The Pemsel Case
F O U N D A T I O N

Submission to The Canada Revenue Agency's consultation on charities' political activities

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PEMSEL CASE FOUNDATION[1]

"Charities play a critical role in our society. They make a valuable contribution to public policy and public debate for all Canadians. To help charities continue this important work, they must be assured they are operating in a regulatory environment that respects and encourages their contribution."[2]

This submission presents arguments favouring change to the regulation of charities' political activity. The preference is legislative amendment. Failing that there is a need to significantly clarify the existing administrative policy. The Foundation's position is that:

- section 149.1 of the Income Tax Act should be refocused on purposes rather than activities, to ensure more consistency between the Act and the common law;
- both the Act and administrative policy need to address the current lack of clarity on which conducts are political, and what constitutes direct or indirect partisan political activity; and
- a distinction should be drawn between raising public awareness which is an almost inevitable concomitant of a charity's operations, and outright attempts at recruiting public support for, or opposition to legislative change or government policies.

[1] The Pemsel Case Foundation was established in 2010, and is emerging as a centre of expertise in the law regulating Canadian charities. Its aim is to foster better knowledge and understanding, by the Canadian public and voluntary sector organizations, of charity law and regulation. This is done through research, education and litigation.

The Foundation has published three relevant papers : Maurice Cullity, *Charity and Politics in Canada – A Legal Analysis*; Alicia Grant, *Political Activities and the Meaning of "Substantially All" An Analysis for Registered Charities* [Grant]; and Carl Juneau, *The Canadian Income Tax Act and the Concepts of Charitable Purposes and Activities*, all available on the Foundation's website. Also forthcoming from the Foundation will be a revised version of A. Parachin, "Charity Versus Politics: Law, Policy and Reform" *National Charity Law Symposium*, The Canadian Bar Association, May 27, 2016, Toronto.

[2] http://www.cra-arc.gc.ca/chrts-gvng/chrts/whtsnw/pacnslttns-eng.html .

The basis of the Foundation's submission is the need for clarification. Uncertainty is not an effective regulatory approach. This is even more the case with charities. The public involvement in matters of values and causes close to the heart needs careful attention. The current income-tax rules on 'activities' by registered charities – and the administrative policies that flow from them – are outdated, flawed in concept, open to arbitrary application, difficult to understand and needlessly intimidating. These issues are especially the case for the provisions regulating "political activities".[3]

The current *Income Tax Act* (the "Act") provisions about "political activities" were introduced in 1985. They were meant to bring the Act more into line with the common law. They were intended to be enabling, rather than prohibitive.[4] Nevertheless, judged against criteria of clarity and certainty, subsections 149.1(6.1) and (6.2) fare poorly in their attempt to clearly regulate charities' political activity. These provisions, and indeed those of section 149.1 suffer from significant drafting flaws which only contribute to an ongoing lack of clarity and certainty. Despite wording that implicitly requires quantification of resources used on political activity, the calculation is so fraught with difficulties that the Canada Revenue Agency itself seems to prefer arguing that there is an unstated political purpose, rather than trying to establish if a charity has exceeded the allowable limits.

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[3] Imagine Canada research on political activity suggests that there is a 28-percent spread between organizations that actually engage in political activities (31% of respondents) and those that actually declare having been involved in political activities (3% of respondents). At the very least, this suggests a basic misunderstanding of the rules in the charitable sector. Sector organizations routinely express that there is an "advocacy chill" – well-founded or not, this perception has grown as a result of the recent allocation of funds to the CRA, specifically to audit charities' political activity.

[4] An Act to amend the Income Tax Act [and other legislation], S.C. 1986, c. 6, s. 85(2), enacting s.149.1(6.1) and (6.3) of the 1952 ITA applicable to 1985 and subsequent taxation years (s. 85(3). The explanatory notes to the Notice of Ways and Means Motion of May 23, 1985 also state:

> … These amendments recognize that it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals. These activities would include advertising, rental of facilities **or mass mailings to influence public opinion to support the charity's views on matters of law or government policy related to its charitable purposes. Under the present law, a charity may, without restriction, provide information and express its views in briefs to government to change laws or policies. These amendments do not alter this position. However, purely partisan activities such as supporting or opposing a political party or candidate will not be permitted**. (Emphasis added)

See also, *N.D.G. Neighbourhood Association c. Revenu Canada, Département de la Taxation,* 1988 F.C.A. docket A-468-86, May 16, 1988, at p.11, where the Court took judicial notice of such an intent.

The Act does not define “political activities” except for a provision that deems the funding of political activities a political activity. The meaning of the phrase is left entirely to the CRA and the courts.

