



**CENTRE FOR LAW
AND DEMOCRACY**

**Submission to the Canada Revenue Agency's online
consultation on charities' political activities**

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Executive Summary

This Submission is the Centre for Law and Democracy's (CLD) response to the Canada Revenue Agency's (CRA) online consultation on charities' political activities. Although the consultation asked specifically for input on three issues regarding the rules governing charities' political activities, CLD believes that focusing on this issue in isolation from the other problems with the legal framework governing charities would be counterproductive. Rather, we believe that there are a number of interconnected, systemic problems with the rules which need to be addressed in a holistic manner. In this regard, we welcome the fact that the mandate letters for the Ministers of Finance and National Revenue call on them to introduce a new legislative framework for the charity sector.

Instead of responding to the specific questions posed by the CRA, this Submission contains CLD's main comments on and recommendations for overall reform of the rules governing charities. Our analysis and recommendations are divided into three main parts, namely:

1. **The Definition of a Charity:** This part looks at how the definition of what a charity is needs to change so as to be better aligned with modern ideas about charities.
2. **Clarifying Partisan Activities:** This part focuses on the absolute ban on charities engaging in partisan activities, making suggestions about how to clarify and refine this.
3. **Moving Beyond 'Political' Activities:** This part puts forward proposals to move away from the very idea of limiting charities' political activities.

The current Common Law-based system for defining charities is drawn from a 19th Century House of Lords decision and an early 17th British statute. Despite being based in the Common Law, Canadian courts have been reluctant to introduce the major changes that are needed to ensure that the notion of what is charitable accords with modern Canadian values. CLD is, as a result, proposing that the broad categories of charitable purposes – the areas of work into which the purposes of charities must fall – should be set out in legislation following a public consultation. At the same time, we are calling for a residual power to continue to be vested in the courts to determine additional categories of charitable purposes.

It is accepted that charities should not engage in partisan political activity, in the sense of supporting or opposing particular political parties or candidates. But the rules currently prohibit both direct and indirect support/opposition, with the latter being interpreted in an unduly broad and hence limiting manner, which has also created a lot of uncertainty in terms of the scope and nature of the rules. CLD is recommending that the prohibition on direct support/opposition remain in place. At the same time, we are calling for the prohibition on indirect support/opposition to be replaced with a requirement of balance and impartiality over time. This is similar to the obligation placed on broadcasters, which has proven to be constitutionally robust as a restriction on freedom of expression, to have provided a clear and workable framework for broadcasters, and to have maintained the desired balance and fairness of the electoral system. To further ensure that the latter policy objective is achieved, we recommend that any work charities undertake which might support or oppose parties or candidates be strictly limited to activities which support the achievement of their charitable purposes.

The most contentious issue, and the one which the CRA consultation formally focuses on, is the question of charities undertaking so-called political activities, which is largely defined as the

engagement of charities in advocacy for a change in the law or policy, or a government decision (which might better be defined as engagement in public policy debates). The current rule, essentially, is that charities may not devote more than ten percent of their resources to this. CLD believes that this is based on an outdated and misguided understanding of the appropriate role of charities in society. For many charities, promoting law or policy reform is the best way to achieve their charitable purposes. In particular, the arguments against allowing them to do this hold very little water and are vastly outweighed by the benefits of promoting wider public engagement in public policy issues. Furthermore, this restriction represents a highly intrusive restriction on the freedom of expression rights of charities which cannot be justified by reference to an overriding public policy objective.

In this area, CLD is recommending that the limitation simply be removed in its entirety. At the same time, we believe that it would be appropriate to require charities to devote most of their resources to activities which bear a “coherent relationship” to their purposes (i.e. the charitable purposes on the basis of which their application for charitable registration was approved). Further consultations and perhaps research are needed to determine what would constitute ‘most’ of their resources, but the 90 percent rule currently applied to non-political activities (also defined as charitable activities) might be reasonable.

Introduction

The Canada Revenue Agency (CRA) has launched an online consultation on charities' political activities asking three questions, namely: i) whether the rules on political activities are understood and support or hinder the work of charities; ii) whether the CRA's guidance in this area is clear; and iii) whether changes should be made to the rules and, if so, what changes. The consultation also invited stakeholders to "address any other issues related to charities' political activities". Somewhat in parallel to this, the mandate letters for the Ministers of Finance and National Revenue call on them to introduce a new legislative framework for the charity sector. As with the CRA consultation, a particular focus of this should be clarifying and modernising the rules regarding political activities.

This Submission is formally the Centre for Law and Democracy's (CLD) response to the CRA consultation. At the same time, we believe that the set of rules governing charities is fundamentally flawed and that a holistic review – involving comprehensive legislative reform – is needed. This Submission therefore outlines the main reforms – whether of a legislative or other nature – which CLD believes are needed. It goes beyond the narrow question of political activities, which is the focus of the CRA consultation, because CLD does not believe it would be appropriate or effective to try to address those problems without addressing other systemic problems with the legal regime governing charities.

It is not inappropriate to describe the current legal regime governing charities as outdated, illogical and unclear. As a result, charities unable to understand what is expected of them. This alone would be enough to condemn the system because it is fundamentally unfair to require any set of actors to conform to rules they do not understand, while they at the same time risk serious sanctions for non-conformance. Indeed, CLD's own staff, who are legally trained, had significant difficulty understanding exactly what is and is not allowed under the rules, even after studying the CRA guidance.

