

Charitable Purpose, Advocacy and the Income Tax Act

INTRODUCTION

Charities receive preferential treatment under the *Income Tax Act*(1) (ITA). Not only is the income of a charity exempt from taxation, but a charity can issue charitable receipts to donors, who are in turn allowed to deduct amounts from their personal income tax. Registered status is thought to convey legitimacy on the organization, because donors distinguish entities that are subject to regulatory oversight by the Canada Revenue Agency (CRA). Charities are distinct from non-profit organizations (NPOs). An NPO may seek an exemption from income tax under the ITA,(2) but lacks the power to issue tax-deductible receipts for donations.

The preferential tax treatment of a charity amounts to an indirect government subsidy, and the registered status of a charity is therefore tightly guarded. This paper attempts to explain the requirements for charitable status under the existing provisions of the ITA and the common law. It then examines whether the rules are still rational. Given the range of organizations performing valuable functions in Canadian society, is the traditional definition of a charity still relevant? As social needs change, should more organizations be given the advantages enjoyed by a registered charity, principally the ability to issue charitable receipts to donors?

COMMON LAW DEFINITION OF CHARITABLE PURPOSE

Section 149.1 of the ITA provides rules for the tax treatment of registered charities, but does not define a charity itself. In the absence of a statutory definition, Canadian courts have developed a number of common law tests to determine whether an organization should receive charitable status. Under the common law:

- the charity's purposes must be exclusively and legally charitable, and the resources of a charity must be devoted to charitable activities in furtherance of the charitable purpose; and
- the charity must be established for the benefit of the public or a sufficient segment of the public.(3)

The CRA uses the common law test for charitable purposes developed by the U.K. House of Lords in the decision of *Commissioners of Income Tax v. Pemsel*.(4) Under the *Pemsel* decision, the four purposes of charity are:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and

- other purposes beneficial to the community as a whole that the courts have identified as charitable.

While more traditional charities qualify under the first three headings, other organizations that consider themselves charitable must qualify under the “other purposes beneficial to the community” heading. In order to do so, the organization must have a charitable purpose that is within “the spirit and intendment” of the preamble to the *Charitable Uses Act, 1601*,⁽⁵⁾ commonly referred to as the *Statute of Elizabeth*. The *Statute of Elizabeth* lists a number of charitable purposes in its preamble, and includes not only the charitable staples of providing relief to the elderly, sick and impoverished, but also charitable activities dedicated to such things as the “Mariages of poore Maides” and “Supportacion Ayde and Helpe of younge Tradesmen, Handicraftesmen and persons decayed.”

The common law has, in addition to limiting the permissible classes of charity, also tried to prevent charities from engaging in “political” activities. Courts in Canada have determined that organizations that engage in political activities do not come under the four heads of charity, including “other purposes beneficial to the community.”⁽⁶⁾ Judges have reasoned that by engaging in political activity, the charity enters into a debate over a policy that may or may not be a public benefit, rather than working towards an accepted public benefit. Moreover, in order to assess the public benefit of advocacy on policy issues, a court would have to take sides in a political debate, in the process usurping Parliament’s role.

Although the common law does not allow charities to engage in any political activities, the ITA has modified the common law to permit registered charities to engage in some degree of political discourse. Subsections 149.1(6.1) and (6.2) of the ITA clarify that registered charities may engage in limited political activities. The provisions state that a charity must devote “substantially all” of its resources to its charitable purpose, but can dedicate part of its resources to political activities, as long as those activities are ancillary and incidental to its charitable purpose. The words “substantially all” are defined by the CRA as more than 90%. There is a further requirement that the political activities cannot be partisan, and cannot directly or indirectly lend support to any political party or candidate for public office.

Under the present law a charity may, without restriction, provide information and briefs to government or elected officials in order to promote change to laws or policies.

An additional section of the ITA operates to constrain a registered charity from engaging in substantial political activities. Subsections 149.1(1) and (2) of the ITA contain definitions for a “disbursement quota” that applies to all charitable foundations and organizations. The disbursement quota rules require that charities spend a specified proportion of the donations for which they issue tax

receipts (typically around 80%)(7) on charitable activities or gifts to other charities. Subsection 149.1(1.1)(b) of the ITA provides that, in determining whether a charity has met its annual disbursement quota, expenditure on political activities is not to be included in the total. A charity that dedicated a substantial portion of its annual charitable receipts (more than 20%) to issues that had political overtones could have trouble meeting its disbursement quota, depending on its financial position.

THE *PEMSEL* CLASSIFICATION, SOCIAL AND POLITICAL ADVOCACY AND CHARITIES

A. Common Law Definition of Charities

The common law definition of a charity presents a preliminary obstacle to benevolent organizations that may otherwise deserve charitable status. The three *prima facie* charitable purposes encompass historical social priorities that do not necessarily reflect current needs. The protection of the environment is not *prima facie* recognized as a charitable purpose because environmentalism was in its infancy at the time *Pemsel* was decided. It is clear, however, that environmental organizations can provide tangible benefits to society. It is difficult, from a policy perspective, to see why an organization promoting literacy should automatically receive preferential status over an organization that promotes equality for women, or that lobbies for cleaner air.

The scope of the accepted purposes of charities is often narrowly defined, and encompasses engagement only in non-contentious societal problems carried out in conventional ways. Until recently, for example, the advancement of education was limited to formal classroom instruction, and did not include informal workshops, seminars, and other training for the purpose of finding employment.(8) The charitable category of the advancement of education often conflicts with rules against political advocacy: courts have ruled that the educational purposes of a charity do not include the provision of educational materials designed to persuade people not to have an abortion,(9) or not to use pornography.(10)

In other words, the law as it currently stands may encourage charitable resources to be committed to a narrow range of non-controversial endeavours. Moreover, the law does not promote innovation in the delivery of services within the three *prima facie* categories of charity. The litigation costs of fighting for a more expansive charitable mandate may discourage all but the most persistent organizations.