The involvement of charities in non-partisan political work is often debated. The sometimes-contradictory case law regulating involvement is little known. For these reasons, alone, the Foundation commends Parliament to provide a legislative scheme that brings clarity and certainty to this matter.

Owing to the inherent tension between, on the one hand, the common law characterization of activities by reference to purposes and, on the other hand, the nature of activities determined by principles of statutory interpretation, any reference to activities in the legislation needs to be limited in scope and sharply delineated. Experience shows that ambiguous drafting makes charity provisions highly vulnerable to misinterpretation by the sector and the regulator. Loosely-worded legislation leaves the CRA open to allegations that it misused its discretion, is subject to political interference or both. Unless an activity is statutorily prohibited, the drafting must indicate a presumption of permission.

SECTION 149.1 OF THE ACT NEEDS TO CONFIRM THE PRIORITY OF PURPOSES

Section 149.1 should be amended to clarify the relationship of purposes to activities. Many of the current problems with these provisions relate to their focus on ‘activities’ without the context of purposes. This focus not only contradicts the purposive approach taken by the common law, but it introduces confusion and contradictions within section 149.1 itself, and between the Act and the common law. “Purposes” and “activities” are not independent of each other. The interpretative logic that flows from a priority of purposes must be made certain so that the nature of activities is understood by reference to a charity’s purposes.[5]

Notwithstanding the contradictions in the current statutory framework, there is no judicial guidance addressing how activities can be characterized in isolation. Focusing on activities creates a fertile ground for arbitrary application of the rules. It enables the regulator to characterize an organization’s operations by parsing them into artificial component parts, or at the other extreme, to brand them in their entirety as

[5] See *Vancouver Society of Immigrant and Visible Minority Women*, (1999) 1 S.C.R. 10, at paragraphs 149-152.

unacceptable based solely on one of those parts. The characterization is often inconsistent.

For instance, in assessing a food bank's program, the tendency is to view many categories of activities as "non-charitable" – executive meetings, leasing or purchase vehicles, locating suppliers, recruiting and training personnel – even though they are all arguably essential in ensuring effective program delivery. But in the case of activities that are deemed political, the approach tends to be the reverse: preliminary research, statistical surveys and related communications activities are all viewed as 'political' if the concluding report or even a fragment of it happens to be critical of proposed government policy or legislation.

The current approach to activities forces charities to track, account for and report practices in a way that is difficult, subjective and misleading. Doing so diverts resources from charitable programs for no clear public policy purpose. The situation has been exacerbated by a gradual accretion of income-tax amendments to section 149.1 made over the years without apparent thought being given to the underlying need for drafting consistency or with the charitable sector's operational realities.[6]

While changes to administrative policy may be a tempting alternative to legislative amendments, many of the existing problems are not solvable at the administrative level because of the conflicts, contradictions and lack of clarity embedded in the statute.

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[6] One example of this lack of clarity in the legislation is whether subsections 149.1(6.1) and (6.2) are to be interpreted strictly or whether they merely create a "safe harbour". Under the "safe harbour" interpretation, advocacy meeting the criteria of subsections 149.1(6.1) and (6.2) is legislatively deemed to be charitable and thus within a statutory "safe harbour". All that happens where the criteria of subsections 149.1(6.1) and (6.2) are not met is that the protection of the legislative "safe harbour" is lost. But under another interpretation, charities are permitted to engage in only political conduct when meeting the criteria of subsections 149.1(6.1) and (6.2). All other political engagement is prohibited. This approach is followed by the CRA in CPS-022.

The "safe harbour" interpretation is more consistent with the text of subsections 149.1(6.1) and (6.2). These provisions state only that where the enumerated criteria are satisfied, a charity engaged in that activity is considered to be constituted and operated for charitable purposes or activities, respectively. This position appears to have been disregarded in past administration of the legislation and the resulting case law with respect to the political activities provisions in the Act. Nonetheless we believe it is pertinent and should be considered if legislative reform is considered, or failing that, in how the current provisions are administered.

DETERMINING WHICH CONDUCT IS POLITICAL

As with the term “charity’, the term ‘political’ in the context of both the Act and the common law leads to misconceptions based on the difference between its technical meaning and its popular meaning. This feeds persisting confusion, both in the charitable sector and in the public, about charities’ ability to participate in public policy development, public discussions and public awareness initiatives.

(a) Statutory Considerations

The Act does not define political *activity* instead relying on the common-law concept of political *purposes* to characterize discrete activities. In practice, the absence of a statutory definition has resulted in a hybrid scheme that draws on opposing statutory and common law logic.

