made available on the internet across Canada for community based organizations. It would create a common ground for both government and community based organizations to understand the law and its enforcement.