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# **Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses**

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by *Betsy A. Harvie*  
January 2002

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B.H.

## About the Author

Betsy A. Harvie is a lawyer and consultant to Canadian charities and voluntary groups. She advises on charity law, organizational structure, board governance and policy issue management. She obtained her B.A. (Hon.) from the University of Alberta in 1981 and her LL.B. from Osgoode Hall Law School, York University in 1986. Between 1988 and 1996, she was an associate and then partner with the Toronto law firm Genest Murray where she practiced public regulatory law. Since 1997 the focus of her work has been within the voluntary sector. She holds a Professional Master's of Public Administration specializing in the Third Sector from the School of Policy Studies, Queen's University. She can be reached at [baharvie@sympatico.ca](mailto:baharvie@sympatico.ca)

## Executive Summary

This paper will provide background and context on the issue of advocacy from the perspective of the voluntary sector and establish a framework for further discussion. Since the Advocacy Working Group (AWG) seeks to engage and learn from the sector, charitable and non-profit leaders were interviewed about their opinions and experiences. Their definition of advocacy goes further than some accepted definitions. Advocacy is understood to enable those who need help to find their own voice. It gives power to citizens. They draw no distinctions in practice between advocacy for an individual and advocacy for systemic change or to benefit a group. Advocacy brings to light widely held bias and dismantles perceptions. Charities engage in advocacy because it is an effective, and sometimes the only, way to achieve their charitable purposes

Surveys indicate that 88 to 93 percent of Canadians strongly support charities engaging in advocacy and almost 80 percent believe that charities understand the needs of Canadians better than government.<sup>1</sup> Nonetheless, there is virtually no systematically collected information in Canada about the groups, charitable and non-charitable, which engage in advocacy. More research is needed on the range and kinds of advocacy that are currently funded by government, however a number of federal departments appear to understand the benefits to their decision-making processes of supporting sector-based public policy input.

As government has downsized, it has come to rely increasingly on the voluntary sector for advice on the operational implications of programs administered by the sector. It needs the sector's expertise, unique access into the community, attentiveness to social need and ability to facilitate the voices of Canadians in public policy formulation – particularly since its own policy capacity has diminished in recent years and the complexity of policy issues has increased. Nonetheless, government enthusiasm for increased sector involvement in policy development seems

ambivalent. In part this is due to the difficulties of accommodating the sector's viewpoints into internal government processes and expectations. It may also relate to perceptions about the sector's capacity for and concerns about the sector's own biases.

Charities may not be established for political purposes. Under the common law and the federal *Income Tax Act* they may participate in non-partisan political activities that further their legitimately charitable purposes. The caveat is that these political activities must be incidental and ancillary to their charitable purposes. The Canada Customs and Revenue Agency (CCRA) has developed a rule that registered charities may not devote more than 10 percent of their resources to political activities.

Registered charitable status can make a material difference to the fundraising capacity of organizations. The sector also seeks a tangible acknowledgment from government that it has a vital role to play in public policy development. Extending the advantages of registered status to groups that do more than incidental advocacy would accomplish this.

CCRA tries to draw a fine line between activity that is intended to inform (which is charitable) and that which is intended to persuade (which is political). According to CCRA, legitimate public education encourages a full and reasoned consideration of an issue; it does not seek to influence public opinion. Public education campaigns are rarely considered charitable however since they seek to persuade, do not present all sides of an issue and are not part of a structured educational experience. The onus on charities to present all sides is greater the more controversial the issue.

The problem with these requirements is that they require groups to distinguish between 'facts to inform' and offering 'opinion to persuade' when that is not how most people perceive an issue or communicate it to others. The 'intention to persuade' will always be present, regardless of what it is called or how the information is shared. Requiring groups to present both sides of an issue is unrealistic as

is making them responsible for establishing that an issue is not controversial when any issue that makes the newspapers is apt to arouse opposition from someone. Moreover, many charities work with the most marginalized members of society and the issues with which they contend are necessarily difficult and contentious. The requirement that charities wait until they are invited to participate in government-led processes places them in a subordinate position vis-à-vis government and one that is inconsistent with their role as an early warning system.

The case law on political activities is unclear and inconsistent. Compounding this is CCRA's conservative legal interpretations and application of its own requirements that can be subjective, impractical, overly broad and unclear. This leads to confusion amongst charities about what exactly is permitted and what is restricted. The uncertainties of the law, compounded with regulator insistence that all decisions be made on a confidential case by case basis hampers the sector's ability to obtain clear guidance on the limits of permissible political activity. The regulatory climate has produced an 'advocacy chill' where groups are fearful of the consequences of engaging in impermissible activities and frequently do much less advocacy than they might wish or should do to achieve their charitable purposes. The secrecy and uncertainty of the regulatory regime prompts some to question its integrity and the impartiality of CCRA in selecting certain groups for audits and investigation. Charities express concerns about fundamental fairness based on the limitations put on advocacy on the one hand, and the deductibility of lobbying and advertising expenses by business, on the other. More certainty and fewer restrictions exist in the regulation of political activities by charities in the United States and England.

This paper also addresses arguments against reform including the following. If the tax advantages of registered status are extended to other groups, is government providing an indirect subsidy to organizations that oppose it? Concerns exist about government's

ability to control groups with extreme views. Although government may be worried about the potential loss of tax revenue if more groups are granted registered status, there is no reliable evidence that this would occur. Canada can learn from practices in other jurisdictions, in particular, England. There may also be opportunities to develop sector-wide guidelines on best practices and approaches to political activities that would establish new benchmarks for responsible conduct by charities in respect of advocacy initiatives and reassure government that the sector as a whole takes seriously its obligations.

The paper concludes by identifying several options for reform including those outlined in the “Working Together” report by the Regulatory Table, a proposal by IMPACS, and the so-called ‘Drache’ and ‘Webb’ proposals. Each option is briefly analyzed from the perspective of charities, the voluntary sector, government and society.

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## PART I - INTRODUCTION

### 1.0 Background

The purpose of this paper is to provide background and context on the issue of advocacy from the perspective of the voluntary sector and to establish the framework for further discussions. We seek to stimulate debate and renewed consideration of the voluntary sector's advocacy and related issues. We are keen that the dialogue engages the voluntary sector directly so that its voice and ideas are heard.

Advocacy is of great importance to the work of many sector organizations and is consistently identified as one of the most vital contributions that they make both nationally and internationally. It is through advocacy that the sector identifies and promotes ideas and activities that policy-makers and legislators subsequently incorporate into public policy. Throughout history voluntary sector organizations have made tremendous contributions through their advocacy including work to eliminate poverty, the development of Medicare, and the creation of child welfare policies and programs. In 1978 Mrs. Dudley of the Migraine Foundation said to a federal commission on charities: "I'd be willing to make a guess that 50 percent of the legislation passed in this country has been at the urging of some group. If you ever just sat and waited for the government to propose legislation, you know what would happen."<sup>2</sup>

The ability of voluntary sector groups to provide a voice for citizens, both at the margins and in the mainstream, has been championed for years as critical to the quality of democratic

decision-making. The sector's acknowledged strength lies in its diversity and autonomy, both of which enable it to promote new ideas and perspectives that enhance public decision-making.

In recent years as governments and public spending have shrunk, the voluntary sector is called on increasingly to serve as the social safety net and response center for complex social problems. This shift demands that the sector be more than just a stakeholder in the process of governance<sup>3</sup>; it requires it to be a full partner with government in a relationship founded on mutual respect and joint decision-making.<sup>4</sup> Some commentators have suggested that the sector's advocacy and capacity for oversight of government is its most valued role: "arguably the most important organizations in the sector are those performing a representation function: providing information so that citizens can participate effectively in the policy process; representing the public interest and minority viewpoints; and overseeing, monitoring, and evaluating government and other powerful institutions in society."<sup>5</sup>

It is not surprising that the voluntary sector chafes under regulatory restrictions limiting advocacy. The current regulatory and funding environments restrict advocacy while failing to recognize its importance in contributing to a vigorous civil society. For example, the sector objects to rules that distinguish between advocacy activities that are invited by government and those which are not. Those that are invited are considered to be of public benefit and the uninvited are viewed as unwelcome, provocative and in need of being restricted or limited. This distinction is inconsistent with the role that the

sector plays in Canadian society. The rules also reinforce a power dynamic that treats the charitable sector as subordinate and diminishes the legitimacy of its independent views. Hence the regulatory environment reveals an ambivalence in government's stated interest in and need for an independent and diverse voluntary sector with the expertise, capacity and mandate to champion causes and make the voices of Canadians heard in discussions about public policy.

## 2.0 Methodology

Informal interviews were conducted with senior managers, staff and board members of registered charities and public benefit groups, and with charity lawyers. An effort was made to interview individuals from all parts of the country and from a range of sectors: health care, disability, environment, arts, recreational sport, social welfare, women, seniors, immigrant and ethno-cultural, Aboriginal, and employment and training. Interviewees came from non-profits, charitable organizations and foundations and included umbrella organizations and membership groups.

The Voluntary Sector Initiative (VSI) Secretariat and members of the Advocacy Working Group (AWG) identified interviewees based on expressions of interest in this project, or because they were employed by charities whose advocacy activities have been the subject of regulatory interest, or because their group has been denied registered charitable status due to their advocacy work.

During telephone interviews, we asked open-ended questions about their experiences and insights, their understanding of advocacy, and how the rules might have affected them. Some individuals did not want their views and experiences disclosed lest it prompt inquiries from the Canada Customs and Revenue Agency (CCRA), or undermine ongoing discussions with CCRA officials over the characterization of their advocacy work. Accordingly, we have not identified specific organizations or interviewees except where the comments are general in nature.

## PART II –ADVOCACY IN THE VOLUNTARY SECTOR

### 1.0 Voluntary Sector’s Definition of Advocacy

Advocacy has been defined as “the act of speaking or of disseminating information intended to influence individual behavior or opinion, corporate conduct or public policy and law.”<sup>6</sup> The individuals interviewed for this paper, virtually all of whom described advocacy in terms of its effects, hold a more nuanced view. A number of interviewees observed that the goal of advocacy is to improve people’s lives. Beyond that they offered four different views of what advocacy accomplishes.

First, they defined advocacy as either: enabling those who need help to find their own voice; or speaking up for people who cannot speak for themselves. Across a diverse range of fields, interviewees indicated that advocacy is necessary because the people on whose behalf organizations speak are disadvantaged and without representation. Without advocacy, government will not listen to or hear them. One executive director stated that organizations must step in to give voice where government has failed in its twin obligations to serve the most marginalized and the least resourced and to enable them to represent themselves.

Second, interviewees explicitly identified advocacy as a way of giving power through the opportunity it creates to rectify the absence of power experienced by many citizens in their own relationship with the state. Hence, its effect is both democratizing and empowering.

Third, interviewees drew no distinction between advocacy on behalf of an individual and advocacy for systemic change or that benefits a group in a way that benefits the public. Rather, they saw the difference as shades along a spectrum. However, they did distinguish between advocacy that promotes only the interests of a membership group or association and advocacy that advances the interests of a group representing a broader public benefit.

A fourth view is that advocacy brings to light widely held bias, challenges assumptions, and

dismantles conventional perceptions. The civil rights, feminist and environmental movements all illustrate how advocacy brought into the mainstream ideas that had previously existed at the margins. On this there was consensus that advocacy has benefited the wider public interest.

Almost none of the interviewees mentioned the distinction drawn by government between activities that are invited and welcomed by it and those that are not. Because their view of advocacy is outcome, not process or legally oriented, interviewees indicated that their decision to launch an advocacy initiative depends on whether they believe they will be listened to, not whether policy-makers invited the submission.

It is interesting to note that sector groups and government each appear to judge the appropriateness of an advocacy intervention from their own perspective – how it might succeed (in the case of the charity), or how it might be controlled (in the case of government).

The starting assumption for those interviewed is that advocacy is a legitimate and legitimizing activity. It was suggested that the starting-point for many in government is very different. Some policy-makers see advocacy by the voluntary sector as one-sided and thus not genuinely analytical.<sup>7</sup> Submissions from think tanks and academics are regarded more favourably not because their bias is necessarily less visible but because they use methods that resemble government’s own approach to developing policy. Because “advocacy” and “political activities” may carry negative connotations for government, some in the voluntary sector recommend it instead be called “public policy input” on grounds that this is what the sector means when it speaks of advocacy.

## 2.0 Diversity of Advocacy Work

Advocacy plays a critical role in the daily work of charities in ways large and small. It includes calling for more prenatal support, home care for the elderly, educating the police on the dynamics of domestic violence, insisting that foreign domestics be told about Canadian employment laws, and supporting research for heart disease.

It can start when a group sees that an injured worker needs help obtaining government compensation or that a refugee family is afraid to ask their school board for remedial tutoring for their child. The origins of an advocacy campaign may lie in individual charitable acts, repeated over and over, until a systemic problem reveals itself and the resolve to fully address the issue galvanizes charitable leaders into action. Alternatively, the identification of a problem requiring new public policies may arise in the course of a sector group's research, analysis and consultations on the issue.

## 3.0 Why Charities Engage in Advocacy

Charities engage in advocacy because it offers an effective means to achieve some of their purposes. In many areas of charitable concern (such as protection of wilderness areas, health research, poverty, mental health treatment, or domestic violence), the most efficacious solutions lie in regulatory change. Sometimes, legislative and policy change may be the *only* answer that will work, as in the case of income support for persons with disabilities or food supplements for persons in institutions.

Charities fulfil their mandates in a variety of ways. These often include service provision and advocacy activities within the same organization. For example, a food bank's purpose is to ensure that the most disadvantaged people receive food. However, over time it may also recognize that unless the underlying causes of hunger – usually deep poverty – are addressed, hunger will never be eliminated. Many charities believe they have a moral and ethical obligation to use all legal means to achieve their purposes, including public policy input.