The common law characterizes activities based on the purpose they are intended to achieve, which – if we follow that logic – ought to make non-partisan political activities “charitable”. Confusion arises because a reading of the statutory scheme (particularly without an understanding of the common-law background) seems to also suggest certain non-partisan activities are in-and-of-themselves political, but provides no adequate way to determine what these might be. So sometimes activities are characterized as political without reference to the charity’s purposes. The Foundation thinks the better view is that only the common-law approach should be adopted in interpreting the legislation, except where clear activities-related regulation is provided. Any attempt to rely on inferring meaning from the common law relating to purposes creates unacceptable uncertainty and inevitably conflicts with the Act’s reliance on the common law to define what entities qualify for registration.

It is unlikely that subs. 149.1(6.1) and (6.2) were ever intended to allow charities to carry out independent political purposes. Rather, these provisions were meant to statutorily acknowledge that “politics” (within some inadequately expressed limits) are one way to achieve charitable purposes. But this leaves us with some confused logic.

This approach under these provisions requires the assumption that political activities are – by definition – activities undertaken to achieve political purposes. This contradicts the stated legislative intention, as reported in *Hansard*[7] – to recognize that charitable

[7] See *House of Commons Debates* (5 December 1985) at 9193.

purposes can be achieved through political means.[8] The confusion surrounding subsections 149.1(6.1) and (6.2) is in part a reflection of this contradictory reasoning.

Regarding 'political activities', the common law recognizes that political purposes are acceptable if they are subservient to a primary charitable purpose. The existing provisions and CRA practice, as interpreted and applied, fail to acknowledge this, and in effect create a much narrower window in which charities can operate. The statutory and interpretative basis for the view taken by the CRA does not appear to be available.

(b) Administrative Policy

If subsections 149.1(6.1) and (6.2) are, as asserted above, enabling ones, then the CRA guidance needs to better define the nature of the conduct limited by the current legislative provisions.

Two administrative policy questions arise: the first relates to the basis on which limited political activities are calculated to demonstrate when the limit is reached, and the second concerns the difficulties quantifying amounts spent on political activities.

On the first question, CRA's position is essentially that "substantially all" resources must be devoted to charitable activities. This is taken to mean 90%.[9] Allowing for the artificial distinction between "charitable" activities and a charity's "other" activities, this leaves 10% for political activity, fundraising, and administration. In practice, because of the realities of administrative and fundraising costs, expenditures on political activity can end up being restricted to only a fraction of resources, far less than 10%.

There is also uncertainty as to whether the 10% is a percentage of all resources (including investments, buildings, etc.) or a percentage of expenditures in the year.

The second administrative quandary relates to the question of how to quantify or measure political activity. With the introduction of the additional T3010 reporting requirements on political activity, the CRA was essentially silent on this point. The suggestion was that charities were free to track expenditures in any "reasonable"

[8] In practice, this sometimes results in an uneven application of the law – large religious charities, most notably, are often given a 'free pass' regarding political commentary.

[9] See Grant, *supra* note 1.

manner. In fact, the lack of more prescriptive direction speaks volumes as to the challenges inherent in measurement.

An issue related to the second question is how to quantify and track political commentary in the context of social media – who should be accountable for comments made in chat rooms and open websites? CPS-022 was drafted before the advent of social media. Without legislative change, even with agreement on what is political, we are still faced with the question of exactly how much can be devoted to such activities. Given the now pervasive use of social media this is a particularly acute matter.

THE NOTION OF 'PARTISAN POLITICAL' ACTIVITY NEEDS TO BE CLARIFIED

(a) Statutory Considerations

The Foundation supports a statutory restriction on registered charities' partisan political activities. We are of the view that the existing confusion cannot be fully resolved unless the Act is suitably amended.

The notion of 'indirect' partisan political activity is fraught with problems. The distinctions between it and 'direct' partisan political activity, or between indirect partisan activity and legitimate conclusions drawn from public policy research are not at all clear. The advent of social media makes this a more pressing problem than it may have been in the past. The problem is due to the absence of clear statutory grounding that distinguishes between 'direct' and 'indirect' partisan political activities.

While public policy research is a recognized charitable purpose, a policy that gives too broad a reach to indirect partisan activities effectively prevents or intimidates charities from drawing any useful conclusions in their area of research. Partisan support ought to imply ongoing, consistent and sustained alignment with, or opposition to a political party's platform, on many issues – not conclusions drawn from legitimate research or coincidental alignment of a charity's position with a registered party's political platform.

(b) Administrative Policy

On an administrative level, if legislative clarification is not forthcoming, CRA policy needs to clarify the scope of the prohibition on partisan activity. Any guidance should ensure that positions taken by the CRA with respect to this aspect of the policy are supported by the statutory provisions and judicial interpretation. Preferably, the

guidance should specify which conduct is prohibited, rather than leaving the issue open-ended.

