Featured Commentary

Senate study offers opportunity for fresh look at charity issues

Peter Broder

The Pemsel Case
FOUNDATION

"The law of charity is a moving subject"
– Lord Wilberforce

About Us

Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta Societies Act and is a registered charity.

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Canada, through the federal government and its provincial counterparts, offers preferential tax treatment to charities and certain other public benefit entities that is among the most generous of any country in the industrialized world. That advantageous treatment comes in the form of tax credits for individuals and tax deductions for corporations that make contributions to these groups. As well, governments forego taxes on much of the income generated by charities and bodies similar to charities, known as qualified donees. Goods and Services Tax and Provincial Sales Tax are also typically not applied or applied at a reduced rate.

To qualify for this special treatment, however, most of these entities must register with the federal government, and are subject to various constraints on how they are constituted and operate.
Not surprisingly, given the favourable tax treatment they get, Canadian authorities have been quite restrictive as to who is entitled to be a "registered charity" or other "qualified donee". This restrictive approach has been adopted both by the courts, in litigation concerning eligibility and conduct, and by the Canada Revenue Agency ("CRA"), the arm of the federal government charged with administering the provisions of the *Income Tax Act* ("*ITA*"), in its rules.

The restrictive approach has led to Canada falling behind in the breadth of legal meaning given to the concept of charity here, and to a regulatory environment that is stricter than that of many other countries. This situation was most recently highlighted by the controversy over the amount and type of non-partisan political activity that registered charities are permitted to engage in. In the wake of this controversy, and other frustrations with the current regime, there have been widespread calls for reform.

Potential ideas for changes to the existing system will have a chance to be aired (and perhaps move a step closer to being adopted) with the approval of a Senate Motion in late January. This is a Motion to strike a Special Committee on the Charitable Sector "to examine the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada". The Committee will have nine members and is expected to submit its final report by December 31, 2018.

Although the precise terms of reference and membership of the Committee were not available at the time of writing, one hopes that the Committee's mandate will explore matters well beyond the tax measures affecting charities and like groups. Notably, the Motion references "non-profit organizations" and the "voluntary sector". Non-profit groups (whether their work benefits their members or the public more widely) that are not registered charities are largely unregulated in Canada, even though most of their income is not subject to tax.

With politicians and policy-makers increasingly alert to the significance of tax expenditures and with the growing use of hybrid structures as vehicles for activity that mixes public and private benefit – including, but not limited to, social enterprise – there is an obvious imperative to consider the need for oversight of tax-exempt entities other than registered charities.

Other areas also warrant attention.

Many jurisdictions that historically, like Canada, relied on recognition of new charitable purposes by the courts – i.e., defining charity through the common law – have modified that approach. They use a statutorily-empowered body, such as a Commission, to determine what qualifies as a charity and/or expand the definition of charity through legislation. Given that Canadian courts have developed the meaning of charity very slowly (typically deferring to Parliament on all but the most incremental change), and the CRA has been reluctant to go beyond positions that have clearly been sanctioned by the courts, thought should be given to whether there is a better approach. New consideration should also be given here about what role transparency, as opposed to hands-on regulation, ought to play in controlling conduct.

Another concern is regulation of activities. There are *ITA* measures that in practice regulate the character and/or the amount of political, international, and business activities that charities and similar groups conduct. These are all areas where there may be legitimate concern over use of tax-supported resources that might not be adequately constrained by the common law.

However, at least some of these measures appear to have been applied in ways that aren't in keeping with the original intention when they were enacted or have taken additional unforeseen directions in how they have been used. In certain areas, this has resulted in a significant gap between the common law and the statute. Additionally, the current categories of registered charity, which seek to distinguish between doers and funders (through provisions framed around activities), may be outdated.

As noted above, reliance on a mix of the common law and a series of *ITA* measures, administered by a branch of the CRA and adjudicated largely through the Federal Court of Appeal, to define and regulate registered charities and similar groups has not allowed Canada to keep pace with other jurisdictions in the 21st century. So the Senate study might also consider matters like the appropriate appeal mechanism for charitable registration or revocation, whether the *ITA* is the best place for the statutory provisions in this area, how to facilitate better federal-provincial coordination of voluntary sector oversight, and the need for a Charity Commission-style body in Canada.

More broadly, consideration could be given to the value of additional research on the nature and scope of the voluntary sector, and re-visiting the principled basis for the relationship between the government and the sector originally contemplated as part of the 2000-2005 Voluntary Sector Initiative, which has since fallen into disuse.

This is a long list to ask for in a study expected to last just under a year. But if we are committed to getting the best "bang for our buck", we need to look beyond just the dollars and cents.

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Peter Broder is Executive Director of The Pemsel Case Foundation. He also serves as Policy Analyst and General Counsel at The Muttart Foundation in Edmonton. The views expressed do not necessarily reflect those of either Foundation. A version of this article appears in the March 2018 issue of LawNow *magazine.*

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