There are even indications that the CRA itself does not have a consistent understand or interpretation of the rules. Examples are provided in other submissions to this consultation of cases where, in the context of an investigation, charities were told that the rules were the precise opposite of clear and unequivocal statements about those same rules in CRA guidance documents. This is not only *prima facie* unfair to charities, it also leaves the system open to political abuse. Unfortunately, this is not a theoretical risk. The previous government used the rules to selectively target certain charities, in behaviour which is more reminiscent of what happens in struggling democracies like Azerbaijan and Hungary than an established western democracy.¹

¹ On 29 June 2015, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders wrote to the government to express their concerns with these tax audits. They stated, among other things: "Concern is expressed at the provision of the Income Tax Act limiting "political activities" for registered charities, which has permitted the application of a very broad definition of what constitutes political activity. Concern is also expressed at the fact that the enforcement of this provision has contributed to an environment of excessive interference by the CRA in monitoring and reviewing the objectives and activities of registered charitable associations thus unduly limiting their rights to freedom of association and freedom of expression. Such interference appears to be in contravention of international human rights law and standards as it does not seem to be necessary in a democratic society and to be proportionate to the aim pursued." Available at: [https://spdb.ohchr.org/hrdb/31st/public_-_AL_Canada_29.06.15_\(2.2015\).pdf](https://spdb.ohchr.org/hrdb/31st/public_-_AL_Canada_29.06.15_(2.2015).pdf).

CLD does not believe that it is CRA's fault that their guidance fails to clarify the rules. Rather, we believe that the underlying assumptions in the rules are flawed in a way which renders it impossible for them to be interpreted in a clear and consistent way. The focus of our Submission is, as a result, on the fundamental changes that are needed to address these underlying flaws.

This Submission is divided into four parts. Part 1, Problem Statement, describes the rules, the underlying objectives which they seek to achieve and the main general problems with them. Part 2, The Definition of a Charity, looks at how the definition of what a charity is needs to change so as to be better aligned with modern ideas about charities. Part 3, Clarifying Partisan Activities, focuses on the absolute ban on charities engaging in partisan activities, making suggestions about how to clarify and refine this. Finally, part 4, Moving Beyond 'Political' Activities, puts forward proposals to move away from the very idea of limiting charities' political activities.

1. Problem Statement

Charity law is a complex combination of statutory and Common Law rules. The essential definition of what a charity is, or the definition of a charity, is left to the Common Law and, in Canada, remains largely based on a 19th Century case decided by the House of Lords, *The Commissioners for Special Purposes of the Income Tax v Pemsel* (*Pemsel*). In that case, the court stated:

How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "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 preceding heads.²

In essence, *Pemsel* establishes a list of four categories of charitable purposes, and organisations which devote themselves to those purposes are deemed to be charities. In *Vancouver Society of Immigrant and Visible Minority Women v MNR* (*Vancouver Society*), the Supreme Court of Canada made it clear that those four categories are exclusive in the sense that only organisations which pursue one or more of them may be deemed to be charities, although the open-ended nature of the fourth category means that the list is not closed:

[T]he *Pemsel* classification is exhaustive: any purpose which is charitable must fit into one or more of the four *Pemsel* categories, although admittedly the fourth category is very broad due to its residual nature.³

Section 149.1(1) of the Income Tax Act⁴ defines a 'charitable organization' as an organisation in relation to which, among other things, "all the resources of which are devoted to charitable activities carried on by the organization itself". It is important to note here the shift from the language of 'charitable purposes' used as the basis for determining whether an entity is a charity in the Common Law to the term 'charitable activities' used in the Act.

² *The Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531, p. 583. These categories have, in turn, been linked to the 17th Century Charitable Uses Act, 1601 (also known as the Statute of Elizabeth or the Statute of Charitable Uses), 43 Eliz. 1, c. 4.

³ [1999] 1 SCR 10, para. 35.

⁴ R.S.C., 1985, c. 1 (5th Supp.).

This is, however, modified by section 149.1(6.2) of the same Act, which states:

For the purposes of the definition ‘charitable organization’ in subsection 149.1(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.

In other words, as long as any resources devoted to “political activities” form only “part” of a charity’s resources, and those activities are “ancillary and incidental” to its charitable activities, the organisation will still be deemed to be devoting all of its resources to charitable activities. The amount of political activity that a charity may engage in has been set, essentially, at ten percent of its overall resources.⁵ Furthermore, non-partisan political activities have been defined by the CRA as those which seek to “retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country”.⁶

There is, furthermore, in sub-section (c) of section 149.1(6.2), an absolute ban on direct or indirect support for or opposition to political parties or candidates for public office, often referred to as the ban on partisan activities.

We note that, in addition to these rules, charities are, like many other actors, subject to a number of other relevant rules, such as those governing elections and broadcasting. Without going into a deep analysis of these rules, we note that the former, among other things, establishes a carefully calibrated scheme to ensure a level playing field during elections, while the latter includes rules aimed at ensuring balance and impartiality in the airwaves.