Where a profound need for charitable action exists, but where only systemic change is apt to produce lasting improvement, charities and public benefit organizations consider advocacy a top priority. A representative of one of Canada's largest health charities indicated in her interview that her organization foresees a coming public health catastrophe and attendant strains on the public purse due to the rising incidence of disability in our aging population. Its board has determined that the solutions – additional trained specialists, accelerated research, and accessible and affordable medication – will be impossible to achieve without extraordinary government leadership and a supportive policy environment. However, government's attention is focused on immediate problems in the health care sector; it appears unable to plan for a crisis that is not yet upon us. For this charity,

whose mandate is to alleviate suffering and disability caused by disease, there is no alternative to advocacy: it cannot wait – and Canadians would not wish it to wait – for an invitation to speak up.

It is clear that in spite of the funding pressures they face (or perhaps because of them), charities are less willing than in the past to limit their response to those activities traditionally considered charitable. Indeed, throughout the charitable and “public benefit” sector (see definition in section 4.0 of this Part III), groups perceive community and individual need as social justice issues. By re-framing the problems as systemic, they have expanded the range of options for addressing such problems to include economic and social policy change.

#### 4.0 Advocacy By Whom?

Surprisingly little empirical data are available on how the voluntary sector participates in public policy processes or how its advocacy activities vary according to core missions. If the information shared in the interviews is indicative of larger trends, we know that advocacy is critically important to organizations that are registered charities as well as to those that do not hold charitable status.

Registered charities for which advocacy is essential are found in all sub-sectors and include those that focus on health, faith, social justice, international development, the arts, education and training. Social service agencies and groups that work with marginalized and disadvantaged populations also invest in advocacy.

Organizations without charitable status fall into two categories: those engaged in charitable work but denied registered charitable status because of the extent of their advocacy; and a much broader range of non-charitable groups that promote activities or provide services intended to improve the quality of life of the community or of a group within the community that shares characteristics based on age, nationality, race, ethnicity, gender, sexual orientation, residence, disability or disadvantaged economic status.<sup>8</sup> Both categories of groups are often referred to as public benefit groups. These organizations operate in the broader voluntary sector, are non-profit, and are altruistic in their outlook; as well, their mandate is to make a measurable contribution to the public welfare.<sup>9</sup>

Public benefit groups include umbrella organizations whose primary purpose is to speak on behalf of and serve their member organizations, rather than deliver services directly to the public. They include umbrella groups in particular sub-sectors such as health, arts and culture, and family services as well as other sector-wide voluntary and volunteer organizations. We do not consider non-profits such as professional associations to be public benefit groups.

According to recent research by the Canadian Centre for Philanthropy, organizations that engage in advocacy but are frequently refused

charitable status (whether because of their advocacy or because the balance of their work is not considered charitable at law) include: groups mandated to foster cultural pluralism, tolerance of diversity, economic and social participation by the disadvantaged, internationalism, environmental protection, human rights and civil liberties, and unicultural and multicultural assistance; culturally focused community and resource centres; organizations promoting local or sustainable trade and international cooperation; groups devoted to refugee support; arts and recreation organizations; and grassroots and umbrella environmental groups.<sup>10</sup> Many of these groups (that engage in advocacy but are denied charitable status) would qualify as public benefit organizations as described here and elsewhere.<sup>11</sup>

There is also a paucity of information about the numbers of voluntary groups that engage in advocacy. Although no central registry for non-profits incorporated under federal or provincial statutes currently exists, recent estimates suggest that Canada has 180,000 organizations.<sup>12</sup> These include almost every type of voluntary association, club, charity, church, trade, professional association, advocacy organization and umbrella group.<sup>13</sup> The number of unincorporated, grassroots groups is thought to be substantially larger.<sup>14</sup> There are better records<sup>15</sup> of the approximately 78,000<sup>16</sup> registered charities that comprise a subset of the non-profit groups.<sup>17</sup>

## 5.0 Public Approval of Advocacy

In spite of government reservations, there is strong evidence that the Canadian public supports charities engaging in advocacy and political activities. In a survey<sup>18</sup> of the perceived importance to Canadians of charities, including their advocacy activities, it was reported that 88% of Canadians think that charities should speak out on social issues, the environment, poverty or health care. Most (79%) believe that charities understand the needs of the average Canadian better than does government. A vast majority felt that charities should speak out about their cause and try to get things changed, including meeting with government ministers (93%), organizing letter-writing campaigns (89%), and placing advertisements in the media (85%). As expected, Canadians were less comfortable with holding street demonstrations and protests (47%) and non-violent civil disobedience. The more familiar people are with the work of charities, the less likely they are to support limits on the amount of advocacy they do; as well, donors are more likely to support the use of resources being used for advocacy than are non-donors. This last finding hints that opposition to charities doing advocacy may be addressed, at least in part, by increasing Canadians' awareness of the work of charities in their communities.

## PART III – THE FEDERAL GOVERNMENT ENVIRONMENT

### 1.0 Government Provides Direct Support for Advocacy

In spite of funding cuts, government has continued to provide direct funding for some kinds of public policy input. Interviewees repeatedly noted that a variety of federal departments fund advocacy programs and initiatives aimed at improving the life circumstances of individuals and bringing about systemic change for women, children, the aged, and persons with chronic illnesses. One interviewee wryly observed that government has no qualms about funding advocacy directed at other levels of government. Interviewees from charities noted that they receive or are aware of funding to charitable and public benefit groups for “policy development,” “research,” “public education,” “sector and public consultations,” “policy and regulatory advocacy” and “representation.” Although more research is needed on the kinds of advocacy activities that government currently funds, there is strong evidence that a number of federal departments have an appreciation for the benefits of advocacy, even where it involves challenges to an existing government policy.

### 2.0 When Good Relations with Government are Not Enough

Individuals interviewed for this paper<sup>19</sup> stated that they seek to change policy in any way that is apt to be persuasive, reflects the values of the group,<sup>20</sup> is sensitive to the needs and particular vulnerabilities of their clients,<sup>21</sup> is unlikely to attract criticism from donors or partners, and is permitted by law. Having said that, interviewees explained that when they believe legislative or policy change is desirable, their first approach is to make direct representations to decision-makers. Direct contact is apt to be more immediate, more effective and less expensive than indirect routes.

Massive staff layoffs from federal departments during the Program Review cuts of the mid-1990s left program and field offices without sufficient experienced staff or adequate institutional memory. Interviewees related how junior staff, now carrying significant responsibility, proposed controversial policy changes without giving adequate thought to the policy implications. Staff were either unaware of the expertise that existed outside government or were troubled about looking uninformed and so declined to ask for advice or input. Even after initial negative reaction, staff dug in and refused to consult front-line groups. Interviewees noted that in these circumstances they have “gone public” to put pressure on government to change its position and that such an approach is often quite effective.<sup>22</sup>

### 3.0 Devolution of Service Delivery Heightens Need for Advice

As operational divisions have been 'downsized,' alternative service delivery is occurring through private for-profit and voluntary non-profit entities and other operators external to the line departments.<sup>23</sup> In addition to the anticipated cost savings from contracting services out, the devolution of responsibility for delivering social services to the voluntary sector is grounded in the belief that the sector is less bureaucratic and therefore potentially more responsive than government.<sup>24</sup> Whether or not this is accurate, it is certainly true that as government has withdrawn from the front lines of service delivery, it has come to depend increasingly on the voluntary sector for its expertise and knowledge of the conditions under which services are delivered.

Service providers from the sector can advise on the operational implications of policy proposals, propose solutions, implement them, and carry out policy and program evaluations. According to Mel Cappe, Clerk of the Privy Council: "The voluntary sector reaches out and touches parts of society which the government cannot easily or efficiently reach. And one of the best ways to gauge the efficacy of the services we offer or support is to engage the sector in dialogue, and listen and learn..."<sup>25</sup> These factors appear to be driving new interest by government in obtaining independent advice from the voluntary sector about program delivery and community conditions and in sharing the load for operational planning.

The government's enthusiasm for alternative service delivery and contracting out for services is regarded by the sector with trepidation. Interviewees noted that depending on government contracts makes them fearful of the consequences of voicing opposition to government policies.<sup>26</sup> Although they were unable to provide evidence that the risk of losing contracts is real, it is likely that few groups are willing to test it.

### 4.0 New Demands for Policy Input

An important consequence of the shift in government's role is that it has lost considerable policy capacity.<sup>27</sup> The loss resulted in part from a cost-cutting strategy based on the belief that policy advice could be contracted when needed. Senior bureaucrats now acknowledge the difficulty of separating policy from operations and that the decision to delegate the two functions to different groups no longer makes sense. Designing good policy without a good understanding of how it is administered has proven difficult.<sup>28</sup>

Compounding this unease about government's policy capacity are the increasing complexity and horizontality of the issues with which it must contend. In recent years, the top challenges on the government agenda – globalization of trade, labour market adjustment, the implications of an aging society, health care, crime prevention, sustainable development and Aboriginal issues – have all been cross-cutting, intractable issues.<sup>29</sup> The resolution of policy issues has been complicated enormously by the effects of globalization and social fragmentation. The policy process is being re-framed as interdisciplinary and requiring the involvement of multiple departments and stakeholders.<sup>30</sup>

Government is no longer able to manage alone; it needs the sector's expertise, unique access into the community, attentiveness to social need, and ability to facilitate the voices of Canadians in public policy formulation. Government has acknowledged that because charitable and public benefit groups are close to the citizenry, they can act as an early warning system with respect to emerging policy issues.<sup>31</sup> In announcing the Voluntary Sector Initiative last year, the Privy Council's Voluntary Sector Task Force stated:

For many federal departments, partnership with the sector is essential to the fulfillment of their mandates and is a cornerstone to the delivery of programs and services, and increasingly to robust policy development....



Over time, the Accord will change the way the Government of Canada works with the sector to develop new policies, programs and services for Canadians. Departments however need to engage voluntary sector organizations now, to work more effectively together to realize common objectives within existing departmental mandates...<sup>32</sup>

While conceding that the sector has an important role in contributing to the public policy debate, government also seems ambivalent about why it is supporting increased policy participation. A clue to this appears in a 1999 speech by Mel Cappe where he acknowledges that the sector's capacity to enlighten the public policy debate is tied to: "in depth research and subject matter expertise." The challenge, he notes,<sup>33</sup> is "to bring the sector's viewpoints systematically into play in the making of public policy" – a comment that hints of government's unease at relying on policy submissions that arrive unsolicited, in diverse formats and of uneven quality in terms of their reliance on "in-depth" research. It is important that government not discount the insights of sector representatives just because their material is not easily accommodated with the government's current internal policy processes.

## PART IV – THE REGULATORY FRAMEWORK FOR REGISTERED CHARITIES

### 1.0 Restrictions on Advocacy

Unlike simple non-profits and grassroots groups,<sup>34</sup> charities are restricted in the kinds and extent of advocacy and political activities in which they may engage.<sup>35</sup> For example, charities cannot:

- be established for political purposes;<sup>36</sup>
- support a political party or candidate for public office or promote a political or socio-economic ideology;
- have as one of their purposes a mandate to campaign for retention or change in law or policy; or
- have as their purpose to persuade the public to adopt a particular opinion on social issues.

The rules under the common law and the *Income Tax Act*<sup>37</sup> limit the nature and extent of political activity in which charities may participate to those that are: (a) non-partisan; and (b) incidental and ancillary to their charitable work. Charities are obliged to devote “substantially all” of their resources to charitable activities. CCRA interprets “substantially all” as meaning at least 90% of an organization’s resources. Further, it interprets the words “political activities” as embracing a wide range of activities that have in common the goal of bringing about changes in law and policy. Sector groups can find it difficult to distinguish between activities that are charitable and those that are “political.” In addition, what the courts have found to be charitable is often different and narrower than what Canadians might consider to be charitable.<sup>38</sup>

### 2.0 Why Charitable Status Matters

Given the restrictions on advocacy and political activities, why would non-profit groups seek to be registered under the *Income Tax Act* as a charity? Managers of non-profits and charities interviewed for this paper confirmed that the most important reason is that registered status makes it easier to raise funds. Like all non-profits, charities are exempt from paying income tax. Unlike non-profits, registered charities may issue tax receipts to donors. Tax receipts entitle a donor, whether an individual or corporation, to claim a tax credit for a portion of the donation thereby reducing the income tax they would otherwise pay. The availability of the tax credit is important to donors<sup>39</sup> and surveys show that the higher the amount of the credit, the more donors will give.<sup>40</sup>

A daycare advocate indicated that the working parents who comprise her donor constituency are not indifferent to the benefits of a tax credit. “When they weigh the relative advantages of donating to us [an unregistered non-profit] or, say the Kidney Foundation, they will feel their money is better spent where they get a tax credit. It’s not that they think the cause is any better.” For this executive director, extending registered charitable status to groups doing measurable and significant work in the public benefit levels the playing field between them and those already possessing registered status.

Being a registered charity also establishes the *bona fides* of an organization. It communicates to prospective donors, grant-making bodies, volunteers, partners, employees and clients that the group is engaged in work of significant public benefit. This is true even if the group is membership-based.<sup>41</sup> Charitable status facilitates fundraising by reassuring donors that their donations contribute to a charitable cause, saving them the trouble of making their own due diligence inquiries.<sup>42</sup> In

addition, the public believes that the financial affairs of charities are more closely monitored and better regulated than those of non-charitable groups. This reassures donors and funders that their contributions will be spent appropriately.