Any reform of the guidance that deals with political activities should clarify that it is permissible for a charity to take a position that is rooted in the purposes for which it has been registered, even if that same position also happens to be one promoted or opposed by a political party or candidate for public office. Implicit is the need to clarify who and when a person is a candidate. As well, guidance needs to address the use of social media, hyperlinks, etc. – particularly on issues such as distinguishing professional versus personal use, and responsibility for third party postings.

PUBLIC AWARENESS

The rules concerning 'public awareness' in CPS-022 are excessively restrictive. Given the positions set out above, the Foundation's view is that CPS-022 is insufficiently grounded in logic and not fully based on the law. For a charity, involvement in raising the public's awareness about an issue is almost unavoidable. Whereas advocacy for law and policy reform by a charity can be episodic, this is not as readily true in relation to public awareness. The latter is typically mission-focused, consistent, non-episodic and unexceptional in that it is thoroughly integrated into all charitable programming.

This is not to deny the need to regulate awareness campaigns that promote or oppose law reform. But rather than conflating public awareness and political activity, there is a need to distinguish – outside of any guidance on political activities – legitimate public-awareness campaigns, from deliberately misleading attempts to sway public opinion on social issues.[10] In this respect, even such seemingly benign charitable trusts as scholarship funds communicate "biased" and potentially controversial value judgments about the sorts of criteria that should be used to identify meritorious scholarship candidates (*e.g*., gender, religion, financial need, geographic residence, disadvantaged ancestry, military service, etc., the sorts of athletic and academic pursuits worthy of financial support and so on). Likewise, relief of poverty charities communicate ideas about the basic standards of living below which no one ought to be left.

Confusion seems to have arisen owing to references to "controversial social issues" or words to that effect in jurisprudence dealing with the permissibility of political engagement by registered charities. These cases ought to be confined to their facts

[10] *Human Life International in Canada v. M.N.R.,* (1998) 3 F.C. 202, at para. 12.

and used as regulatory authority only where political purposes or political activities are in issue. Instead, their existence has resulted in a regulatory approach in which promotion of public awareness initiatives is often not appropriately treated or is subject to arbitrary enforcement actions.

Absent illegality or conduct that is contrary to public policy, public awareness activity in furtherance of the purposes of a registered charity should not be interfered with by the regulator. This is currently the practice with certain charities (*e.g.*, MADD) fostering widely-accepted societal values, but appears less so where groups (*e.g.*, environmental organizations) deal with matters on which there are a variety of strongly held views. Once a group is recognized as having a charitable purpose or purposes, it should be subject to the same standard as other registered charities. Given the pervasiveness of public awareness, there is tremendous potential here for the CRA to have a severe and negative impact upon charities if an excessively restrictive conception of public awareness is applied.

In addition, the current apparent CRA requirement is that awareness campaigns must conform to the standards expected of formal education to qualify as charitable. This seems to go beyond what the cases establish. Also problematic is the absolute requirement in CPS-022 for "factual information". Taken literally, this requirement unreasonably confines public awareness to empirically demonstrable facts. Information based on non-factual sources, *e.g*., conceptions of justice or morality, automatically fail the requirement for factual information and by extension fail to qualify as charitable under CPS-022. There is, though, no authority for the proposition that charities should be confined in their public messaging to empirically demonstrable facts, either for purposes or activities the true limitation is bias.[11]

CONCLUSION

The Foundation is of the view that the only means to substantive lasting change is legislative reform. This would involve a re-emphasis of purposes – the traditional focus of the enquiry as to whether an endeavour is charitable. Such an approach would eliminate contradictions within s. 149.1, and better harmonize the common law and the statutory provisions. It is our view that such amendments would have a minimal impact on the CRA's ability to protect the tax base from abuse.

[11] Most notably, where advancement of religion is concerned.

Alternately, certain references to activities in the Act could be deleted, while adding provisions like those found in the New Zealand *Charities Act* (2005) with respect to ancillary and incidental purposes.[12]

If legislative amendments replacing activities with purposes, or on diverse aspects of subsections 149.1(6.1) and (6.2) are not forthcoming, any review of the political activities issue would need to focus on administratively providing:

- clearer definitions about the notions of 'political activity' and 'direct' or 'indirect' partisan politics;

- more precise boundaries between political activity and public awareness campaigns;

- clearer and fairer approaches to quantifying expenditures on political activity as a component of a charity's resources;

- better and more contemporary examples on what is political.

While this should be helpful, unless amendments to the guidance are a collaborative sector-CRA initiative, and unless there is agreement on what is political, changes to administrative policy could also end up being counter-productive. We must stress that if the current statutory language is in place, it will be open to arbitrary application and will not provide the certainty both the regulator and the sector require.

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[12] (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

…

(3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.

(4)For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—

(a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and

(b) not an independent purpose of the trust, society, or institution.