A key benefit to being registered as a charity, which is not enjoyed by other non-profit organisations or by profit making organisations (such as corporations), is that individuals who make donations to charities can claim back the personal income tax that they paid on those funds. On the other hand, other non-profits and for-profit entities are not limited as to their political activities (although they are subject to some restrictions on partisan activities, especially during elections) and, in addition, the latter can, for the most part, claim funds spent on those activities as business expenses, thereby avoiding paying tax on them. This latter is different from the benefit enjoyed by charities and would not be relevant to either charities or other non-profits since these entities do not make profits and are, therefore, not subject to tax on profits.

The tax benefit enjoyed by charities is sometimes characterised as a form of public support for their work. While this is certainly correct, it is submitted that another important public interest served by this benefit in the modern social context is to encourage Canadians to support the work of charities, which can be understood as a form of participation in social benefit activities.

⁵ See part 9 of CRA Policy Statement CPS-022, available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/whtsnw/pacnslttns-eng.html>.

⁶ Part 4 of CRA Policy Statement CPS-022, note 5.

It is clear that the purposes which are to be supported in this way need to be limited in nature. It would not, for example, be appropriate to provide this form of support and encouragement to a group which supported the narrow interests of its members, among other things because there is no need to encourage such self-interested behaviour and to do so would not only impose an undue burden on the public purse – for many such groups could be expected to be formed – but also undoubtedly lead to abuses and uneven public benefits being distributed to Canadians. At the same time, the anachronistic nature of the *Pemsel* purposes will immediately be clear to anyone who reads them, and modern purposes such as promoting human rights and protecting the environment, both of which have been recognised as charitable in nature, cannot easily be seen as analogous to the *Pemsel* list. This issue is explored in greater detail in section 2 of this Submission.

The prohibition on partisan activities is designed as part of the system to preserve a level playing field in elections and is, at least in principle, supported by all, or nearly all, stakeholders. However, the reference to both direct and indirect support for parties or candidates has led to confusion about the scope of this rule. It is, in addition, unduly restrictive for charities and, in particular, fails to properly balance the need to avoid partisan engagement by charities against the need for charities to be free to pursue their charitable purposes. This issue is explored in greater detail in section 3 of this Submission.

It is no longer clear why, in a modern context, there should, subject to clear rules on defining charities and clear prohibitions on partisan activity, be any prohibition on charities carrying out political activities, as presently defined. The distinction, in law, between ‘charitable’ and ‘political’ activities does not correspond to any underlying reality or logical division. This has led not only to enormous confusion but also completely unjustifiable restrictions on what charities can do. Despite this, given its statutory basis, courts in Canada, at least, have been reluctant to address these problems.

2. The Definition of a Charity

As noted above, a charity is an organisation which pursues one of the four charitable purposes described in *Pemsel*, namely relief of poverty, advancement of education or religion and other purposes beneficial to the community. The latter has, in Canada, been left entirely for the courts to determine. We note that this is an inherently difficult task for courts, because decisions about what constitutes a charity engage public spending obligations – in the form of tax relief for those who donate to charities – something which courts are traditionally, and with good reason, reluctant to impose.

In *Vancouver Society*, the Supreme Court of Canada stated:

In determining whether a given purpose is charitable, the courts adhere to the analogical approach to legal reasoning familiar to the common law.⁷

However, as noted above, there are a number of purposes which have been accepted as charitable in the modern world – such as promoting human rights and protecting the environment – which it is difficult to link to the three fixed *Pemsel* purposes. As a result of the limited nature of the latter,

⁷ Note 3, para. 42.

courts look to the preamble of the Charitable Uses Act, 1601,⁸ adopted hundreds of years before notions such as human rights and environmental protection were even conceived of, when applying the “analogical approach”.⁹ As a result of these challenges, courts have had to be somewhat inventive. As the Supreme Court of Canada noted in *Vancouver Society*,

Thus, the courts begin with the language of the preamble, but do not limit themselves to it. They speak of looking to whether the purpose under consideration fits within the preamble’s “spirit and intendment”, or of the “equity of the Statute”. Reference to the “spirit and intendment” of the preamble has actually overtaken reference to the preamble itself.¹⁰ [references omitted]

It is beyond the scope of this Submission to enter into a detailed analysis of the precise Common Law rules regarding the definition of a charitable purpose, and hence a charity. But the elaboration of the approach above, combined with the point about how challenging and delicate this task inherently is for courts, augur in support of expanding the statutory definition of a charity while leaving the door open to courts adding additional purposes or categories of purposes. In essence, replacing the current *Pemsel* and preamble of the Charitable Uses Act, 1601 bases for Common Law elaboration of categories of charitable purposes with a modern list of categories would provide clearer direction to those seeking to establish charities, to those tasked with granting charity status to applicants and administering the charity rules, and to the courts.

There is, furthermore, almost no downside to such a move. In its Charities Act 2013,¹¹ Australia followed this approach. Sections 12(1)(a)-(j) of the Act set out ten categories of charitable purposes, while sections 14-17 elaborate in further detail on some of those categories.