In an intensely competitive fund-raising environment, registered charitable status offers a real advantage. Foundations, trusts and grant-making organizations are an important source of project and program funding for the sector. Yet the “qualified donee” rule requires that foundations and other registered charities disburse their funds to donees who themselves have registered charitable status or qualify for a limited number of exceptions. The United Way, for example, specifies that only registered charities are eligible for long-term support; non-charities are limited to receiving a single non-renewable grant, usually in relatively modest amounts.<sup>43</sup> Many foundations do not offer grants for non-charities.<sup>44</sup>

Although private giving is an important source of revenue for registered charities, at 14% of their overall income, it ranks far below the 26% derived from earned income, and the 60% from government grants and payments.<sup>45</sup> So why does charitable status for groups engaged in advocacy remain the single largest issue for many organizations?<sup>46</sup> The answer is that the voluntary sector seeks a *tangible* acknowledgement from government that its contribution to public debate and public policy development is a legitimate and significant aspect of its work.

### 3.0 Advocacy and the Regulation of Charities

The complexity of charity law has been the subject of well-researched and thoughtful writings by Canadian legal scholars, making it unnecessary to do more than briefly summarize the high points here.<sup>47</sup>

#### 3.1 Limited federal authority to regulate charities

Responsibility for charitable trusts is a matter of exclusive provincial jurisdiction but with the exception of Ontario, where a separate statutory regime exists, the common law role of the Crown is simply delegated by the Provincial Attorney-Generals to their respective Public Trustees.<sup>48</sup> Although certain privileges are attached to charitable trusts, for most practical purposes, those advantages are overshadowed by the fiscal privileges achieved by registering as a charity under the federal *Income Tax Act*. Once a charity is registered, it is subjected to federal authority and oversight. The federal government’s authority over registered charities, however, derives solely from its taxing powers; it has no power over the regulation of charities *per se*.

#### 3.2 Charity interpreted narrowly under the law of trusts

There is no definition of “charity” in the *Income Tax Act*. Accordingly, recourse must be placed on common or “case” law interpretations of what constitutes a charitable trust and which activities are properly charitable. Under the English and Canadian common law, charities are “purpose trusts,” as opposed to trusts for identifiable beneficiaries. Generally, a trust with no identified beneficiaries is invalid. A narrow exception exists for purpose trusts where their purposes are framed to benefit the community in a specific way. The significance of this is that for the past 400 years, judges have approached the question of what constitutes a charitable purpose from the restrictive perspective imposed by trust law.

### 3.3 Headings of charity

The law of charity in Canada has its genesis in the judgement in the 1891 English case of *Pemsel*.<sup>49</sup> There, “charity” was defined as comprising four principal divisions: (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; and (4) other purposes beneficial to the community. The basis of these divisions was the preamble to the *Charitable Uses Act* of 1601,<sup>50</sup> which contained an illustrative list of projects considered charitable in Elizabethan England.<sup>51</sup> These purposes are supplemented by a further requirement that the purposes must be for the benefit of the community or of an appreciably important class of the community. An organization’s purposes or objects are contained in its Letters Patent, or incorporating document. To obtain registered status, a group must satisfy CCRA that its purposes fall within one of the four headings of charity.

### 3.4 Prohibition on political purposes

Not all objects of public benefit, even those that the public might consider charitable, necessarily qualify as charitable. To be recognized by the law as charitable, they must fall within the spirit and intent of the Elizabethan statute.

Today’s courts consider whether the purpose falls within one of the first three headings or whether by analogy it resembles a charitable purpose recognized by previous courts.<sup>52</sup> Because political purposes are not explicitly included under any of the three headings, the courts have considered whether they qualify under the public benefit heading. In 1917, in *Bowman v. Secular Society*,<sup>53</sup> the House of Lords ruled that:

. . . a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit . . .

This case has become the touchstone of the modern prohibition against political purposes. Purposes aimed at promoting or advocating a change in the law or in its administration, or a change in public policy, are not regarded as charitable. The argument that the court has no ability to judge whether the proposed change will benefit the public has been criticized by legal scholars on several grounds,<sup>54</sup> but it continues to be cited in Canadian judgements.<sup>55</sup>

The courts have also been reluctant to encroach on the power of the legislature. The concern to judges is that by recognizing a political purpose as valid, they may be inadvertently acknowledging that the law targeted by the purpose warrants change. Determining if a law needs changing is a political and legislative decision, not a judicial one, they have held. In *National Anti-Vivisection Society*,<sup>56</sup> the House of Lords held that courts should on principle assume the law is right as it stands.<sup>57</sup>

In *McGovern v. Attorney General*,<sup>58</sup> the court was asked to determine whether the objects of the Amnesty International Trust were exclusively charitable under English law. Amnesty’s objects were “to secure worldwide observation of the Universal Declaration of Human Rights in regard to prisoners of conscience.” The court accepted that the trust was aimed at the relief of human suffering. However, it was held that its activities could prejudice British foreign relations because its object was to secure changes in foreign laws. Therefore, the court was unable to know if the trust was for the public benefit. In ruling that the objects were political and not charitable, the court summarized its views on trusts for political purposes as follows:

Trusts for political purposes include (inter alia), trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.<sup>59</sup>

### 3.5 The restriction on political activities

Although a charity cannot be dedicated to political *purposes*, it may engage in limited political *activities* but only insofar as they further its charitable purposes. In 1985, the Federal Court of Appeal ruled in *Scarborough Community Legal Aid Clinic*<sup>60</sup> that influencing policy-making could be acceptable so long as it was non-essential and incidental to other charitable activities. Faced with this judicial interpretation, the government amended section 149 (1) of the *Income Tax Act* to allow political activities ancillary and incidental to a charity's purpose. Although charities are required to devote their resources exclusively to charitable purposes, under subsections 149 (1) (6.1) and (6.2) they may pursue non-partisan political activities that are ancillary and incidental to their purposes so long as substantially all of their resources continue to be directed to activities that are properly charitable. CCRA followed up with Information Circular 87-1 specifying that "substantially" meant at least 90% of everything the charity can use calculated annually. This is called the "10% rule."

The provisions at section 149 (1) do not explain or define "political activities." CCRA's position is that "political activities" include "a wide range of activities that have in common the goal of bringing about changes in law and policy."<sup>61</sup> CCRA identifies three kinds of activity:<sup>62</sup>

- 1) partisan political activity, which is always prohibited;
- 2) government-related activity which is deemed charitable and permitted without limitation;
- 3) political activity which is permitted provided
  - a) it is incidental and ancillary to the charitable purposes, and
  - b) substantially all the group's resources are devoted to its charitable work.

Government-related activity is distinguished from political activity by determining whether the charity's intention was to inform people (which is charitable), or whether it was to persuade people (which is political). The test is not whether government or public opinion was actually influenced by the presentation of facts and

knowledge but what the intention was. Oral and written representations to politicians, a public servant or a government body are considered charitable as long as they are designed primarily to allow a full and reasoned consideration of an issue rather than to influence public opinion or to generate controversy. As charitable activities, they are subject to no limits.

Political activities, however, are subject to strict spending limits. Information Circular 87-1 lists examples:

- a) publications, conferences, workshops and other forms of communication which are produced, published, presented or distributed by a charity primarily in order to sway public opinion on political issues and matters of public policy;
- b) advertisements in newspapers, magazines or on television or radio to the extent that they are designed to attract interest in, or gain support for, a charity's position on political issues and matters of public policy;
- c) public meetings or lawful demonstrations that are organized to publicize and gain support for a charity's point of view on matters of public policy and political issues;
- d) mail campaigns – a request by a charity to its members or the public to forward letters or other written communications to the media and government expressing support for the charity's views on political issues and matters of public policy.<sup>63</sup>

A second theme arises out of the dichotomy in the case law between activities and purposes aimed at supporting government policy preferences and the enforcement of existing legislation, versus those that seek change to the status quo. The law of charitable trusts has usually characterized the former as charitable and the latter as political.<sup>64</sup> CCRA, taking its cue from the courts, argues that government-related activity that is helpful and informative is charitable but interaction for the purpose of change is not.

To help determine whether a charity's intent was to support or to change government policy, CCRA uses a test which inquires if government invited the interaction. CCRA has produced draft publication RC4701 (E) *Registered Charities: Education, Advocacy and Political Activities*,<sup>65</sup> to replace Information Circular 87-1. Draft RC4107 (E) gives the following examples of charitable activity:

- *a charity expressing an expert opinion on an issue, at the invitation of a government body or the media; (underlining added)*
- *a charity speaks at the direct invitation of others, or responds to an indirect invitation such as a general call from government authorities that are seeking public input in developing policy; (underlining added)*
- *having given the government or public the benefit of its experience and expertise, it does not intervene further; (underlining added)*
- *it avoids language (and images) designed to appeal to the emotions.*<sup>66</sup>

### 3.6 The limits of public education

Because public education campaigns are used to sway public opinion, the courts have also considered whether to characterize these activities as charitable (under the educational heading) or as political. In the majority judgement in the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*,<sup>67</sup> Mr. Justice Iacobucci states:

To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise. Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough. Neither is "educating" people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination.<sup>68</sup>

The mere provision of information to the public is not sufficient because it lacks structure. To qualify as charitable, education can feature informal training aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view.<sup>69</sup>

Permitted charitable education should involve a full, fair presentation of the facts so people can draw their own conclusions. CCRA considers this to occur when all sides of an issue are presented. On this basis it would appear that what is often involved in a "public education" campaign – distributing written and visual materials, seeking media coverage possibly supplemented with paid advertisements, participating in public meetings and demonstrations, and sending mass mailings out to members and decision-makers – would not qualify as charitable.

Lastly, some courts have deemed that activities that ultimately seek to create a climate of opinion, or to advocate a particular cause or that arouse strong feelings because the subject matter is controversial, are not charitable.<sup>70</sup> CCRA has chosen to rely on this line of judicial thinking. Draft RC4107 (E) states: "The more controversial the subject matter, the greater the care the charity must take not to prejudice the issue in its courses and publications."<sup>71</sup>

There is another line of judicial thinking in Canada and it acknowledges that the voluntary and charitable sectors have traditionally been an independent centre for pioneering social activity. At times, the sector's work may be considered to be controversial. For example, in the 1999 *Alliance for Life* case,<sup>72</sup> Mr. Justice Stone said:

...It may well be that a charitable organization would want to adopt a relatively strong and controversial posture in order to effectively advance its charitable objectives even to the extent, if necessary, of advocating a change of law or policy or of administrative decisions, without incurring the risk of losing its status as a registered charity.<sup>73</sup>

## PART V – PROBLEMS WITH THE RULES

### 1.0 Regulation is Unreasonable and Overly Broad

#### 1.1 The difference between facts and opinion

The distinction CCRA makes between providing facts to inform, and offering opinion to persuade is unrealistic and untenable. The selection and communication of ‘facts,’ like ‘truth’ and ‘beauty,’ depends on an individual’s values and the existing social context. Opinion and judgement are involved in assessing which ‘facts’ are relevant. ‘Facts,’ in turn, inform opinion. They are inextricably linked. It is impractical to insist that organizations distinguish between the two.

#### 1.2 Intention to persuade will always be present

It is unreasonable to expect that organizations will be able or willing to provide facts that are not supportive of the opinions they have formed. An invitation to present facts to officials and policy-makers is, in truth, an opportunity to persuade. Organizations may present their ‘facts’ and information in a way that appears unencumbered by subjective judgements but their intention will surely be to persuade.

Under CCRA’s rules, this imparting of ‘facts,’ and indeed many forms of informal daily communication between organizations and government, is rendered “political.” Although it is not CCRA’s intention to broaden the category of limited activities, that is the effect when such distinctions are drawn.

#### 1.3 The rules mandate the subordination of charities to government

Charities are disturbed by the implications of government control implicit in the distinction CCRA makes between being invited to make submissions to government, which is charitable, and speaking out, uninvited, against a government policy choice or law, which is deemed political.

RC4107 (E) indicates that a charity responding to an invitation from government or the media to share its expertise is engaging in charitable activity but it becomes political if they continue to speak out after having provided their advice. As one interviewee pointed out, the test for whether the activity is restricted appears to be whether government welcomes the input or not. The implication of this, perhaps unintended by CCRA, is that the rules reward passivity and deference by imposing no restrictions on charities that wait for an invitation to speak but limit those that have the temerity to take the initiative. Such limits are difficult to reconcile with the sector’s acknowledged role as an early warning system.

#### 1.4 The ban on influencing any person is overly broad

The boards of voluntary organizations expect their senior staff to take every opportunity to speak about the issues that are of concern to the organization, its clients and members. These activities support fund-raising and build community networks, and it is hoped that enlightened audiences “will take the message back” and thereby influence public opinion.

The specification in RC4107 (E) that an intention to influence any person in order to sway public opinion, to bring pressure on a government or to influence law or policy renders the activity political means that organizations speaking in virtually any forum are guilty of political activity.

#### 1.5 Requiring charities to present both sides is unreasonable

Although it may sound reasonable to require charities to present both sides of a controversial issue, in practice it is not. Even if a public education initiative is designed to provide a structured training of the mind, the additional requirement that the group present both sides of the issue forces charities to defy common sense. An environmental group would be required to

present arguments in favour of the activities of polluters.<sup>74</sup> A charity providing support for people receiving treatment for cancer would need to provide information on studies disproving the link between treatment wait times and treatment outcomes. Anti-poverty organizations would be required to present facts in support of cuts to welfare payments. The imposition of this requirement denies the reality of how contentious issues are debated.

