

**CHARITIES SPEAKING OUT:
THE EVOLUTION OF ADVOCACY AND POLITICAL ACTIVITIES
BY CHARITIES IN CANADA***

Terrance S. Carter and Theresa L.M. Man

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A. INTRODUCTION

Advocacy has been defined as the act of speaking or of disseminating information intended to influence individual behaviour or opinion, corporate conduct, or public policy and law.¹ Many people believe that the act of advocacy as a form of free speech is an essential part of democracy.²

The amount of advocacy that an organization can become involved in becomes relevant for tax purposes when dealing with registered charities in Canada. Charities in Canada receive preferential treatment under the *Income Tax Act* (Canada) (“ITA”)³; upon receiving charitable status, they have the ability to issue charitable receipts to donors, and not be subject to income tax. As a result of these tax benefits, a registered charity is subject to stringent guidelines when becoming involved in advocacy or political activities.

There is a general misconception among registered charities in Canada that they are either unable to participate at all in any public policy debates involving political issues, or alternatively, that they can participate completely unrestrained. Both assumptions are incorrect. Registered charities can become involved in public policy debates as long as they do so within the limits imposed by Canadian law. This becomes an important and relevant topic for registered charities in Canada that are interested in impacting their world.

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¹ Voluntary Sector Initiative, “*Improving the Regulatory Framework-Supplementary Paper A-Education, Advocacy and Political Activity*”, Working Together: A Government of Canada/Voluntary Sector Joint Initiative - Report of the Joint Tables (2000).

² *Ibid.*

³ R.S.C. 1985, c. 1 (5th Supp.), as amended.

The focus of this paper is to review the development of the ITA and Canada Revenue Agency's administrative policies in relation to the extent of political activities that may be engaged in by registered charities in Canada. Through an analysis of the regulations and policies put in place as a result of the ITA, the common law and Canada Revenue Agency guidelines, the ability of charities to "speak out" in Canada will be addressed. Final reflections of the current regulatory regime will provide some insight into the future for Canadian charities involved in advocacy.

B. INCOME TAX ACT REQUIREMENTS REGARDING POLITICAL PURPOSES AND ACTIVITIES BY CHARITIES

Although the Canadian Constitution⁴ establishes that charities are the jurisdiction of the provinces, it empowers the federal government to establish the federal tax system and have administration of the ITA. The ITA sets out the regulatory regime for charities under which charities are required to be registered with the Minister of National Revenue.

There are two main benefits of acquiring the status of a registered charity. All income earned by registered charities is exempt from income tax under Part I of the ITA.⁵ In addition, registered charities can issue donation tax receipts to their donors, providing individual donors with tax credits⁶ and corporate donors with tax deductions to reduce their income.⁷

Due to the significant tax benefits provided to registered charities and their donors, the ITA imposes various limitations on the activities of registered charities. Some of these limitations reflect what is charitable at common law, while others reflect policies of the Canadian government in relation to how they wish charities to operate. One of these

⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1984, App. II, No. 5.

⁵ Paragraph 149(1)(f) of the ITA.

⁶ Individuals who made donations to registered charities may claim non-refundable tax credits pursuant to the rules set out in section 118.1 of the ITA.

⁷ Corporations that made donations to registered charities may claim tax deduction pursuant to the rules set out in section 110.1 of the ITA.

restrictions directly imposes limits on the extent of political activities that may be conducted by registered charities.

By way of background, under the ITA, there are three types of designations for registered charities, namely, charitable organizations, public foundations and private foundations. Charitable organizations, public foundations and private foundations (the latter two are collectively referred to as charitable foundations)⁸ are separately defined and regulated under the ITA.⁹ These entities differ in a number of respects, including organizational form, relationship between directors/trustees and their control by major donors, business activities, granting activities, borrowing activities, and control of other corporations.¹⁰

Under the ITA, a charitable organization must devote all of its resources to charitable activities carried on by the organization itself,¹¹ while a charitable foundation must be constituted and operated exclusively for charitable purposes.¹² As such, organizations that are organized solely or in part for political purposes would not be eligible for registration under the ITA. However, the ITA does not define what is “charitable” or what is “political.” The courts have been left with the responsibility of developing common law tests to determine what is and what is not charitable, and what would constitute political purposes. The following two sections of this paper review of the meaning of “charitable purposes” and “political purposes.”