CLD believes that the precise list of categories of charitable purposes should be developed following a proper public consultation which specifically directs participants to give their views on this issue. In Appendix A to its submission, West Coast Environmental Law Research Foundation provides a list of categories of purposes which it deems should be recognised as charitable. Without either endorsing or rejecting this list, CLD believes that it would provide a good basis for the public consultation we view as being necessary on this issue. As a human rights organisation, we suggest that it is clear that the promotion of constitutional and/or international human rights should be included as a category of charitable purposes.

CLD also believes that it is important to continue to allocate some flexibility to the courts in determining additional charitable purposes, given that this will never be a closed category. The benefits of this have been well established through the current approach to defining charitable purposes and the flexibility which is built into it. In our rapidly changing modern world, notions of what should be recognised as charitable will inevitably change. Furthermore, imaginative individuals may come up with new and distinct ways of serving the public interest which should be recognised as being charitable. This is the approach taken in the Australian Charities Act 2013, section 12(1)(k) of which adds to the other purposes,

any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);

⁸ Note 2.

⁹ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, note 3, para. 42.

¹⁰ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, note 3, para. 44.

¹¹ No. 100, 2013.

As with the approach of creating a statutory list of categories of purposes, there is little downside to this, given the careful way courts have historically approached this task. If, however, there are concerns about this, additional safeguards could be built in by providing statutory conditions on or considerations for recognising additional purposes. These could build on the existing Common Law standards for this – such as the need for charitable purposes to be characterised by altruism and public benefit – or be drawn from other sources.

Recommendations:

- A proper public consultation should be held on the issue of what items should be included on a list of categories charitable purposes.
- Following the consultation, legislative reforms should be introduced with a view to creating a reasonably detailed statutory list of categories of charitable purposes.
- One item on the list should be an open-ended reference to analogous purposes so that courts can continue to develop and expand the categories of charitable purposes.

3. Clarifying Partisan Activities

It is essentially universally accepted that it is appropriate to prohibit charities from engaging in explicitly partisan activities. Indeed, to allow them to do so would represent an end run around the carefully constructed system of electoral spending limits, which the Supreme Court of Canada has upheld as a legitimate restriction on freedom of expression.¹²

At the same time, because these sorts of rules are restrictions on freedom of expression, they are subject to the standards for such restrictions under human rights law. The mere fact that an entity has elected to exist as a charity and, as a result, benefits from certain special public benefits does not mean that it ceases to enjoy the right to freedom of expression. Rather, it continues to enjoy that right, but the assessment of any restrictions on it may take into account those benefits and the particular nature of the charities rules.

One of the well established conditions for restrictions on freedom of expression to be valid is that they must be clear and unequivocal. That standard is absolutely not met by the existing prohibition on partisan activities, as several of the other submissions to this CRA consultation illustrate. While the notion of direct support for a party or candidate is, especially with the benefit of CRA guidance, reasonably clear, the notion of indirect support is anything but. For this reason alone, it is not appropriate as a restriction on the right to freedom of expression of charities. Unclear rules create a chilling effect as entities subject to them steer well clear of the possible zone of application to avoid any risk of censure, discouraging legitimate forms of engagement. This is particularly true when the penalties are severe. The potential consequences of breaching the

¹² See, for example, *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569.

prohibition on partisan activities is revocation of charity status, which is basically a death sentence for many charities.

Restrictions on freedom of expression also need to be carefully tailored to meet their (legitimate) aims and be proportionate in the sense that the benefit in terms of protecting the interest involved is greater than the harm to freedom of expression. The absolute ban on indirect support also fails to meet both of these conditions. In many cases, providing indirect support to parties or candidates is a logical and effective way for charities to achieve their goals. Adducing support for one's cause by mentioning that certain parties support it, even while others do not, might be deemed to be partisan activity in favour of the supporting parties, but it is also an effective advocacy tool. Asking a high-profile politician who supports one's cause to speak at an event could equally be seen as a breach of the rules but it is again an effective tactic. This is not just a freedom of expression interest. Facilitating the ability of charities to do their work effectively is an important public interest, given that the very reason States grant charity status to these entities is because they are pursuing public interest goals.

We suggest a more carefully tailored approach to this issue, which provides for a vastly more appropriate balance between the right of charities to freedom of expression and countervailing interests, as well as charities' need for clarity and flexibility in terms of their activities. Instead of an absolute ban, an obligation of balance and impartiality should be considered. This would not require balance and impartiality to be maintained in every discreet activity undertaken by a charity but, rather, overall balance and impartiality over time. As these concepts evolved, stricter requirements could be developed for election periods. The idea of balance and impartiality could be elaborated on in the legislation or regulations. Ideas such as non-discrimination among parties and equitable engagement of them in the work of a charity might help clarify exactly what was required. The CRA and courts could also, over time, further clarify these concepts.

The above should be accompanied by a strict requirement that any activities by a charity which might provide indirect support to a party or candidate should support the charitable purposes for which it was established. This would ensure that charities activities in this area were limited to the public interest issues which, by definition, charitable purposes cover. Together, these rules would be enough to avoid any risk of unbalancing the electoral playing field or of politicising charities.

It may be noted that this is analogous to the obligations that are placed on the broadcast media in Canada and most other established democracies.¹³ The ability of powerful media outlets, and especially television, to unbalance an election is obvious, and rules based on the idea of balance and impartiality have proven to be broadly effective in negating this threat. They have, furthermore, been broadly upheld as striking an appropriate balance between freedom of expression and other social interests (including electoral ones).