### **1.6 Tiptoeing around socially controversial issues**

RC4107 (E) places a greater onus on charities to present both sides for more controversial issues. The question is: what constitutes a socially controversial issue and in whose opinion? Charities are asked to consider whether: the subject arouses strong feelings in people; the media produces editorials, columns and debates on the subject; the subject forms the basis of litigation; governments, political parties and the media commission public opinion polling on the subject.<sup>75</sup> Arthur Drache points out that if this is the threshold, almost any subject that makes the newspaper is apt to be off-limits.<sup>76</sup> The onus of establishing that an issue is *not* controversial falls to charities. This is an extremely difficult task because even seemingly benign issues can arouse passionate opposition from a small minority.

## **2.0 Problems of Clarity: Where to Draw the Line?**

### **2.1 When do language and images become emotive?**

The requirement that charities limit their advocacy on controversial issues presents practical difficulties because judicial opinion goes both ways on whether social controversy is inconsistent with charitable activity.<sup>77</sup> CCRA has chosen to take the conservative view. RC4107 (E) states that activity can become political if it relies on language and images designed to appeal to the emotions.

How should a charity that works with children living on the street characterize its policy recommendations for coping with child prostitution, for example? Does inserting realistic but disturbing images of these children to illustrate their circumstances cause the document to be political speech?

### **2.2 Subjectivity and other difficulties in measuring intention**

Separating the intent to inform and the intent to influence carries with it significant problems. The judgement requires that credulity be suspended in determining that a group did not intend to persuade.

RC4107 (E) states that two charities can do the same activity but for different reasons and depending on their intent, one may be political, and the other charitable. There is truth to the assertion<sup>78</sup> that acts do not present themselves with labels identifying their true form as either charitable or political. It is an impossible task, however, for a charity to differentiate between two similar activities based on the actors' motives. The reality is that organizations will judge what is permissible with reference to the activities, not the intention, of other groups in the same field. Although not suggesting that motives are unimportant, the practical challenges in requiring groups to distinguish between different activities based on the actors' intentions are significant.



### 2.3 Insufficient clarity among the regulated about what is being regulated

In the view of charity lawyer Laird Hunter, the single biggest problem with the rules is that “the people being regulated don’t know where the line is.” The rules are too complex, too subjective, and too arcane. The result is they are often ignored. “Charities don’t realize the risk they face” because they do not understand how CCRA’s rules might apply to them. Moreover, “if they seek legal advice, there is no practical way to arrive at a legal answer because the costs of going to court are prohibitive and there are no court cases on the hard cases.”<sup>79</sup>

The current morass of conflicting common law cases and CCRA legal interpretations, both published and non-published, when combined with the highly subjective judgements that must be reached, has meant the regulation of charities’ advocacy appears inconsistent and mysterious to the sector. The Canadian Centre for Philanthropy recently reviewed the legal files of a number of groups that ran afoul of the rules on political activities and concluded that even CCRA’s application of its rules was inconsistent.<sup>80</sup>

### 2.4 Advocacy chill

The uncertainty about how the rules will be applied, especially when considered in light of the severe consequences that flow from an error (deregistration or annulment<sup>81</sup> of registered status), create an ‘advocacy chill’ in the sector. Charities are unsure about the line between sharing views with government and the public and influencing law, policy or public opinion. This often leads them to err on the conservative side.

Interviewees related that their boards have become deeply anxious about the risk of being deregistered without truly understanding the risk or where the line is drawn. For parts of the sector, advocacy and any kind of political interaction (restricted or not) have come to be viewed with suspicion. As a result of the chill, many charities engage in far less public education, advocacy and political activity than they

might wish or should do to achieve their purposes. Entirely permissible activities are limited because of the advocacy chill. Interviewees from non-profits indicated that even their funders and government contacts may be uneasy with their advocacy, illustrating the extent of confusion generally about who and what is limited.

### 2.5 Difficulties with the 10% rule

Charities are troubled by the “substantially all” test, and CCRA’s interpretation that this means at least 90% of their resources. At a practical level, the rule has differential impacts on large and small organizations. Interviews revealed that large national health charities with annual budgets of \$30 million to \$120 million are able to carry on substantial advocacy work and keep their expenditures well under the 10% ceiling. Small charities, however, felt that 10% is not sufficient given the costs of carrying out advocacy work and the importance this work has to the achievement of their charitable objectives.

Charities also find it difficult to calculate 10% of all their resources. Uncertainties in how to characterize certain activities means that the manner in which charities allocate and report on their resources in the Annual Information Return is imprecise and subjective. Interviewees felt both the rule and the process by which they are expected to report on their compliance lack integrity.

Moreover, legal commentators have argued that 10% is far more restrictive than is supported by the case law. “The key consideration,” said Mr. Justice Stone in *Alliance for Life*, “must be whether the [political] activities actually engaged in, though apparently controversial, remain ancillary and incidental to the charitable activities.”<sup>82</sup> Other scholars have recently argued that the Supreme Court in *Vancouver Society* recognized that political purposes and activities that are merely ancillary and incidental to charitable purposes are themselves charitable.<sup>83</sup> Therefore, the so-called 10% rule has no application to them.

### **3.0 The Rules Prevent Charities From Achieving Their Charitable Purpose**

#### **3.1 Necessary for achievement of charitable purposes**

Charities are less willing than in the past to limit their response to deep social need by only engaging in those activities traditionally considered charitable. They argue that it is their legal and fiduciary duty to pursue systemic policy change where it clearly advances the achievement of their charitable purposes. They also perceive a moral responsibility to 'bear witness' to the effects and causes of need.

#### **3.2 Advocacy empowers those denied social justice**

New approaches to social and public policy issues are proving inconsistent with the rules limiting political activity. For example, empowerment models for addressing poverty emphasize the capability of vulnerable people, the importance of self-help strategies and the role of advocacy as a tool for change. These are not compatible with the concept of the 'needy poor' enshrined in the Elizabethan-era law and perpetuated in more recent judicial pronouncements. Poverty is re-framed in contemporary dialogue as an issue of social justice rooted in the economic *status quo*. Calls for systemic change flow from this approach. The growth of social justice groups world-wide and the increasing focus on advocacy by the voluntary sector point to an emerging consensus that advocacy is a legitimate tool for addressing the root causes of a number of societal problems.

#### **3.3 Controversy is part of helping people on the margins**

Additional precautions imposed on charities that speak on socially controversial topics seem at odds with their purpose to help the most marginalized sectors of society. Issues that people on the margins face may well be controversial. A leading U.S. commentator once observed:

There is a tendency to regard charity as intrinsically free of controversy because it includes activities that are 'good' or 'beneficial to the public.' This notion...represents a fundamental misunderstanding of the institution [that] not only perverts its historical development, but also destroys its essential values...The role of philanthropy in competing with, supplementing, and even displacing government is particularly significant where controversy abounds. It is here we have special need for the initiative to create and spread ideas and the diversity of outlook and method that come from the many centers of creative thought and experimentation, free from uniformity that is often subtly transformed into conformity by the atmosphere of government responsibility.<sup>84</sup>

#### 4.0 The Appearance of Discriminatory Application of the Rules

Uncertainty in the application of the rules, compounded by the subjective judgements regulators are forced to make, leads to uneven and selective enforcement. The sector's perception is that enforcement is arbitrary or discriminatory. Charity lawyer Arthur Drache has argued:

There is a double standard, whether Revenue Canada [sic CCRA] will admit it or not. There is a huge anti-tobacco lobby that comprises, in part, registered charities. The group is extremely active politically, but perhaps because the lobby is funded in part by government, there is a "hands off" attitude to charities that are involved... When this issue is raised with Revenue Canada, the usual response is that the specific actions of organizations cannot be discussed because of the confidentiality rules of the *Income Tax Act*.<sup>85</sup>

According to the Canadian Centre for Philanthropy's research into CCRA's handling of applications and audits, CCRA carries out audits on only about 600 registrants a year, most triggered by complaints.<sup>86</sup> The voluntary sector strongly believes that charities whose activities are objectionable to CCRA officials and those involved in socially controversial issues are singled out for investigations.<sup>87</sup> It is hard to blame CCRA for this. Budgetary restrictions mean that a highly selective enforcement policy is a practical necessity. At the minimum, a more transparent and systematic risk assessment tool for audits would combat the perception that the agency is not above politics.<sup>88</sup>

#### 5.0 Group Interests Can Support the Broader Public Interest

RC4107 (E) distinguishes between advocacy on behalf of individuals and advocacy on behalf of groups, concluding that advocating on behalf of individuals is acceptable, but advocating the interests of a group is rarely charitable.

CCRA's approach is problematic. Advocacy on behalf of individuals may be necessary for the reason that the person is a member of a disadvantaged group. As the anecdote below illustrates, there are instances where advocacy on behalf of a group should be considered charitable.

One interviewee, whose charity offers services to and advocates on behalf of individuals with a particular disability, has an advocacy program funded by a federal department. This program allows it to provide legal representation to individual clients denied disability benefits by a provincial government by appealing these refusals to a special tribunal. After winning 500 tribunal appeals in three years, using identical scientific and medical evidence, the charity felt the province's policy of denying these applications had been demonstrably undermined. Continuing to appeal individual cases was clearly wasting resources; the solution was to seek to change the provincial policy on behalf of the group of persons with disabilities. This strategy, however sensible under the circumstances, may not be considered charitable. As an interesting aside, the federal department was impressed with the systemic approach proposed by the group and extended its funding for the advocacy program.

The second difficulty is that CCRA presumes that "advocacy" is always self-interested and therefore not of public benefit. Although charitable status should not be extended to groups whose goals do not accord with a broader public interest, membership interests can coincide with a broader public interest. This is particularly so when the membership group represents "an appreciably important class of the community."<sup>89</sup>

## **6.0 Inconsistent Treatment of Advocacy by Charities and Other Efforts to Change Policy**

### **6.1 Unclear why litigation is treated differently**

Registered charities face no restrictions if they seek to change the law by means of recourse to the courts. Why there is a distinction between litigation and other ways of bringing about legislative change is unclear to the voluntary sector. Litigation is only one way to change legislation and to draw attention to injustice. It is not unknown for groups to use lawsuits, not to gain a judicial opinion or ruling but rather as a strategy to force government's hand outside the courtroom.

### **6.2 Difference between advocacy in the charitable sector and lobbying and advertising expenses in the private sector**

Under the *Income Tax Act*, expenditures made by a business in making representations related to its affairs to government or regulatory authorities are deductible. This ability to deduct lobbying expenses seems unfair to the charitable sector. For example, an anti-poverty charity that advocates for rent controls has to abide by the 10% rule. Yet a landlord is subject to few financial limits on expenses incurred through lobbying to lift rent controls, and the expenses are deductible.

Commentators have argued that the charity's non-taxable expenses for advocacy and the business's deducted expenses for lobbying are both being diverted from tax coffers.<sup>90</sup> However, for the charity the favourable tax treatment is for an activity pursued in the broader public interest whereas for the business the state is subsidizing the pursuit of private commercial gain.

The same tax policy applies to business's advertising expenses. The end tax effect to businesses for their advertising is the same as the end effect for charities' expenditures on public education. The former is limited only by the proportion of the expenditure to revenues, the latter by an arbitrary rule of 10%.

### **6.3 Difference between advocacy expenditures and donations to political parties**

Although charities must limit their advocacy, there is no limit on the size of donation an individual or corporate taxpayer may make to a political party or candidate. Moreover, at the level of political donation made by most Canadians (e.g., under \$300 annually), the tax benefits of political donations usually outstrip those for charitable donations of an equivalent size.<sup>91</sup>

The historic rationale for extending preferential tax treatment to donors to political parties is that democratic governance of society is enhanced by the participation of properly resourced political parties. However, what ensures that a political party is properly resourced (and most parties in opposition rarely are) is their proximity to power now or in the near future and not the availability of a political tax credit.

Both political parties and charities enhance democratic participation through which the collective and disparate interests of citizens can be aggregated and resolved. The motives for engaging in charitable and political activity may actually be the same; in both instances, the actors seek to contribute to the public good and are presumed to be acting altruistically.

## PART VI – OTHER JURISDICTIONS

### 1.0 The United States

In most U.S. jurisdictions, the fact that a trust has as its purpose the promotion of advocacy or changes in the law or policy does not affect its validity as a charitable trust.<sup>92</sup> In terms of the tax regime, the fundamentals are not markedly different from Canadian regulation but overall are more flexible and accommodating of advocacy.

A tax-exempt organization is allowed to influence legislation so long as it is not a substantial part of its operations.<sup>93</sup> Between 5% and 20% of a charity's total expenditures may be devoted to advocacy. "Attempting to influence legislation" is defined more broadly than its equivalent in RC4107 (E). In particular, the U.S. definition excludes: "examining and discussing broad social, economic and similar problems." Provision is also made for public education "grass-roots" campaigns, which cannot exceed 25% of total lobbying expenditures up to \$250,000. Other organizations can spend up to \$1 million on lobbying, provided their budget is at least \$17 million. If a charity exceeds either limit by more than 50% over a four-year period it could risk losing the exemption altogether – a significantly more liberal rule than applies in Canada.

### 2.0 England

A key advantage of the English system is the presence of a Charity Commission to which applicants for registered status may direct questions and seek rulings that, in turn, are available to help inform applicants of the Commission's position. It regularly provides guidance and rulings on what constitutes an appropriate level of political activity. Overall, the English system ensures more transparency and clarity than is available under the Canadian regime.