⁸ See definition for “public foundation” and “private foundation” in subsection 149.1(1) of the ITA.

⁹ See their definitions in subsection 149.1(1) of the ITA.

¹⁰ See also Theresa L.M. Man and Terrance S. Carter, “A Comparison of the Three Categories of Registered Charities” *Charity Law Bulletin* No. 73 (21 July 2005) (online: www.charitylaw.ca); Theresa L.M. Man and Terrance S. Carter, “How do charitable organizations and foundations differ under income tax?” *The Lawyers Weekly* Vol 25, No. 16 (2 September 2005).

¹¹ See paragraph (a) in the definition for “charitable organization” in subsection 149.1(1) of the ITA:
“charitable foundation” means a corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization.

¹² See definition for “charitable foundation” in subsection 149.1(1) of the ITA:

“charitable organization” means an organization, whether or not incorporated,
(a) all the resources of which are devoted to charitable activities carried on by the organization itself, ...

Notwithstanding the general rule that charities must not be established for political purposes, the ITA was amended in 1986 to permit charities to engage in a limited amount of political activities, as long as the charity only devotes a small part of its resources to non-partisan political activities that are ancillary and incidental to its charitable activities (in the case of a charitable organization) or charitable purposes (in the case of a charitable foundation).¹³ When draft legislation was introduced in 1985, the Notice of Ways and Means Motions indicated that for the 1985 and subsequent taxation years, registered charities are permitted to engage in political activities (other than the direct or indirect support of or opposition to any political party or candidate for public office) that are ancillary and incidental to their charitable purposes, provided that substantially all of their resources are devoted to their charitable activities or purposes.¹⁴ It is interesting to note the following in the explanatory notes to the said Notice in relation to the proposed changes:

... These amendments recognize that it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals. These activities would include advertising, rental of facilities or mass mailings to influence public opinion to support the charity's views on matters of law or government policy related to its charitable purposes. Under the present law a charity may, without restriction, provide information and express its views in briefs to government to change laws or policies. These amendments do not alter this position. However, purely partisan activities such as supporting or opposing a political party or candidate will not be permitted.¹⁵

Specifically, subsections 149.1(6.1) (dealing with foundations) and (6.2) (dealing with charitable organizations) of the ITA provide as follows:

149.1(6.1) Charitable purposes [limits to foundation's political activities] —
For the purposes of the definition “charitable foundation” in subsection (1),

¹³ *An Act to amend the Income Tax Act [and other legislation]*, S.C. 1986, c. 6, s. 85(2), amending the 1952 *Income Tax Act*, R.S.C. 1952, c.148.

¹⁴ *An Act to amend the Income Tax Act [and other legislation]*, S.C. 1986, c. 6, s. 85(2), enacting s.149.1(6.1) and (6.3) of the 1952 ITA applicable to 1985 and subsequent taxation years (s. 85(3)). See also M.L. Dickson, “Recent Tax Developments”, *The Philanthropist* Vol. 6, No.1 (1986) 55, at 55.

¹⁵ Notice of Ways and Means Motion, May 23, 1985.

where a corporation or trust devotes substantially all of its resources to charitable purposes and

- (a) it devotes part of its resources to political activities,
- (b) those political activities are ancillary and incidental to its charitable purposes, and
- (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, the corporation or trust shall be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.