In terms of proportionality, it may be noted that the rule on indirect partisan activities is extremely limiting. It is widely recognised that bringing more voices into play during election times in relation to public policy issues serves a significant public interest. As the Supreme Court of Canada noted in *Harper v Canada (Attorney General)*:

¹³ The United States being a notable exception to this.

The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices".¹⁴ [references omitted]

Surfacing the positions of parties or candidates on the public interest issues that, by definition, charities work on, as long as this is subject to a requirement of balance and impartiality, is a very important way to contribute to informing voters about matters that are of interest to them. It may be noted that in many cases charities have very particular and valuable expertise in relation to these sorts of issues.

On the other side of the proportionality ledger is the risk of unbalancing the election or of public funds (in the form of tax rebates to donors) being abused for political ends. It seems clear that, with the constraints proposed above, while partisan activity by charities would not be ruled out entirely, it would remain a limited and fringe phenomenon. Furthermore, charities would remain, of course, subject to other relevant laws, in particular the *Canada Elections Act*.¹⁵ In addition, the appropriate balancing in this area for charities cannot be seen in isolation of other actors. In a series of cases, senior Canadian courts have helped clarify the appropriate limits on third party spending during elections.¹⁶ Absolute bans on election advertising were struck down and a more carefully tailored approach was fashioned. The same line of reasoning suggests that an approach which very largely, even if not absolutely, negates partisan activity by charities, in exchange for creating far clearer rules which allow them to pursue their charitable purposes, is much more in line with the general trend of Canadian jurisprudence in this area.

Another aspect of the right to freedom of expression is that even where actors have breached the rules and some sort of sanction is appropriate, those sanctions still need to be proportionate. As noted above, the threat of unduly harsh sanctions creates a chilling effect whereby those involved avoid not only the prohibited behaviour but also a penumbra of surrounding (legitimate or legal) behaviour, so as to avoid any risk of incurring the (harsh) sanction. For charities, the risk of being found to be in breach of the partisan activities rule is potentially huge.

To mitigate this problem, it is incumbent on the State to establish a graduated regime of sanctions, with associated conditions, for breach of the partisan activity rule. While wilful, knowing breaches of this rule may warrant the ultimate sanction of revocation of charity status, more minor, non-intentional breaches, especially by smaller charities which cannot afford legal advice, should only attract lesser sanctions such as a warning, a formal commitment not to commit another breach or perhaps the imposition of a practice regime to ensure that further breaches do not occur. While it is understood that the CRA does in practice apply graduated measures in these cases, as well as for breach of the rules on political activities, formalising this either in the legislation or in binding regulations would limit the chilling effect and bolster charities' confidence in the system.

¹⁴ [2004] SCC 33, para. 71.

¹⁵ S.C. 2000, c. 9.

¹⁶ See, for example, *National Citizens' Coalition Inc. v. Attorney General of Canada* (1984), 32 Alta. LR (2d) 249 (QB), *Harper v Canada (Attorney General)*, [2004] SCC 33 and *Libman v Quebec (Attorney General)*, note 12.

Recommendations:

- At a minimum, the rules on partisan activities need to be revised so that they are clear to the charities on which they are imposed.
- The current absolute ban on direct support for parties and candidates should be retained.
- The current absolute ban on indirect support for parties and candidates should be removed. In its place, consideration should be given to requiring charities to:
 - Strictly limit themselves, in the case of activities that might provide indirect support to parties or candidates, to activities which support the achievement of their charitable purposes.
 - Respect, over time, rules on balance and impartiality (or non-discrimination or equitable treatment) in relation to parties and candidates.
- Formal rules on the graduated application of sanctions should be incorporated into either the legislation or binding regulations.

4. Moving Beyond ‘Political’ Activities

The previous two parts of this Submission – dealing, respectively, with how to define a charity and clarifying what constitutes a partisan activity – advocated for changes essentially with a view to clarifying and tightening the rules. In this part, however, CLD is calling for a more significant shift. It is our contention that the very idea of limiting the amount of time and resources that charities can devote to so-called ‘political’ activities is unreasonable and, furthermore, that the very way that the term political activity is defined is illogical and unsustainable. In order to avoid confusion, here we will refer to political activity as understood in charity law by the term ‘public policy debate’.

Some of the other submissions to this consultation make it clear that there is a common misunderstanding of what ‘political activities’ constitutes. These submissions noted that some charities understood the limitation essentially as being the opposite of what it is, namely as a restriction on conducting advocacy with officials rather than reaching out to the wider public. This is also how ordinary Canadians would intuitively understand it. There is something inherently problematical with using a term in a regulatory context that stands its ordinary language meaning on its head. Furthermore, this definition of political activity leads to bizarre situations. For example, a representative of a charity might meet with an MP at his or her request to discuss a public policy issue, which would not be a political activity, and yet, if a journalist asked her later what she had discussed, responding to this would be deemed to be a political activity.