The law in England is that only political activities that are ancillary and incidental to charitable purposes are permitted but unlike Canada there is no additional test requiring charities to devote substantially all of their resources to charity. The Charity Commission for England and Wales has published guidelines on political activities<sup>94</sup> which draw a different – and in our view more sensible – line around permitted activities. We believe the English guidelines have much to offer and are worth examining closely:

...A charity may engage in political activities if:

- there is a reasonable expectation that the activity will further the stated purposes of the charity, and so benefit its beneficiaries to an extent justified by the resources devoted to the activity;
- the activity is within the powers which the trustees have to achieve those purposes;
- the activity is consistent with these guidelines; and
- the views expressed are based on a well-founded and reasoned case and are expressed in a responsible way.<sup>95</sup>

The guidelines indicate that the threshold test for acceptability is that the efforts to persuade are based on a well-founded and reasoned argument. For example:

- A charity may seek to influence government or public opinion through well-founded, reasoned argument based on research or direct experience on issues either relating directly to the achievement of the charity's own stated purposes or relevant to the well-being of the charitable sector.
- A charity may provide information to its supporters or the public on how individual Members of Parliament or parties voted on an issue, provided they do so in a way which will enable its supporters or the public to seek to persuade those Members or parties to change their position through well-founded, reasoned argument rather than merely through public pressure.
- A charity may provide its supporters, or members of the public with material to send to Members of Parliament or the government, provided that the material amounts to well-founded, reasoned argument.
- A charity must not base any attempt to influence public opinion or to put pressure on the government, whether directly or indirectly through supporters or members of the public, to legislate or adopt a particular policy on data which it knows (or ought to know) is inaccurate or on a distorted selection of data in support of a preconceived position.
- Except where the nature of the medium being employed makes it impractical to set out the basis of the charity's position, a charity must not seek to influence government or public opinion on the basis of material which is merely emotive.<sup>96</sup>

The extent to which charities are allowed to promote, support or participate in political activities has to be considered in each case in light of all the relevant circumstances. It is not sufficient for the trustees to simply believe that their activities will effectively further the purposes of the charity: there must be a reasonable expectation that this is so. Trustees are encouraged to seek the advice of the Charity Commission.

## PART VII – RESPONSES TO ARGUMENTS AGAINST CHANGE

### 1.0 Advocacy is Not Included in the Traditional Justification for Subsidizing the Charitable Sector

The traditional justification for subsidizing charities through the tax system has been that they provide public goods and services that would otherwise be provided by the state. Hence, government is not losing revenue by extending a tax credit because without the charity, it would need to pay for the goods and services directly.<sup>97</sup> In the case of advocacy, however, the argument is that government would not otherwise pay for it so there is no tax policy justification for extending a tax credit to donations for advocacy activities.

In response to this argument, we offer the following observations. A variety of federal departments and agencies currently provide direct funding for a range of advocacy activities, some of which are directed at policy change. In making such payments, government acknowledges the value and necessity of this work. It is likely that in the absence of funding to third parties, government would need to set up alternative mechanisms to obtain independent policy input.<sup>98</sup>

Some commentators have also suggested that the foremost function of the voluntary sector is not to provide services at all but to act as a balance to the state and an independent centre for social experimentation. Under this view, the sector provides independent oversight, monitors government, ‘hurries along’ new ideas, and challenges the *status quo* – roles that deserve support through the tax system.

### 2.0 Indirect Subsidy to Organizations Opposing Government

Carl Juneau, a senior official at CCRA, points out that the courts have held that it is not in the public benefit to provide an indirect subsidy (in the form of a tax break) to organizations whose purposes may be to oppose the very laws the public and the state want implemented.<sup>99</sup> We believe that this concern relies on an overly simplistic view of the process inherent in policy development where there are diverse perspectives and interests at stake and where participants modify their positions in response to new information.

It is wrong to presume that government seeks nothing more than to enforce existing laws and policies. Governments continually re-evaluate the effects of policy and laws with a view to determining if change is needed. The sector’s public policy input assists government in identifying needed changes and improving the quality of governing. This surely is the rationale for permitting charities to engage in litigation challenging government policies and legislation. Beyond allowing groups to help fund their activities, there is nothing in the system of tax credits that undermines government’s basic ability and obligation to enforce laws it considers appropriate and in the public interest. There will inevitably be some inconvenience to government in deflecting unwanted input or in justifying the usefulness of existing laws but that, we argue, is a small cost compared to the benefits of a healthy democracy.

### **3.0 Government Loses Control Over Who to Exclude**

#### **3.1 Government loses control over groups whose political views are considered extreme**

Under the current regime, CCRA is the gatekeeper denying registered charitable status to groups whose mandate or activities are political. Groups whose politics find favour with most Canadians, e.g., groups opposed to torture, as well as groups whose politics are more controversial, e.g., conservative opponents of the women's movement, are both excluded, claims CCRA. If the rules limiting public policy input were liberalized (and if CCRA ceased its practice of denying registered status to all groups who mention advocacy or public education as activities they pursue),<sup>100</sup> it would be harder for CCRA to disguise its reasons for denying status.

One senses that underlying these arguments made by defenders of the system is not concern about the integrity of the rules but with the political risk to government of extending privileges to so-called questionable or fringe groups. This depends partly on whether access to the tax system is viewed as a privilege or an entitlement. Americans regard tax advantages as a right, whereas Canadians have tended to consider them as a privilege afforded only to the deserving.<sup>101</sup> This may be changing, however, as Canadians' core values and beliefs about the role of government shift. In a democracy it is useful to hear diverse views, even those many would consider repugnant, provided they are not illegal or promoting the abuse of fundamental rights and freedoms. Granted, charities with unpopular views might find audiences unreceptive, but government should make no apology for supporting the ability of such groups to speak out.

#### **3.2 Government loses flexibility to make judgements most Canadians would support**

CCRA has argued that the current system creates flexibility for the regulator to exercise judgements that Canadians would support. We understand this flexibility is seen to arise precisely because the rules and their administration are impenetrable and the law is inconsistent. Moreover, regulating primarily by gatekeeping rather than audit (due perhaps to resource constraints) has the advantage of forcing CCRA to focus its regulatory attention only on those charities whose conduct has attracted complaints and to ignore the rest that are smart enough to 'lie low.' Far from seeing these circumstances as a disadvantage, CCRA may perceive that the current regime works efficiently and fairly.

The goal of regulation should be to address issues requiring a remedy in a manner that citizens perceive as fundamentally fair, evenhanded, accountable and with a minimum of interference. An approach that puts all the power into the hands of the regulator through the following methods – denying the public access to its decisions; removing it from meaningful supervision by the courts or administrative oversight; and allowing officials to shield their political judgements under the guise of applying broad policy – is not apt to engender public confidence.

Regulatory efficiency should not be judged solely by regulator convenience. Nor should it be the role of the revenue collection system to determine the political acceptability of groups that believe they have a contribution to make to the public good. The responsibility for creating policy in this area lies with politicians and if they see risk in exercising this function, it should not be delegated to officials who operate free from scrutiny. The challenges related to this provide an argument for the development of a third-party body to regulate or oversee the manner in which registered charitable status is granted and revoked.



#### **4.0 Not in the Best Long-term Interest of the Charitable Sector**

It has been argued that it is not in the best long-term interests of the sector to permit charities to engage in unlimited advocacy. If advocacy increases overall and if charities repeatedly take unpopular positions or use manipulative techniques to attract attention, their credibility and public support will decrease. Charities are sensitive to public opinion. Their obligations to donors and their stakeholders ensure that they are unlikely to pursue unpopular positions unless they believe they are in the public interest. The voluntary sector has acknowledged this issue and developed guidelines for accountability and ethical fund-raising designed to ensure that inappropriate practices are discouraged. Possibly, there is a need for the sector to invest in developing codes of conduct and minimum expectations in conducting public policy work and public education campaigns. This may present an opportunity to reassure government that the sector's approach overall to advocacy is informed by good intentions and a commitment to responsible conduct.

#### **5.0 Loss of Taxation Revenue**

CCRA's mandate is to uphold the integrity of the taxation system and to maximize revenue collection for the federal government. Its officials have expressed concern that broadening the category of groups eligible for registered status will increase the amount of lost revenue as more taxpayers use credits to reduce their tax payable. This view assumes that charities consume public funds that would otherwise not be spent. Economists have argued that the service performed by charities has the direct effect of freeing government from performing the service; furthermore, by granting a charitable tax exemption, the state is subsidizing itself, to the extent it acknowledges some responsibility for meeting these social needs.<sup>102</sup> This view also assumes that the rate at which Canadians give to charity will keep pace with any increase in the number of groups

that can offer tax receipts, e.g., that there is no ceiling on the global amount of donations. The government has offered no evidence that this will occur, whereas some in the voluntary sector argue that an increasing number of organizations will increase the competition for funds.

#### **6.0 Advocacy Groups and Charities Do Not Contribute Usefully to the Policy Debate**

This concern relates to the quality of information and advice supplied to government. Here government may be troubled that it is supporting submissions that are of little benefit to it, either because it cannot make effective use of the information, or the information is not a reliable basis on which to develop public policy. We acknowledge the government's concern about quality of "in-depth research" and the capacity challenges facing the sector in this regard. However, government may need to adjust its expectations, and to value the input it receives from the sector for what it discloses about the community and from the front-line observations of individuals who work with the populations who receive charitable services. Just as significantly, the concern may reveal an institutionalized elitism on the part of some federal departments that can hamper efforts to build a collaborative relationship.

## 7.0 Difficulty in Measuring the Impacts of Advocacy

Here the concern is with the difficulty in ascertaining whether expenditures for public policy input contribute to the public good. Advocacy and public education campaigns often take years to bear fruit and when change happens it is rarely attributable to the actions of only one player. How, then, can the federal government know whether the change sought is feasible; whether the group's approach to the issue is sensible in the circumstances; whether the expenditure is proportionate to its goals; whether the advocacy is usefully connected to the achievement of the group's charitable goals or even to the policy or legislative change when it is finally achieved? The 10% rule caps a charity's risk exposure to bad strategic and spending decisions on advocacy. If the rule were attenuated, what would stop some charities from pursuing impractical plans and wasting donated funds?

This determination is what boards of directors are meant to do. Directors have a fiduciary responsibility to ensure the prudent management of the organization's resources. If an expenditure or commitment of staff time to an advocacy initiative is ill-advised for any reason, but particularly if it is disproportionate to the benefit expected, it is the board's responsibility to make inquiries and, if necessary, to halt it.

It is not clear why government needs to scrutinize these matters any differently than other spending and program decisions made by charities. A service or program offered to clients may be more visible and directly related to meeting a client's immediate needs, but it does not necessarily optimize the charity's resources or provide the best means to achieve its purposes.

The experience of charities in England and Wales using the Charity Commission's guidelines on *Political Activities and Campaigning by Charities*<sup>103</sup> would be helpful in learning how these judgements are made elsewhere. Trustees must be able to demonstrate there is a reasonable expectation that a political activity will further the organization's purposes. Considerable precedent and experience in that jurisdiction, on which we could rely and build in Canada, is available.

## **PART VIII – OPTIONS FOR CHANGE**

### **1.0 Our Purpose and a Caveat**

This section outlines some of the proposed options for change. Out of deference to the ongoing work of the Regulatory Joint Table and sensitive to the limitations of space and the reader's patience, we have selected only a few options for analysis. We acknowledge that viable options have been excluded and for this we apologize to their proponents and hope they will urge us to include these alternatives in upcoming consultations. This is not intended to be a detailed analysis of the options but to highlight key issues for further thought and discussion.

## 2.0 Working Together Proposal: Re-define Political Activities

In *Working Together*, the Regulatory Table proposed that the *Income Tax Act* be changed to permit “political activities” by charities – provided certain conditions are met. The political activities have to:

- (have a reasonable expectation that they will) contribute to the achievement of the charity’s objects;
- be non-partisan;

- be based on fact and reasoned argument;
- not be based on information the charity knows or ought to know is inaccurate or misleading, and
- not constitute illegal speech.<sup>104</sup>

This definition draws heavily on the English guidelines *Political Activities and Campaigning by Charities*<sup>105</sup> cited above in Part VI, Section 2.0. Presumably, administrative guidelines might also be developed to further explain the new statutory tests.

### Impact Analysis

Society	Voluntary Sector	Charities	Government
<p>Would be supported by public.</p> <p>Public interest served in allowing freedom of speech by charities, whether or not critical of government.</p> <p>Places emphasis on whether advocacy is apt to achieve charitable purposes rather than the activity.</p> <p>Addresses concerns about government control and subordination of sector.</p> <p>Requires standards of accuracy, fact and reason so ensures minimum quality in submission.</p> <p>Requirement for factual basis and not misleading would prevent ‘flat earthers’ and ‘Holocaust deniers’ from promoting such views at all.</p>	<p>Provides needed sign from government that it philosophically supports advocacy by charities.</p> <p>In ensuring minimum quality of advocacy submissions, reflects well on advocacy practices of the sector, hence building public confidence in sector as a responsible participant in policy process.</p>	<p>Clarifies basis of judgements whether activities are political and subject to limits.</p> <p>Expands range of acceptable political activities and ends unreasonable and subjective requirements.</p> <p>Draws on a regime that is known to work elsewhere so reinforces confidence in and efficiency of regulation for those being regulated.</p>	<p>Publicly defensible – difficult for political opposition to challenge because it looks so reasonable and is based on English practice.</p> <p>No revenue losses as not expanding number of groups eligible for charitable status.</p> <p>No new regulatory regime so costs of start-up and preparing guidelines minimal.</p> <p>Can build on rulings of English Charity Commission so expedites drafting guidelines and reduces regulatory risk of error.</p> <p>Deprives government of ability to limit criticism by charities.</p> <p>Leaves current charitable registration regime intact so minimum disruption.</p> <p>Regulatory audits will be less subjective and require less judgement – although test of what is reasonable will require more training for auditors.</p>

**3.0 Working Together Proposal:  
Replace the 10% Rule with the  
Requirement that Political  
Activities be Incidental and  
Ancillary**

The Regulatory Table saw little merit in quantitative limits, whether set in law or CCRA policy, although it agreed that such activities should not predominate. It argued that the 10% rule should be significantly attenuated. This recommendation flows from its proposal above and is assumed to accompany it.