149.1 (6.2) Charitable activities [limits to charity's political activities] — For the purposes of the definition “charitable organization” in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and

- (a) it devotes part of its resources to political activities,
- (b) those political activities are ancillary and incidental to its charitable activities, and
- (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

Failure of a charity to meet its disbursement quota for the year by expending a sufficient amount on charitable activities may be cause for revocation.¹⁶ In this regard, subsection 149.1(1.1) of the ITA was also amended in 1985 to ensure that expenditures on political activities by a registered charity are not considered to be amounts expended on charitable activities. In this regard, subsection 149.1(1.1) provides as follows:

(1.1) Exclusions [deemed non-charitable] — For the purposes of paragraphs (2)(b), (3)(b), (4)(b) and (21)(a), the following shall be deemed to be neither an amount expended in a taxation year on charitable activities nor a gift made to a qualified donee:

- (a) ,,,;
- (b) an expenditure on political activities made by a charitable organization or a charitable foundation; and
- (c) ...

The terms “political activities”, “substantially all” and “resources” are not defined in the ITA. For an explanation of how Canada Revenue Agency interprets these terms in

¹⁶ Paragraphs 149.1(2)(b), 149.1(3)(b) and 149.1(4)(b) of the ITA.

its administration, see the section of this paper on Canada Revenue Agency administrative policies.

C. MEANING OF “CHARITABLE PURPOSES” AT COMMON LAW

As mentioned above, the ITA requires registered charities to be established for exclusively charitable purposes and engage in exclusively charitable activities, and as such they cannot be established for political purposes. However, the ITA permits charities to engage in some political activities, to a limited extent. The ITA does not define what is “charitable” or “political.” Eligibility for charitable registration under the federal income tax regime is based on meeting the common law definition of charity, as developed through the courts. This common law definition is therefore vital to the Canadian charitable sector because there is no statutory definition to explain the terms “charity” or “charitable” in the ITA. This section of the paper reviews the meaning of “charitable purposes” at common law, and the next section of the paper reviews the meaning of “political purposes” at common law.

In accordance with English common law, the legal concept of “charity” in Canada can be traced back to the enactment of the *Statute of Elizabeth* in 1601,¹⁷ in which the preamble listed numerous purposes that would assist in the statute’s objective of reforming the law of uses, being an early form of trusts. Although it has been suggested that “[t]he purpose of the preamble was to illustrate charitable purposes rather than to draw up an exhaustive definition of charity”,¹⁸ the courts have traditionally used this extensive preamble to assist in defining “charity” and classifying what is “charitable.”

¹⁷ (1601) 43 Eliz. 1 c. 4 Also known as the *Charitable Uses Act* or the *Statute of Uses*. The preamble of the *Statute of Elizabeth* lists the following purposes as being charitable: The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poorer maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

¹⁸ Hubert Picarda, *Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) at 72.

The seminal decision of the House of Lords in *Special Commissioners of Income Tax v. Pemsel*¹⁹ has been adopted by the courts in Canada as the leading case in establishing a legal definition of charity. In this regard, the House of Lords set out four heads within which all charities must fall: namely, relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.²⁰ The purpose of a charity must fall into one or more of these categories recognized by the law as charitable.

As well, in order for an organization to be charitable, the charity's purposes must be exclusively and legally charitable, the resources of a charity must be devoted to charitable activities in furtherance of the charitable purposes, and the charity must be established for the benefit of the public or a sufficient segment of the public.²¹ A purpose must also be considered exclusively charitable in that it cannot serve both charitable and non-charitable means.²²

In addition, to be charitable at common law, an organization's activities must also result in a benefit to the public, or a sufficient section of it. This is commonly referred to as the requirement for public benefit, and is a discrete concept applicable to charitable purposes in general, not to be confused with the fourth head of charity, being "other purposes beneficial to the community." The fourth head of charity focuses on *what* would be provided by a charity and can usually only be determined by finding an analogy to other accepted charitable purposes; while the broader public benefit test centers on *who* would benefit from the charity. In addition, all charities must meet the public benefit test by being established for the benefit of the public or a sufficient segment of the public.²³ This consists of two parts, namely, a tangible benefit must be conferred, directly or indirectly, and the benefit must have a public character.

¹⁹ *Special Commissioners of Income Tax v. Pemsel* [1891] A.C. 531 (H.L.).

²⁰ *Ibid.* at 583 per Lord Macnaghten.

²¹ *McGovern v. Attorney General* [1982] 3 All E.R. 439.