All of the arguments about freedom of expression made in the previous part of this Submission apply equally strongly here, because engaging in public policy debates about matters of public benefit (which defines what charities are supposed to do) is clearly a protected freedom of expression interest. To the extent that a rule is unclear, it cannot be sustained as a restriction on this fundamental human right (see the arguments presented in the previous part of this Submission,

which also apply, *mutatis mutandis*, here). The points above, as well as points made in many of the other submissions, clearly establish that the political activities rules lack clarity.

Two false dichotomies are at the centre of this lack of clarity, as well as other problems in this area, namely the dichotomy between activities and purposes and the dichotomy between charitable and political. The first was introduced for the first time by the Income Tax Act, as it had not been part of the historic Common Law approach.¹⁷ Specifically, section 149.1(1) of the Act defines a charitable organization as one which, among other things, devotes all of its resources to ‘charitable activities’.¹⁸ The creation of the notion of a ‘charitable activity’ is an unfortunate and ultimately illogical development because there is, in fact, no such thing. Put differently, it is not the character of an activity *per se* that renders it charitable but the wider context – including the actors involved and the purpose of the activity – which render it charitable or not. As the Supreme Court of Canada noted in *Vancouver Society of Immigrant and Visible Minority Women v MNR*, soliciting donations for a cultural activity might be deemed to be charitable or not depending on who was doing it, while distributing bibles for free might be charitable while selling them for a profit could not be.¹⁹ In the same case, Gonthier J., in dissent (but not on this point), noted that the essence of the matter is whether or not the activities “bear a coherent relationship to the [charitable] purposes sought to be achieved”.²⁰

In the same way, the dichotomy between charitable and political activities/purposes is at least artificial and, in a modern context, illogical. At present, advocacy for a change in the law or policy, or a government decision is defined as a political activity. However, measured against the justifiable standard of requiring activities to bear ‘a coherent relationship’ to charitable purposes, this is illogical. The purpose of the charities regime is to support organisations which aim to promote public benefit (charitable) objectives, and it makes no sense to limit artificially the ways in which they may do that. The very fact that charities do often seek to change law or policy shows that they understand that this is an effective way to achieve their goals. They should, absent a compelling countervailing public interest, be free to do that in the way they deem most effective.

The CRA Policy Guidance, CPS-022, puts forward two objections to charities engaging in public policy debate. The first is that something cannot be deemed to be a public benefit if one must advocate against (current) public policy to achieve it.²¹ There are, in turn, three main problems with this argument. First, there is something intuitively absurd about the suggestion that it cannot be for the public benefit to advocate for a change in public policy and the statistics on the comfort Canadians feel with charities conducting activities aimed at changing laws and policies, provided in the Introduction of the submission of the West Coast Environmental Law Research Foundation, support this. This argument somehow elevates public policy to a democratic and legitimacy standard, a position which cannot be sustained. In many cases, public policy has been adopted without full public debate, public attitudes about the issue have changed or the policy was based on a weak or incorrect evidential basis. The engagement of charities in promoting debate about the policy can help address all three of these weaknesses.

¹⁷ See *Vancouver Society of Immigrant and Visible Minority Women v MNR*, note 3, para. 52.

¹⁸ Note 4. See also section 149.1(6.2).

¹⁹ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, note 3, paras. 152 and 54, respectively.

²⁰ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, note 3, para. 52.

²¹ Part 4 of CRA Policy Statement CPS-022, note 5.

This issue takes on a particular light in relation to human rights issues, which is the subject matter focus of CLD's work. It is, of course, untenable to suggest that it would be against the public benefit for an organisation to advocate for a change in a law or policy on the basis that it was unconstitutional on human rights grounds (or even did not comply with international human rights standards). But current charities law severely limits the ability of a charity to do this. Of course one does not know for sure whether or not courts will ultimately agree that a contested law or policy is unconstitutional but, subject perhaps to some outer limits of reasonableness, it must surely be a public benefit to promote debate about this.

Second, the position of the CRA appears to be based on a confusion about the link between certain activities and charitable purposes. The example given is as follows:

A political purpose, such as seeking a ban on deer hunting, requires a charity to enter into a debate about whether such a ban is good, rather than providing or working towards an accepted public benefit.²²

It is true that a charity could not claim to be engaging in education if it were simply advocating for a ban on deer hunting, because that would not be an appropriate educational approach, as this concept is understood as a category of charitable purpose. However, this activity would certainly qualify as supporting a public safety purpose, if that were recognised as a category of charitable purpose, for there are obvious safety risks to hunting. In the same way, advocating for a ban on the death penalty or a change in the law on defamation would certainly qualify as supporting a human rights purpose (assuming, as noted above, that the arguments met some minimum standard of reasonableness), even if it did not qualify as serving an (charitable) educational purpose.

It is likely the case that the confusion here links back to underlying problems with the definition of a charitable purpose. CLD has not researched this issue, but we believe from *ad hoc* anecdotal evidence that at least some charities are wrongly classified as educational because that was understood to be the easiest way to attain charitable status, given the convoluted and confusing rules that currently apply.

As a result, sorting out the problems with the definition of a charitable purpose will help sort out confusion in this area as well. Indeed, we believe that this confusion, as well as the need for restrictions on political activities, will disappear if the following three conditions are met: i) charitable purposes are clearly defined in a way which accords with current Canadian values about public benefits; ii) charities are properly classified under the appropriate category of charitable purposes, given the actual focus of their work; and iii) charities are required to primarily limit themselves to activities which support those purposes.