**Impact Analysis**

<b>Society</b>	<b>Voluntary Sector</b>	<b>Charities</b>	<b>Government</b>
<p>Supported by public – in Muttart survey of public attitudes, 62% indicated that charities should be able to allocate more than 10% to advocacy and 47% thought limits should be greater than 20%.</p>	<p>Because this is part of proposal in 2.0 clarifying political activities, it provides a needed sign from government that it philosophically supports advocacy by charities.</p>	<p>Probably permits higher expenditure on advocacy – so good for small charities.</p> <p>In combination with proposal 1.1, it gives increased clarity and flexibility but less certainty for charities; but does not obviate need for judgements about whether activities are political.</p> <p>Re-focuses attention on charitable purposes as basis for any expenditure.</p> <p>Allows for more flexibility in discussions with CCRA about permissible expenditures.</p> <p>More closely resembles the American model which <i>effectively</i> allows 5% to 20% to be spent on advocacy.</p>	<p>Regulatory audits will require more judgement by auditors in determining what is incidental and ancillary; further training of auditors required.</p> <p>More closely resembles the American model and can build on and learn from U.S. experience in interpreting similar provisions.</p>

#### 4.0 IMPACS Proposal: List Prohibited Partisan Political Activities in the *Income Tax Act*

In late-2001, the Institute for Media, Policy and Civil Society (IMPACS) and the Canadian Centre for Philanthropy proposed<sup>106</sup> that the *Income Tax Act* be amended to clearly identify what charities cannot do. The problem, they said, is that confusion has arisen as the distinction between “charity” and “partisan politics” has become blurred. As a result over the years, CCRA has developed rules that limit non-partisan activities and advocacy. Although IMPACS describes it as a technical problem, this new approach seems to start from the proposition

that Canadian judges and regulators may have misinterpreted the older case law as limiting non-partisan political activities. The proposal is that under the heading of “partisan politics,” a list of prohibited activities would be set out. So long as a charity avoided the enumerated activities, it would be free to engage in unlimited amounts of desired public education, advocacy or non-partisan activity – terms that could be abandoned because the distinctions would no longer matter. The “incidental and ancillary” requirement would also be removed. The list of banned activities would be short: (1) support for or opposition to a political party or candidate; and (2) promotion of a political ideology.

#### Impact Analysis

Society	Voluntary Sector	Charities	Government
<p>Unclear if this option would be supported by the public; public opinion surveys have not asked Canadians what they think of charities pursuing unlimited non-partisan activities.</p> <p>Some charities may reduce their service delivery to devote additional funds to advocacy. Change could be good if advocacy reduces need for service or if it forces other parties, such as government or private sector to do more. Could be bad if charities decide unwisely to re-direct funds from urgently needed programs to advocacy with little chance of success.</p> <p>Can be difficult for donors and public to assess feasibility and success of some advocacy efforts.</p>	<p>Provides clearest sign of all options that government philosophically and tangibly supports advocacy by charities.</p> <p>Would eliminate advocacy chill.</p> <p>Only distinction between permitted activities of non-profits and charities is ability of the former to support partisan politics.</p> <p>Number of registered charities would increase as some applicants now excluded solely because of their advocacy would become eligible.</p> <p>Probably not a large increase in registrations because current legal requirements to register as charity would still apply.</p>	<p>Permits much higher expenditures on advocacy – especially good for small charities that wish to develop advocacy expertise.</p> <p>Eliminates confusion and difficulties in applying current rules; provides certainty and reduces risk, advocacy chill and expenditures on obtaining legal advice.</p> <p>Places greater onus on boards of directors to provide policy and strategic guidance to management, to assess likelihood of advocacy achieving purposes and to monitor costs. Boards will need support and resources.</p>	<p>Provides an objective tool for making determinations on political activities.</p> <p>Less uncertainty for regulators; easier and less costly to administer than complicated rules.</p> <p>Requires statutory amendment, which would be politically contentious, especially with populist politicians.</p> <p>Probably supported in Quebec; sovereignist charities there can spend on non-partisan activities; could be new issues that arise on what is a political ideology.</p> <p>Less flexibility for regulators and government to exclude and deregister groups with extreme views.</p> <p>May be opposed by provincial governments, especially Ontario, on legal and political grounds.</p>

### 5.0 Press for More Guidance From Courts or Tribunal

Laird Hunter and others have argued that the paucity of judicial interpretation in this country of what is permissible political activity or advocacy has retarded the evolution of the issue and left charities and their advisors with little guidance. This policy and legal vacuum

has allowed CCRA to enjoy virtually unfettered discretion to develop and apply its policies and procedures narrowly to meet its prime objective: the preservation of tax revenues. Additional guidance is urgently needed. This recommendation is assumed to be stand-alone although its proponents may expect that it would accompany any other structural reforms.

#### Impact Analysis

Society	Voluntary Sector	Charities	Government
<p>Society benefits indirectly by having clearer rules &amp; coherent laws &amp; policies regulating charities – increasing the efficiency of the charitable sector in delivering public goods.</p>	<p>Obtain needed clarification on the bounds of political activities.</p> <p>Initially, some groups will need to devote resources to obtaining judicial input or administrative guidance.</p> <p>In the longer term, increased clarity will save the sector money, time and resources and will reduce or eliminate advocacy chill.</p>	<p>Obtain needed clarification on the bounds of political activities.</p> <p>Given the legal precedents, it is unlikely that the courts would rule in a manner substantially inconsistent with the existing jurisprudence – which may not bode well for expanding the limits on advocacy.</p> <p>A specialized tribunal with a carefully constructed mandate, jurisdiction and policy framework will address the sector’s desire for liberalizing the rules.</p>	<p>Obtain needed clarification on the bounds of political activities.</p> <p>Increased costs and resources spent in legal proceedings arguing the law.</p> <p>Decreased regulator flexibility as “gray areas” cleared up.</p>

## 6.0 Drache Proposal: Create New Category of Public Benefit Organization

Arthur Drache and Frances Boyle<sup>107</sup> have proposed that a new category of ‘public benefit’ organization be established by statute to get around the definitional complexities of what constitutes a charity at law and yet is responsive to contemporary needs. An explicit list of qualifying kinds of organizations, whose activities are of broad public benefit, would be deemed public benefit organizations. The list includes umbrella

organizations, charities (that would be grandfathered by the new regime), and non-profit organizations dedicated to the public benefit, including groups whose advocacy consumed a substantial part of their resources. There would be no limits on advocacy, i.e., the dissemination and debate of ideas and opinions that are substantially and demonstrably true and related to the organization’s objects. Non-partisan political activities that are not advocacy would be subject only to a requirement that they be incidental and ancillary to the organization’s purposes.

### Impact Analysis

Society	Voluntary Sector	Charities	Government
<p>Would address host of definitional problems over charities and would recognize benefit of many organizations excluded from charitable status.</p> <p>Consistent with existing trends to legislating new categories of “quasi-charities.”</p> <p>Diminishes practical distinction between charities and non-profits.</p>	<p>Provides needed sign from government that it philosophically supports advocacy by charities.</p> <p>Additional groups would receive support from government through tax system.</p> <p>Some non-profits may not wish to register for new status due to increased regulation and monitoring of their activities.</p> <p>The system subjects advocacy by non-profits to closer supervision by government than to lobbying by business.</p>	<p>Clarifies regulation of advocacy for charities.</p> <p>Significantly widens permissibility of advocacy and political activities and while advocacy must be substantially and demonstrably true, it does not appear that permitted political activities are so restricted.</p> <p>Added burden and costs for non-profits currently doing advocacy to register and report on their activities.</p> <p>As number of qualifying groups increases, so does potential competition for fund-raising.</p>	<p>As new regime is a replacement for charitable registration, it would require creating new rules and attendant costs, considerable research and consultation necessary to determine which groups qualify for PB status.</p> <p>Politically problematic for government to defend some categories suggested.</p> <p>Entails additional revenue losses as more groups could issue tax receipts but insufficient information available about number of non-profits that might wish to apply for Public Benefit status.</p> <p>Deprives government of some control over which groups receive government support.</p>



### 7.0 Webb Proposal: Create New Category of Registered Interest Organization

Kernaghan Webb has proposed that a new category of “Registered Interest Organizations” (RIOs) be created to extend more favourable tax

treatment to non-profit organizations engaged in advocacy and political activity. RIOs would be tax-exempt, registered and able to offer tax receipts for donations at a level equivalent to the deductions available to corporations for lobbying expenses at the average effective tax rate.

#### Impact Analysis

Society	Voluntary Sector	Charities	Government
<p>Would leave current charitable registration regime intact.</p> <p>Consistent with existing trends to legislating new categories of “quasi-charities.”</p> <p>Allows for systematic collection of data on advocacy activities – information that is not now being collected.</p> <p>Allows opponents of advocacy to obtain information on file and to publicize or use against organization.</p>	<p>Obtain acknowledgement from government that advocacy is worth extending support to via tax system.</p> <p>Additional groups would receive support from government through tax system.</p> <p>Some non-profits may not wish to register for RIO status due to increased regulation and monitoring of their activities – is there an opt-out provision?</p> <p>Subjects advocacy by non-profits to closer supervision by government than to lobbying by business for which the reporting requirements are apt to be less onerous.</p>	<p>Clarifies regulation of advocacy for charities to some extent.</p> <p>Potential competition for fund-raising with RIOs.</p> <p>Replaces burden of incorporating separate non-profit for advocacy with greater burden of incorporating separate entity <i>and</i> registering it.</p> <p>Need to clarify that only those charities seeking to devote more resources to advocacy than permitted by incidental and ancillary rule would need to register.</p> <p>Unclear how RIO system would clarify current uncertainties in rules regulating advocacy by charities – may just add new complexities.</p>	<p>Start-up of RIO regime would require creating new rules and attendant costs.</p> <p>Entails additional revenue losses as more groups could issue tax receipts.</p> <p>Deprives government of some control over which groups receive government support.</p>

## PART IX – CONCLUSION

Liberalizing the rules that limit political activities by registered charities has interested Canadian non-profit groups for many years. Concerns with the policy objectives of the federal regulatory regime for registered charities as well as the conceptual and practical difficulties arising out of the case law, scant as it is, are long-standing. What is adding new urgency to these issues is the insistence with which charitable and voluntary groups are calling on government to acknowledge, in a very tangible way, that the vitality and effectiveness of the sector are tied to its contributions to public policy processes. Behind the sector's new assertiveness are structural and philosophical changes in the role of government and a shifting of responsibilities to the voluntary sector. Public policy advocacy by charities, perhaps more than any other issue facing Canadians and their government, highlights the policy, legal and political challenges of adopting a new paradigm of governance based on collaboration and partnership. Responding to these challenges in a way that satisfies charities, the broader voluntary sector, the federal government and the Canadian public may be difficult. It will test our democratic resilience and our capacity for acknowledging the unique contributions and changing responsibilities of each partner in governance.

The process by which a solution can be reached will require consultation, debate and collaboration. The Advocacy Working Group is deeply committed to furthering the process. This paper and the consultations that follow will, on their own or in conjunction with the Regulatory Joint Table, the Canadian Centre for Philanthropy, and the IMPACS Charities and Advocacy project, amongst others, contribute to the identification and assessment of various options for reform. We look forward to this next phase.