²² *Ibid.*

²³ *McGovern*, *supra* note 21.

The origin of the public benefit requirement in Canada is clearly found in *Towle Estate v. Minister of National Revenue*,²⁴ where the Supreme Court of Canada not only expressly adopted the *Pemsel* definition, but additionally, stated that those purposes were “subject to the consideration that in order to qualify as ‘charitable’ the purposes must... be ‘[f]or the benefit of the community or of an appreciably important class of the community’.”²⁵ The requirement of public benefit was explained in the Canadian leading decision of *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*²⁶ In that decision, Gonthier J. explained the requirements of public benefit as follows:

The public benefit requirement has two distinct components. There must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit.²⁷

D. MEANING OF “POLITICAL PURPOSES” AT COMMON LAW

The distinction between what is a political purpose and what is a charitable purpose in Canada is not easy to distinguish and, as a result, has been the subject matter of considerable judicial deliberation over the years, originally in the English courts and more recently from Canadian decisions.²⁸

In this regard, it is established law that trusts for political purposes are not charitable. The House of Lords in the leading case of *Bowman v. Secular Society, Ltd.*²⁹ held that a trust for political purposes is not charitable, not because it is illegal, 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:

²⁴ *Towle Estate v. Minister of National Revenue* [1967] S.C.R. 133 at para. 5.

²⁵ *Ibid* at para. 5.

²⁶ *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* [1999] 1 S.C.R. 10.

²⁷ *Ibid*, at para. 41.

²⁸ A detailed overview of the jurisprudence invoicing political purposes and activities is outside the scope of this paper. For an interesting review, see Adam Parachin, “Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes”, 45 *Alberta Law Review* 871 – 899 (2008).

²⁹ *Bowman v. Secular Society, Ltd.* [1971] A.C. 406 (H.L.).

Equity has always refused to recognise such objects as charitable. ... [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, and therefore cannot say that a gift to secure the change is a charitable gift.³⁰

This principle was further clarified in *McGovern v. Attorney General*.³¹ In that case, Amnesty International was attempting to promote objects that included securing the release of prisoners of conscience, undertaking research into the maintenance of human rights, and the abolishment of torture and other degrading human practices. The judge held that the purposes of Amnesty International were not charitable since the elimination of injustice was a political purpose and had not been recognized as a purpose that was charitable at law. In this regard, Slade J., building upon the House of Lords decisions in *Bowman v. Secular Society, Ltd.*³² and *National Anti-Vivisection Society v. Inland Revenue Commissioners*,³³ provided a framework for categorizing political purposes:

(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes...can never be regarded as being for the public benefit in the manner which the law regards as charitable. (2) Trusts for political purposes falling within the spirit of this pronouncement 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.³⁴

In brief, the court held that “political purposes” are not charitable and such purposes include purposes that promote the interests of a political party, promote changing the law in a country, or promote changing government policies or a particular

³⁰ *Ibid*, at 442.

³¹ *McGovern*, *supra* note 21.

³² *Bowman*, *supra* note 29.

³³ *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 (H.L.).

³⁴ *McGovern*, *supra* note 21 at 340.

government decision. The court further held that such categorization was not exhaustive. The court also held that while it is not possible for a charity to have any political purpose, it is possible for a charity that is constituted exclusively for charitable purposes to employ political means to further its charitable purposes:

First, if any one of the main objects of the trusts declared by the trust deed is to be regarded as "political" in the relevant sense, then, subject to the effect of the proviso to clause 2, the trusts of the trust deed cannot qualify as being charitable. Secondly, however, if all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status.³⁵

Given the fact that the courts have not recognized political purposes to be charitable at law, a common theme reviewed in cases involving purposes and activities that may have a “political” implication is whether the purposes and activities in question are charitable because they are for the advancement of education or for the benefit of the community under the fourth head of charitable objects (i.e. other purposes beneficial to the community as recognized by the courts); or are not charitable because they are in fact “political.”