Third, CRA's position fails to recognise the fact that promoting public policy debate, at least about matters of public benefit (which is by definition what charities are limited to doing) is itself a public benefit. In the case of *Aid/Watch Inc. v. Commissioner of Taxation*, the High Court of Australia addressed this contention directly. The Court assessed the claim that we are evaluating here, which it described as, "the apparent paradox in a 'coherent system of law' treating as for the public welfare 'objects which are inconsistent with its own provisions'"²³ (i.e. the public benefit of

²² Part 4 of CRA Policy Statement CPS-022, note 5.

²³ [2010] HCA 42, para. 43.

calls, within a coherent system of law, for amendment of that same system). It is worth quoting the response of the Court to this:

Proposition (iv) [the claim cited above] invites further examination, particularly in the light of recent decisions in this Court. In Australia, the foundation of the “coherent system of law” of which Dixon J spoke in *Royal North Shore Hospital* is supplied by the Constitution. The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is “an indispensable incident” of that constitutional system. . . . Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government.

The system of law which applies in Australia thus postulates for its operation the very “agitation” for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*.²⁴ [references omitted]

In that case, the Australian High Court comprehensively rejected the idea that it was appropriate to limit the ability of charities to engage in public policy debate with a view to achieving the charitable purposes for which they were formed. In this regard, it should be recognised that charities often have a unique skill set or insight into a specialised issue. This makes their opinions invaluable in debating public policy and in raising wider public awareness about the issues involved, thereby facilitating and improving the quality of wider public engagement.

The second objection put forward in CRA Policy Statement CPS-022 was that, “in order to assess the public benefit of a political purpose, a court would have to take sides in a political debate.”²⁵ This too appears to be based on a misunderstanding of how courts should apply and develop the categories of charitable purposes. To return to the deer hunting example, in assessing a charity registration application by an entity whose activities included pushing for ban on deer hunting, the courts would not need to take a position on whether or not such a ban was a good or bad thing for society, which would indeed engage them in a political debate. Rather, they would have to decide whether the goals and related activities of the entity fell within the categories of charitable purposes. If such an entity applied as an educational charity they might reject the application, but it might be different if it applied as a safety charity (if safety was recognised as a category of charitable purpose).

This issue, as well as the suggestion above that at least some charities are (wrongly) registered as educational due to the limitations in the definition of a charity, is highlighted by the example in the case *Southwood v. A.G.*, described in CPA Policy Statement CPS-022.²⁶ In that case, the court held that promoting disarmament did not align with a charity’s officially accepted charitable purpose, which “was the ‘advancement of the education of the public in the subject of militarism and disarmament and related fields.’” That is reasonable, because promoting one outlook on an issue does not meet charitable standards regarding education. But if the charity had been registered as an organisation which promoted peace (assuming that this was recognised as a charitable purpose), then this activity would clearly have fallen squarely within it. Under that purpose it would have been irrelevant for the court to point out, as it did, that there were differing views as to how to

²⁴ Note 23, paras. 44-45.

²⁵ Part 4 of CRA Policy Statement CPS-022, note 5.

²⁶ Appendix II, note 5. The case reference is [2000] ECWA Civ. 204.

achieve peace. The only task for the court would be to ensure that the charity did in fact devote itself to promoting peace (as it was understood as a charitable purpose). For those worried about balance in public debates, if the public were interested in supporting it, another charity might be formed to promote peace through strength (as opposed to disarmament), the other way of supporting peace which was cited by the court.

This leads us to another key point, which is the wider context regarding engagement in public policy debate. Private actors – including commercial players – are not subject to any limits regarding their engagement in public policy debate. Indeed, commercial actors can normally claim the resources that they spend on this as business expenses, and so avoid paying tax on them. The result is that in many cases the ability of the commercial sector to articulate its views on public policy issues massively outweighs that of charities. Millions of Canadians regularly donate to and otherwise support the work of charities. In this light, the limitations on the political engagement of charities may be seen as denying these individuals a full and robust voice in ongoing public policy debates. At best, this is unfortunate, given the low overall engagement of Canadians in public policy issues. At worst, it may represent an unconstitutional limitation on the freedom of expression rights of Canadians. In any case, it is extremely difficult to conceive of any solid policy rationale in support of this approach.

The Australian Charities Act 2013 not only does not limit the engagement of charities in public policy issues but even recognises this, as long as it is tethered to their charitable purposes, as a specific type of charitable purposes. Section 12(1)(l) of that Act states:

In any Act:

charitable purpose means any of the following:

...

- (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
 - (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

Two further points are important here. The first is the enormous inefficiency of the current system and the large burden it places on often small and struggling charities. Other submissions have highlighted in detail some of the administrative challenges here, such as that of dividing the costs of the many activities that fall into a dual-purpose category. There is also the basic challenge of putting in place an administrative system in the first place for separately tracking these expenditures. All of this is further complicated by the lack of clarity as to what falls into the political and charitable activities columns, described above. This effort necessarily diverts charities from their core goals, which are to promote public benefits in the different areas in which they work. For smaller organisations, many of which face challenges in raising the funds they need to do their core work, it can represent a significant burden. And, as with partisan activities, this needs to be seen in light of the potential penalties, which are very significant.