## ENDNOTES

- <sup>1</sup> The Muttart Foundation, *Talking About Charities: Canadians' Opinions on Charities and Issues Affecting Charities* (Edmonton: Canadian Centre for Philanthropy, 2000) at pp. 4, 6 and 10-11.
- <sup>2</sup> Cited in Neil Brooks, *Charities: The Legal Framework* (Ottawa: Secretary of State, February 1983) at p. 131.
- <sup>3</sup> Susan Phillips describes this new paradigm as governance (as opposed to government) and writes that it refers to a process of governing through collaboration with voluntary, private or other public-sector actors in the planning, design and achievement of government objectives in a manner that shares policy formulation, risk and operational planning. Susan D. Phillips, "More than Stakeholders: Reforming State-Voluntary Sector Relations," *Journal of Canadian Studies*, vol. 35, no. 4 (Spring 2001), pp. 1-22 at 18.
- <sup>4</sup> Described as fundamental to an effective partnership by the Panel on Accountability and Governance in the Voluntary Sector, on p. 34 of *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector, Final Report* (Ottawa: February 1999) [hereinafter the Broadbent Report]. Available at <http://www.vsr-trsb.net/pagvs/Book.pdf>.
- <sup>5</sup> Neil Brooks, "The Role of the Voluntary Sector in a Modern Welfare State," in Jim Phillips, Bruce Chapman and David Stevens (eds.), *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2001) at p. 202. Available at <http://www.nonprofitscan.org/state-and-market.htm>.
- <sup>6</sup> Government of Canada, Voluntary Sector Task Force, Privy Council Office, *Working Together: A Government of Canada/Voluntary Sector Joint Initiative: Report of the Joint Tables* (Ottawa, PCO, August 1999) at p. 50 [hereinafter the *Working Together* report]. Available at <http://www.vsi-isbc.ca/eng/reports>.
- <sup>7</sup> This view was shared with the author by senior policy staff with the federal government. Carl Juneau, then Assistant Director of Charities Division, Revenue Canada, has written: "Essentially, the difference between education and advocacy (of the unacceptable type) involves the presence of bias or propaganda." Carl Juneau, "Defining Charitable Limits: Advocacy, Education and Political Activities," *Fit to be Tithed II: Reducing Risks for Charities and Non-Profits* (Toronto: Osgoode Hall, November 28, 1998) at p. 15.
- <sup>8</sup> Definition of public benefit organizations provided by A.B.C. Drache with K.F. Boyle, *Public Benefit and the Canadian Income Tax System: A Proposal for Reform* (Toronto: Kahanoff Nonprofit Research Initiative, 1998) at pp. 69-79.
- <sup>9</sup> Peter Broder, *Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process* (Toronto: Canadian Centre for Philanthropy, August 2001) at p. 55. Available at <http://www.ccp.ca>. There is a strong correlation between the goals and activities of these public benefit groups and a working definition of charity devised by the Ontario Law Reform Commission (OLRC), *Report on the Law of Charities* (Toronto: Publications Ontario, 1996) at pp. 148-152. Available at: <http://www.qut.edu.au/bus/ponc-new>. The OLRC considered charity to be the altruistic provision to others of "the means of pursuing a common or universal good." The goods associated with charity encompass the basic forms of human flourishing, including life, knowledge, religion, aesthetic experience, and friendship.
- <sup>10</sup> Broder, *ibid.*, p. 25. This list is based on a review by the Canadian Centre for Philanthropy (CCP) of a number of refused or revoked charitable registrations. Copies of the records are available at CCP's offices in Toronto. An additional piece of information about these groups, notes Broder, concerns the level of private financial support they receive, most or all of which is donated with no tax credit being supplied to the donor. Donations to organizations identified as civic and advocacy organizations totalled approximately \$19 million; environmental groups were given \$7 million; international organizations focusing on exchange programs, peace or human rights drew another \$7 million; and groups promoting volunteering received \$100,000. This is to be compared to the \$9.4 billion that individuals and businesses donated to registered charities.
- <sup>11</sup> Drache, *op cit.*, note 8.
- <sup>12</sup> The figure of 180,000 is cited in "Facts about the Voluntary Sector in Canada" released on December 5, 2001 by the Voluntary Sector Initiative in the announcement of the Accord. Available at <http://www.vsi-isbc.ca/accord>. Previously, the figure of 175,000 was cited in the *Working Together* report, *op cit.*, note 6 at p. 18. Also see: Michael Hall and Keith G. Banting, "The Nonprofit Sector in Canada: An Introduction," Keith G. Banting (ed.), *The Nonprofit Sector in Canada: Roles and Relationships* (Montreal and Kingston: McGill-Queen's University Press, 2000), pp. 1-28 at 11; and Don K. Embuldeniya, *Exploring the Health, Strength and Impact of Canada's Civil Society* (Toronto: Canadian Centre for Philanthropy, July 2001) at p. 10. The data source in both instances is J. Quarter, *Canada's Social Economy* (Toronto: James Lorimer & Company, 1992). Erwin Dreesen, "What We Should Know about the Voluntary Sector but Don't," *ISUMA*, Vol. 2, No. 2, Summer 2001, under "Non-charitable non-profit organizations," available at <http://www.isuma.net>, explains the paucity of data on the non-profit sector:
- Statistical data on non-profit organizations that are not registered charities are limited to a few categories

surveyed by Statistics Canada in 1973 and 1974, data on trade unions, the collection of which was discontinued after 1995, and data on non-financial co-operatives published by Agriculture and Agri-Food Canada's Cooperatives Secretariat and on credit unions and *caisses populaires* provided by the Department of Finance....As well, since 1993 the largest non-charitable non-profit corporations have been required to file an annual return with Revenue Canada (now the Canada Customs and Revenue Agency). Efforts by a few researchers to estimate the total number of non-charitable non-profit organizations suggest that the available data cover only a small portion of this component of the voluntary sector.

<sup>13</sup> *Working Together*, *op cit.*, note 6, p. 16.

<sup>14</sup> Hall and Banting, *op cit.*, note 12 at p. 11, suggest that if in the United States there are 30 groups per 1,000 population, the Canadian count of grassroots associations could yield a count of 870,000.

<sup>15</sup> Currently, data on the organizations in the non-profit sector are scarce, partial and scattered; and where these data exist, it is often impossible to separate them from data on market sector organizations. This is both a cause and an effect of the lack of consensus in Canada and world-wide, on a conceptual and operational definition of the sector: Canadian Centre for Canadian Policy Research Networks, *The Voluntary Sector in Canada: Literature Review and Strategic Considerations for a Human Resources Sector Study*, 1998. Available at <http://www.ccp.ca/information/documents/gd45.pdf>. Currently, CCRA collects information from a portion of non-profits that are not registered charities (those with revenues exceeding \$10,000 or whose total assets exceed \$200,000).

<sup>16</sup> The number of registered charities as of August 30, 2001 was 77,716 according to CCRA in a written response to questions submitted to it by the Advocacy Working Group. Although Hall and Banting, *op cit.*, note 12 at p. 11 suggest that the number of registered charities is growing by 3% per year, this no longer appears to be correct. In June 1999, their data collection date, there were 77,926 registered charities. This shows a slight decline over the previous two years. Broder, *op cit.*, note 9, also relates that in the late-1990s, CCRA approved approximately 2,500 charitable applications a year. Despite a 38% increase in the number of registrations in the 1990s compared to the previous decade, the approval rate is falling from 84.6% in 1992-1993 to 67% in 1998-1999.

<sup>17</sup> It is not an exact subset because to be registered as a charity usually, but not always, means that the group has been incorporated as a non-profit. Charitable trusts and other non-incorporated entities may also be registered charities.

<sup>18</sup> Muttart Foundation, *op cit.*, note 1. For a summary of research findings on public attitudes, also see Winston Husbands, A.-J. McKechnie and Fleur Leslie, *Scan of Research on Public Attitudes Towards the Voluntary Sector* (Canadian Centre for Philanthropy, February 28, 2001). Available at [www.nonprofitscan.org](http://www.nonprofitscan.org) and at [www.ccp.ca](http://www.ccp.ca).

<sup>19</sup> We have relied on anecdotal information collected in the interviews as we have been unable to find reliable empirical data on the range of advocacy activities carried on by the sector.

<sup>20</sup> Many charities and public benefit groups have policies on diversity, human rights, client confidentiality, handling complaints, workplace rights, codes of conduct, etc., that all delineate a set of organizational values.

<sup>21</sup> For example, many groups have policies that prohibit the disclosure of individual client personal information and identity, even though their fund-raising and advocacy work might be enhanced by 'giving a face' to their charitable work and even though the client may have no objections.

<sup>22</sup> Kathy L. Brock, *Sustaining a Relationship: Insights From Canada on Linking the Government and Third Sector* (unpublished paper presented at the Fourth International Conference of the International Society for Third Sector Research (ISTR), Dublin, July 5-8, 2000), discusses at p. 13 the risks to government in partnering with the third sector, particularly when bureaucrats lack expertise or technical knowledge and worry that they may become beholden to groups with the resources and information to drive a policy agenda forward. She also points out that where a group has wide public support, it may be able to influence the priorities and policy agenda of a weak or smaller government department.

<sup>23</sup> Brian Mulroney, in a 1984 speech to the Progressive Conservative Party, said: "One of the major priorities of my government will be a complete revision of social programs in order to save as much money as possible. One way of meeting that objective is to encourage the voluntary sector to participate more in the implementation of social programs. Volunteer work is the most efficient method of work in Canada." Brooks, *op cit.*, note 5 at p. 171.

<sup>24</sup> *Royal Commission on the Economic Union and Development Prospects for Canada*, Report, Vol. 2 (Ottawa: Minister of Supply and Services, 1985) at p. 826 (the MacDonald Commission Report).

<sup>25</sup> Mel Cappe, Clerk of the Privy Council and Secretary to Cabinet, *Building a New Relationship with the Voluntary Sector*, Speech to Third Canadian Leaders' Forum on the Voluntary Sector, May 31, 1999. Available at <http://www.tbs-sct.gc.ca/Clerksspeechesandmessages>.

- <sup>26</sup> Anecdotal evidence that their dependency on contracts muzzles their opposition is to be contrasted with international findings that government support for third-sector agencies may politicize them and give them new tools, access and knowledge that actually enhance the effectiveness of their advocacy work: Lester Salamon, "Government-Nonprofit Relations in International Perspective," in Elizabeth T. Borins and C. Eugene Steuerle, *Nonprofit and Government: Collaboration and Conflict* (Washington: Urban Institute Press, 1999) at p. 346-356. The sector is also concerned that these contractual relationships with government will tempt groups to stray from their core missions.
- <sup>27</sup> John C. Tait and Mel Cappe, *Rethinking Policy: Perspectives on Public Policy* (Ottawa: Canadian Centre for Management Development, October 1995) at p. 26 and Ivan Fellegi *et al.*, Panel Discussion, *Rethinking Policy: Strengthening Policy Capacity*, Conference Proceedings (Ottawa: Canadian Centre for Management Development, January 1996) at p. 8, citing the findings of the Task Force on Strengthening the Policy Capacity of the Federal Government, chaired by Ivan Fellegi and submitted to the Coordinating Committee of the Deputy Ministers (Policy) in April 1993. Available at <http://www.ccmd-ddg.gc.ca/pdfs/p60e.pdf>. Scholars have also commented on the federal government's policy capacity deficit, including, for example, Katherine Graham and Susan D. Phillips, "Citizen engagement beyond the customer revolution," *Canadian Public Administration*, Vol. 40, No. 2, 1997, pp. 255-273.
- <sup>28</sup> Cappe, *ibid.*, at pp. 27-29.
- <sup>29</sup> *Report of the ADM Sub-Group on the Management of Policy Personnel* [the Kane Report], May 1997. Available at <http://www.tbs.gc.ca>. Also see Fellegi, *op cit.*, note 27.
- <sup>30</sup> Tait and Cappe, *op cit.*, note 27.
- <sup>31</sup> Cappe, *op cit.*, note 25.
- <sup>32</sup> Government of Canada, *Partnering for the Benefit of Canadians: Government of Canada-Voluntary Sector Initiative*, Voluntary Sector Task Force, Privy Council Office, June 9, 2000. Available at <http://www.pco-bcp.gc.ca/reports>.
- <sup>33</sup> Cappe, *op cit.*, note 25.
- <sup>34</sup> Most charities registered under the *Income Tax Act* are also non-profit corporations established under either federal or provincial incorporation statutes and subject to independent reporting and filing requirements as an incorporated entity.
- <sup>35</sup> Individual Canadians and non-charities, whether they are non-profit or for-profit organizations, enjoy almost unlimited freedom to advocate for policy or legislative change. They may: conduct public education campaigns; engage the media in critical commentary; pay to advertise their views; organize mail campaigns, petitions and demonstrations; give speeches; and support political parties and candidates – all of which is protected under the *Charter of Rights and Freedoms*.
- <sup>36</sup> Information Circular 87-1, *Registered Charities: Ancillary and Incidental Political Activities*, February 25, 1987. Available at <http://www.ccradrc.gc.ca/E/pub/>. Information circulars set out CCRA's particular interpretation of the law. Also see CCRA publication RC4107 (E), Draft #2, *Registered Charities: Education, Advocacy, and Political Activities*, p. 8. Available at <http://www.ccradrc.gc.ca/E/pub/> [hereinafter RC4107 (E)]. RC4107 (E) is intended to replace Information Circular 87-1.
- <sup>37</sup> *Income Tax Act*, R.S.C. c. 1 (5<sup>th</sup> Supp.).
- <sup>38</sup> For example, the Supreme Court of Canada recently held that although an organization devoted to helping immigrant and visible minority women find employment was offering a useful service of public benefit, it was not, on the whole, charitable. *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* [1999] S.C.R. 10 [hereinafter *Vancouver Society*].
- <sup>39</sup> Forty-five percent of donors indicate that they or someone in their household intend to claim a tax credit for charitable donations. *Caring Canadians, Involved Canadians: Highlights from the 2000 National Survey of Giving, Volunteering and Participating* (Ottawa: Minister responsible for Statistics Canada, August 2001), p. 29. Statistics Canada catalogue no. 71-542-XPE.
- <sup>40</sup> Statistics Canada, *ibid.*, note 39. Forty-nine percent of donors indicated they would contribute more if governments offered them a better tax credit for their charitable donations. This is a substantial increase from the 37% of donors who indicated the same in 1997.
- <sup>41</sup> Many registered charities – particularly in the social service, health, arts, and international development sectors – are legally structured as membership-based, non-profit corporations. The public benefit of such entities is assumed even when they are governed and run by members, demonstrating that such organizations can coalesce membership interests and public interests. Non-profit governance expert John Carver characterizes non-profit boards of directors as governing on behalf of the members and other owners, by which he means the community at large. John Carver, *Boards that Make a Difference: A New Design for Leadership in Nonprofit and Public Organizations* (San Francisco: Jossey-Bass Publishers, 1990) at p. 130.
- <sup>42</sup> John D. Gregory. "Establishing a Charity," *The Philanthropist*, vol. XI, no. 4 (Winter 1993), pp. 53-68 at p. 54.
- <sup>43</sup> [http://unitedwaytoronto.com\\_who\\_we\\_help-pdf](http://unitedwaytoronto.com_who_we_help-pdf).