The first Canadian judicial commentary on the question of political activities by charities appeared in 1985. Since the amendment of the ITA in 1985, there were a series of cases between 1985 and 2002 involving whether the purposes and activities in question were political. Since the release of Canada Revenue Agency’s revised policy in 2003 on the nature and extent of political activities that can be conducted by registered charities (as explained below in the next section of this paper), there have been no Canadian cases involving the issue of political purposes or activities. A detailed overview of Canadian jurisprudence involving political purposes and activities is outside the scope of this paper. However, the following provides a brief summary of a number of the key cases.

³⁵ *McGovern*, *supra* note 21 at p.15.

The case of *Scarborough Community Legal Services v. The Queen*³⁶ in 1985 is the first Canadian case on the issue of political activities conducted by a charity. In this case, the organization was established to operate as a community legal clinic for the purpose of providing advice, assistance, representation, education and research to individuals and groups for the benefit of the Scarborough community. The organization carried out activities, such as participating in rallies and working to change municipal by-laws. The Minister denied the organization's application for charitable status on the basis that it was participating in activities of a political nature. The organization's appeal was dismissed. The court accepted the organization's argument that there is a difference between an organization's "primary and incidental purposes," in that an organization should not lose its charitable status "because of some quite exceptional and sporadic activity in which it may be momentarily involved" and an activity would not be "deprived of its charitable nature only because one of its component or some incidental or subservient portion thereof cannot, when considered in isolation, be seen as a charity." However, in that case, the court held that the community legal clinic's "sustained" efforts to influence the policy-making process constituted an essential part of its action and was not only "incidental" to some other of its charitable activities. Not long after this decision, the ITA was amended in 1985 to address these issues and to expressly permit charities to engage in limited political activity.

On the issue of whether certain purposes and activities can be acceptable to advance education rather than political in nature, the distinction hinges on a determination of the type of activities that are required to constitute advancement of education. Prior to the Supreme Court of Canada's landmark case of *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*,³⁷ in order for a charity to be recognized under the charitable head of advancement of education, the courts in Canada required that it be limited to the "formal training of the mind" through structured analysis or presentation of knowledge or the "improvement of a useful branch

³⁶ *Scarborough Community Legal Services v. The Queen* [1985] 1 C.T.C. 98, 85 D.T.C. 5102 (F.C.A.).

³⁷ *Vancouver Society*, *supra* note 26.

of human knowledge.”³⁸ The Supreme Court in *Vancouver Society* in 1999, however, took a more inclusive definition of education. The difficulty in distinguishing between education and political activity is illustrated in many cases in Canada from 1986 up to the present, some of which are summarized below.

*Native Communications Society of B.C. v. Minister of National Revenue*³⁹ was a successful appeal in 1986 from the Minister’s refusal to register the organization as a charitable organization. The purposes of the organization included the development of radio and television productions relevant to the native people of British Columbia, training native people as communication workers, and delivering information on issues affecting native people. Upon considering the special legal position in Canadian society occupied by aboriginal people, the court decided that a unique approach had to be taken towards the purposes of the organization. In this regard, the court found that the use of newspaper, radio and television by the organization provided an element of education and was beneficial to the aboriginal community of British Columbia within the spirit and intendment of the preamble to the Statute of Elizabeth. The fact that one of the purpose clauses permitted the organization to “procure and deliver information on subjects relating to the social, educational, *political* and economic issues facing native people of British Columbia” [emphasis added] was not problematic because it did not authorize the organization to engage in political activities, but merely to deliver information on a number of issues, including political ones; the newspaper was also expressly stated to be politically non-aligned.

However, in the 1988 decision of *Toronto Volgograd Committee v. M.N.R.*,⁴⁰ the court found that the organization’s intention to promote an understanding between Toronto and Volgograd in the U.S.S.R. through education, public awareness, exchanges and meetings was not charitable. The distribution of materials by the organization was intended to create a particular climate of opinion and promote an attitude of mind and as

³⁸ *Briarpatch Incorporated. v. The Queen*, 96 D.T.C. 6294 at 6294; [1996] 2 C.T.C. 94 at 7 (F.C.A.).