The second is the perspective that perhaps the ten percent rule is not that important because so few charities, according to the statistics, are close to the limit. There are a few problems with this analysis. First, even if a very small number of charities go over the line, the implications are very important indeed, so that the rule itself is of some significance. The revocation of charity

registrations, taking into account all of the problems with the rules noted above, in particular the lack of clarity about what exactly qualifies as a political activity, has an enormous chilling effect on the work of other charities.

Second, and related to the above, the statistics do not reflect the extent to which charities avoid engaging in public policy debate in support of their charitable purposes either because they do not understand the rules or out of fear of being challenged for breaching the rules. The politically motivated investigations that started under the previous government but which still continue until today, certainly represent an all-time low point for charities in Canada, and it is to be hoped that this sort of behaviour is a thing of the past. However, the shadow that those events cast and continue to cast is large and only reform of the system can really do away with it.

Third, again related to the previous points, the argument ignores the fact that some groups may have avoided registering as charities in the first place due to the restrictive nature of the rules for charities. Such groups will be denied the opportunity to encourage donations from the public on a tax-free basis. The challenges of this should not be underestimated given that most individuals would vastly prefer to give to charities, knowing they will get a tax refund in due course. Looked at from a participation perspective, this rule contributes to denying Canadians an accessible outlet for getting engaged on public policy issues.

Fourth, again related, there is evidence that the extent of public policy work is significantly underreported by charities, both through a lack of understanding of the rules and due to the regulatory risk full reporting may create. The submission by Imagine Canada supports this idea, noting that there appears to be underreporting based on a lack of understanding of the rules (see page 5 of their submission).

Fifth, the rules are illogical and unreasonable and that is, of itself, enough of a reason to change them. We understand that there are human resource and other costs to undertaking law and policy reform. However, the government has already signalled its commitment to revise the charity rules. For charities, the political activity limitations are probably the most oppressive and threatening requirements of the system. It would be a huge lost opportunity not to amend those rules as part of this process.

For CLD, the logical way forward in this area is fairly clear. The limitations on so-called political activities, in particular those that relate to advocacy for reform of the law, policy and/or government decisions, should be done away with altogether. Political activities does not represent a logical or coherent category of activities. More importantly, there are no cogent public policy grounds for the limitations. Instead, there are important public policy reasons for encouraging charities to engage in public policy debates as they relate to matters of public benefit.

At the same time, we strongly support the idea of requiring charities to focus primarily in all of their work, including their public policy work, on activities which bear a “coherent relationship” to their purposes. This will ensure that public support, in the form of tax rebates, remains focused on issues which are of public benefit. It might be useful to hold a consultation on how to measure what would qualify as “primarily” for these purposes. A threshold of 90 percent might not be unreasonable in this regard but more work needs to be done to understand the pros and cons of various limits.

Recommendations:

- The limitations on charities engaging in ‘political’ activities (understood broadly as engaging in public policy debates) should be done away with entirely.
- In its place, charities should be required to focus primarily in all of their work on activities which bear a “coherent relationship” to the charitable purposes for which they have been registered as a charity.
- Public consultations should be held to determine the best way to understand the reference to “primarily” in the preceding recommendation.

Conclusion

It is clear that there is a need for a fundamental revision of the rules relating to charities in Canada. CLD therefore welcomes the various initiatives in this area, including the current consultation being conducted by the CRA as well as the inclusion of a call for revision of the legal framework for charities in the mandate letters for the Ministers of Finance and National Revenue. This Submission is CLD’s formal response to the CRA consultation, which focuses on the issue of political activities. At the same time, we believe that only a holistic and profound reform of the system makes sense. Adjusting policy guidance or legal interpretation at the administrative level will not suffice. Indeed, we believe that the problems inherent in the basic legal framework are so profound that focusing only at these levels would be counterproductive.

Just as we are calling for holistic reform, so we hope that policy makers understand our recommendations as a holistic package, although we have presented them in three discrete parts here for presentational purposes. The following ideas lie at the heart of our recommendations:

1. Registration of organisations as charities should be based on their stated purposes falling within the scope of a list of wider categories of charitable purposes. This list should be developed following a consultation with Canadians and should be set out in legislation. A residual category of analogous purposes should be included, so as to continue to allow the courts to develop these categories in a flexible way.
2. The ban on direct support of or opposition to political parties and candidates should be continued. The ban on indirect support, however, should be replaced by a requirement that charities respect, over time, rules on balance and impartiality in relation to parties and candidates, and that, in this area, they strictly limit themselves to activities which support the achievement of their charitable purposes.
3. The limitations on charities engaging in ‘political’ activities should be removed and replaced by a requirement that charities should focus primarily on activities which bear a “coherent relationship” to their purposes. A more precise meaning for “primarily” should be developed as part of the reform process.

Although these proposals are far-reaching, they are not by any means radical or risky in nature. Indeed, they have been put in place in other jurisdictions without any apparent negative results. The basic structure of Canada's main rules on charities dates back to at least the 19th Century. It is too late for tinkering. Serious reform which aligns the rules with the expectations of Canadians in the 21st Century, established better democratic practice in other countries, and Canada's domestic and international human rights obligations is what is needed now.