- <sup>44</sup> Sandy Houston of the Metcalfe Foundation in conversation with the author, September 2001, observed that the “vast majority of private foundations will only fund registered charities.” According to advice from CCRA, foundations may fund non-profits via a formal agency agreement, which tightly controls how expenditures are made and reporting is to be carried out. As few foundations are prepared to go to the trouble and expense of following this route, there is little opportunity for non-profits to obtain foundation assistance without having registered status, according to Mr. Houston.
- <sup>45</sup> M. Hall and L. Macpherson, “A Provincial Portrait of Canada’s Charities,” *Research Bulletin*, 4 (2 & 3) (Toronto: Canadian Centre for Philanthropy, 1997). Gordon Floyd, “Re Improved Tax Incentives for Modest-Income Donors,” *Notes for Presentation to House of Commons Standing Committee on Finance*, 1998. Available at <http://www.ccp.ca>. Gordon Floyd cites 20% of donations coming from private giving, most of it from individual donors. Although both the 14% figure (which is cited in Michael Hall and Keith G. Banting, *op cit.*, note 12) and the 20% figure rely on sources that originated with the Canadian Centre for Philanthropy, the differences are unexplained. At any rate, the difference does not make a material difference to the argument that private donations are a less important revenue source than earnings and grants.
- <sup>46</sup> Frances K. Boyle, *Charitable Activity under the Canadian Income Tax Act: Definition, Process and Problems* (Toronto: Voluntary Sector Roundtable, 1997). Available at <http://www.vsr-trsb.net/publications>. Also see Broadbent Panel report, *op cit.*, note 4.
- <sup>47</sup> See, for example, Broder and the OLRC report, both *op cit.*, note 9, and Boyle, *ibid.*, note 46. Richard Bridge, *The Law of Advocacy by Charitable Organizations: The Case for Change* (Vancouver: IMPACS, 2000). Available at <http://www.impacs.org/pdfs/charities.pdf>. Patrick J. Monahan and Elie S. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (Toronto: York University, 2000); Kernaghan Webb, *Cinderella’s Slipper? The Role of Charitable Tax Status in Financing Canadian Interest Groups* (Vancouver: SFU-UBC Centre for the Study of Government and Business, 2000); Abraham Drassinower, “The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis” in Jim Phillips, Bruce Chapman and David Stevens (eds.), *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2001) at p. 288-315. Available at <http://www.nonprofitscan.org/state-and-market.htm>; Arthur B.D. Drache, *The Charity & Not-for-Profit Sourcebook: Cases, Legislation and Commentary*, Vol. 1 (Toronto: 1999); Donald Bourgeois, *The Law of Charitable and Non-profit Organizations*, Second Edition (Toronto and Vancouver: Butterworth’s, 1998).
- <sup>48</sup> In Ontario, the *Charities Accounting Act* provides statutory authority for supervision over charities by the Ontario Public Guardian and Trustee.
- <sup>49</sup> *Commissioners of Income Tax v. Pemsel* [1891] A.C. 531 (H.L.) at p. 583.
- <sup>50</sup> (U.K.) 43 Eliz. I, 1601, c. 4.
- <sup>51</sup> The preamble to the *Charitable Uses Act* of 1601 states: Whereas land...goods...chattels...and money, have been...given by Sundry...well-disposed persons...for ...[t]he relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; the maintenance of schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids. The relief or redemption of prisoner or captives; the aid or care of any poor inhabitants...
- <sup>52</sup> Ontario Law Reform Commission, *op cit.*, note 9, ch. 7. at p. 5 of 28.
- <sup>53</sup> [1917] A.C. 406 at 442. The Court was asked to consider whether a society established to promote the principle that human conduct should be based on natural knowledge and not supernatural belief had a charitable purpose. The court viewed with skepticism the Society’s goal of reducing the role of Christianity in public life and was concerned that the Society was non-Christian, blasphemous and possibly, even criminal.
- <sup>54</sup> Legal writers have argued that *Bowman* was wrong from the start. Webb, *op cit.*, note 47 at p. 130, argues that the House of Lords in *Bowman* relied on a commentator who had misinterpreted 19<sup>th</sup> century case law and planted the idea that reform-oriented charities were against public policy. He points out (at p. 27) that in the 19<sup>th</sup> century, it was common for charities to overtly make use of political activism such as charities devoted to legislation against slavery, observance of the *Lord’s Day Act*, penal reform, promotion of anti-poverty laws, temperance and animal welfare. Webb at p. 134 and Broder, *op cit.*, note 9 at p. 43, offer several arguments why this concern by the courts about their suitability for determining whether a legislative change would benefit the public is misplaced. In particular, they point out that determining whether a law is in the public benefit is no more difficult than assessing whether, under the *Charter*, a law is demonstrably necessary in a free and democratic society. Brooks, *op cit.*, note 2 at p. 146, argues: “The question is not whether a particular legislative outcome is in itself for the public good, but whether having all sides presented on legislative issues is a public benefit.” Brooks goes on to cite another legal commentator as follows: “There seems no reason why judges should be

unable to determine whether the *advocacy* of change in particular laws is for the public benefit. It may be possible to decide it is, even if there remains doubt about the rights and wrongs of the change itself. In a free democracy the promotion of controversial views may well be for the public benefit” (Cotterell, “Charity and Politics,” 38 *Modern Law Review* 471, 474 (1975)).

- <sup>55</sup> For example, in *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C.A. 202 starting at p. 217, Strayer J.A. stated: “advocacy on opinions of various social issues” is “political activity” and “Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community? Any determination by this court as to whether the propagation of such views is beneficial to the community and thus worthy of temporal support through tax exemption would be essentially a political determination and it is not appropriate for this court to make.”
- <sup>56</sup> *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31. The court considered whether the Society was charitable given that its purpose was, in part, to call on Parliament to suppress the practice of vivisection on animals. Because vivisection was permitted under an existing law, its suppression would involve legislative repeal. This was a purpose that Lord Simonds held could not be charitable.
- <sup>57</sup> *National Anti-Vivisection Society*, *ibid.*, at p. 50.
- <sup>58</sup> [1981] 3 All E.R. 493, (1982) 2 W.L.R. 222 (Ch. D.) cited with approval in *Positive Action Against Pornography v. M.N.R.* (1988) 2 F.C. 340 (F.C.A.).
- <sup>59</sup> *McGovern*, *ibid.*
- <sup>60</sup> *Scarborough Community Legal Aid Services v. The Queen* [1985] 1 C.T.C. 98 5102 (F.C.A.).
- <sup>61</sup> Appendix A to Information Circular 87-1, *op cit.*, note 36.
- <sup>62</sup> This typology is set out in CCRA’s draft publication RC4107 (E), *op cit.*, note 36, p. 9 of 22.
- <sup>63</sup> Information Circular 87-1, *op cit.*, note 36 at p. 3 of 9.
- <sup>64</sup> Juneau, *op cit.*, note 7 at p. 6. Also see *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association*, [1953] A.C. 380 (H.L.) where a trust to enforce existing law was held to be charitable.
- <sup>65</sup> RC4107 (E), *op cit.*, note 36.
- <sup>66</sup> RC4107 (E), *op cit.*, note 36, page 11 of 22.
- <sup>67</sup> *Vancouver Society*, *op cit.*, note 38.
- <sup>68</sup> *Ibid.*, para. 171.
- <sup>69</sup> *Ibid.*, para. 168.
- <sup>70</sup> *Human Life International*, *op cit.*, note 55, *Buxton and Others v. Public Trustee and Others*, (1962) T.C. 235 (Ch. D.), at p. 242.
- <sup>71</sup> RC4107 (E), *op cit.*, note 36, p. 5 of 19.
- <sup>72</sup> *Alliance for Life v. M.N.R.* [1999] 3 F.C. 504 (C.A.).
- <sup>73</sup> *Ibid.*, at p. 29 of 40.
- <sup>74</sup> This and other examples are taken from Webb, *op cit.*, note 47 at p. 42, citing Paul Tuns, “When is a charity considered to be dealing in ‘propaganda’? Human Life International Canada was stripped of its charitable tax status for being too ‘political.’ Who’s next?” *The Globe & Mail*, February 1, 1999. Also see Shira Herzog, “Give Charities a Voice: Advocacy as a form of free speech is an essential part of democracy,” *The Globe & Mail*, December 13, 2000, p. A17.
- <sup>75</sup> RC4107 (E), *op cit.*, note 36 at pp. 6 and 7 of 22.
- <sup>76</sup> Arthur B.C. Drache with Frances K. Boyle, *Charities: Public Benefit and the Canadian Income Tax System: A Proposal for Reform* (Toronto: Kahanoff Foundation Nonprofit Sector Research Initiative, 1998) at p. 61.
- <sup>77</sup> In *Human Life International*, *op cit.*, note 55, the Federal Court of Appeal explicitly held that the “advocacy of opinions on various important social issues” was a “political activity” and therefore not charitable in the context of that case. This position was put into question the next year by the same court in *Alliance for Life*, *op cit.*, note 72, where Mr. Justice Stone stated: “It seems to me that political activities may well be “ancillary and incidental” despite the fact they involve the advocacy of a particular point of view on controversial social issues.”
- <sup>78</sup> Ontario Law Reform Commission, *op cit.*, note 9 at p. 5, ch. 6.
- <sup>79</sup> Laird Hunter in conversation with the author, September and October 2001.
- <sup>80</sup> Broder, *op cit.*, note 9 at p. 51.
- <sup>81</sup> CCRA uses annulment of registered status administratively to revoke registered status without imposing the penalties that follow from deregistration such as disallowing deductions for donations, disposing of assets, or paying a penalty tax.

- <sup>82</sup> In *Alliance for Life*, *op cit.*, note 72, Mr. Justice Stone stated:  
It seems to me that political activities may well be “ancillary and incidental” despite the fact they involve the advocacy of a particular point of view on controversial social issues. This surely must depend on the scope of the organization’s objectives and the activities undertaken in pursuit thereof. It may well be that a charitable organization would want to adopt a relatively strong and controversial posture in order to effectively advance its charitable objectives even to the extent, if necessary, of advocating a change of law or policy or of administrative decisions, without incurring the risk of losing its status as a registered charity. The key consideration initially must be whether the activities actually engaged in, though apparently controversial, remain “ancillary and incidental” to the charitable activities.
- <sup>83</sup> Patrick J. Monahan and Elie S. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (Toronto: York University, 2000) at pp. 59-60, citing the judgement of Mr. Justice Iacobucci in *Vancouver Society*, *op cit.*, note 38.
- <sup>84</sup> Sacks, “The Role of Philanthropy: An Institutional View,” 46 *Virginia Law Review*, 516 at 531 (1960) as cited in Brooks, *op cit.*, note 2 at 148 and 218.
- <sup>85</sup> Drache and Boyle, *op cit.*, note 8 at p. 66.
- <sup>86</sup> Broder, *op cit.*, note 9 at p. 38, based on data supplied to the Canadian Centre for Philanthropy by CCRA. We are indebted to Peter Broder and the Canadian Centre for Philanthropy for the original research Mr. Broder has conducted into CCRA’s handling of advocacy and other issues related to files under regulatory review (applications for registration and audits).
- <sup>87</sup> This was also the view in 1984 of Law Professor Brooks, *op cit.*, note 2 at p. 200.
- <sup>88</sup> CCRA has recently released a draft Audit Protocol regulating the conduct of audits by CCRA but nothing there provides further clarification on why certain charities are singled out for investigation. Available at <http://www.ccradrc.gc.ca/tax/charities/auditprotocol-3.html>.
- <sup>89</sup> The importance of the public benefit test was reiterated in both the majority and minority in *Vancouver Society*, *op cit.*, at note 38 at paragraphs 41 and 148.
- <sup>90</sup> Boyle, *op cit.*, note 46 at p. 30.
- <sup>91</sup> Federal political donations attract a tax credit of 75% on the first \$200 and 50% on amounts between \$200 and \$550. Hence, a political donation of \$300 would attract a tax credit worth \$150. Charitable donations attract tax credits based on the donor’s marginal tax rate. Only income earners in the highest tax bracket attract a charitable tax credit worth up to 50%; income earners in other tax brackets attract a lower percentage rate on their charitable tax credits.
- <sup>92</sup> Brooks, *op cit.*, note 2 at p. 153, observes that it is puzzling why the U.S. courts following the same common law precedents and principles as the English courts reached the opposite conclusion about the charitable nature of advocacy.
- <sup>93</sup> Section 501 (c) (3) of the *Internal Revenue Code*.
- <sup>94</sup> *CC9 – Political Activities and Campaigning by Charities*, September 1999. Available at <http://www.charity-commission.gov.uk/CC9.htm>.
- <sup>95</sup> *Ibid.*
- <sup>96</sup> *Ibid.*
- <sup>97</sup> There are opponents of this perspective who suggest that government would *not* otherwise fund charitable services but their argument is undermined by the following observations: (1) There is strong evidence that government does view these services as a necessary public good because 60% of charities’ revenue currently comes from government; (2) These opponents assume that the services are not necessary or, if need is indeed sincere and pressing, altruistic elements in society – such as churches and other religious institutions – will voluntarily address it. The inadequacy of informal and unsupported altruism to address the range and depth of charitable need seems to us obvious, and we assume Canadians do not wish to see increased homelessness and hunger.
- <sup>98</sup> This role can be analogized to that played by the Auditor General, commissions of inquiry, civilian oversight of security forces, and even the courts and Parliament (by funding opposition parties) – all of which exercise independent oversight functions and may press for policy change.
- <sup>99</sup> Juneau, *op cit.*, note 7 at p. 5.
- <sup>100</sup> Broder, *op cit.*, note 9 at p. 50.
- <sup>101</sup> *Working Together*, *op cit.*, note 6.
- <sup>102</sup> Adam Yarmolinsky, “The charitable deduction: subsidy or limitation?” *Nonprofit and Voluntary Sector Quarterly* (San Francisco, March 2000). Available at <http://www.proquest.umi>.
- <sup>103</sup> *CC9*, *op cit.*, note 94.
- <sup>104</sup> *Working Together*, *op cit.*, note 6 at p. 22.
- <sup>105</sup> *CC9*, *op cit.*, note 94.
- <sup>106</sup> In *Options for Change*, a brochure prepared for IMPACS Charities and Advocacy Project cross-country consultations in the fall of 2001, this proposal was identified as Option 1. Available at [www.impacs.org](http://www.impacs.org).
- <sup>107</sup> Drache and Boyle, *op cit.*, note 8 at p. 71.