³⁹ *Native Communications Society of B.C. v. Minister of National Revenue* [1986] 3 F.C. 471.

⁴⁰ *Toronto Volgograd Committee v. M.N.R.*[1988] 1 C.T.C. 365, 88 D.T.C. 6192 (F.C.A.).

such, was not a purpose to advance education. Similar facts arose in the case of *Canada UNI Association v. M.N.R.*⁴¹ in 1993, where an organization with the broad purpose of promoting Canadian unity by informing Canadians concerning the unique geographic, social, cultural and linguistic nature of Canada, was found to be inherently political as it did not involve an element of training or instruction. The court also determined that the promotion of national unity or personal exchanges between Canadians was not beneficial to the community in a way the law deems to be charitable. The *Native Communications* case was distinguished because that organization's activities were directed towards aboriginal people who hold a special position in Canadian society.

Presenting selected items of information and opinion on the subject of pornography was held not to be charitable in the 1988 case of *Positive Action Against Pornography v. M.N.R.*⁴² In that case, the organization was established to provide educational material to the public concerning the issue of pornography. The court held that the purpose of the organization was to achieve social change and therefore was political in nature, rather than for the advancement of education.

In the 1988 decision of *N.D.G. Neighbourhood Association v. Revenue Canada*,⁴³ a neighbourhood association to assist the urban poor was held to be non-charitable because its activities in defending people's rights, promoting letter writing campaigns, providing a forum to exchange ideas and information, and advocating for tenants' rights were found to not be for the advancement of education. Instead, it was determined that the organization was in fact an activist organization, since its activities were found to be primarily of a political nature.

Operating an abortion clinic was held to be charitable in the 1991 decision of *Everywoman's Health Centre Society v. Canada*,⁴⁴ where the court held that the organization was established for the dispensation of health care to women who want or

⁴¹ *Canada UNI Association v. M.N.R.* [1993] 1 C.T.C. 46, 151 N.R. 4 (F.C.A.).

⁴² *Positive Action Against Pornography v. M.N.R.* [1988] 1 C.T.C. 232, 88 D.T.C. 6186 (F.C.A.).

⁴³ *N.D.G. Neighbourhood Association v. Revenue Canada* [1988] 2 C.T.C. 14, 88 D.T.C. 6279 (F.C.A.).

⁴⁴ *Everywoman's Health Centre Society v. Canada* [1991] F.C.J. No. 1162.

need an abortion and that its purpose was not to alter the law with respect to abortion or to promote the “pro-choice” view. The court also held that the fact that there is no public policy or consensus on a controversial issue (i.e. abortion) does not necessarily mean that the object in question is not charitable. However, in the 1998 decision of *Human Life International in Canada Inc. v. M.N.R.*,⁴⁵ the court held that swaying public opinion on a controversial “pro-choice” social issue was not advancement of education nor beneficial to the public. In that case, the organization was established to protect the unborn, elderly and handicapped, to promote true Christian family values, to encourage chastity, and to teach natural family planning, by conducting lectures, seminars and conferences and publishing a variety of literature advocating its points of view.

In the 1997 decision of *Interfaith Development Education Association, Burlington v. M.N.R.*,⁴⁶ the court found that the organization was established to educate the public and encourage an awareness and understanding of social justice conditions through a variety of activities, including social analysis study groups, public meetings, provision of speakers, etc., to mobilize and facilitate actions by the public around the 'social condition'. The court held that such activities were not for the advancement of education because they were not directed toward the formal training of the mind or the improvement of a useful branch of human knowledge. The court further held that “the attainment of political equality, freedom from poverty and oppression, and the preservation of human rights is indeed a commendable objective” but “encouraging an awareness and understanding of these conditions to mobilize and facilitate actions by the public on these matters, is not charitable as advancing education.”

Distributing general information was also held not to be charitable. In the 1998 case of *Action des femmes handicapées (Montréal) v. The Queen*,⁴⁷ the organization’s activities were directed towards alerting handicapped women to their condition and to

⁴⁵ *Human Life International in Canada Inc. v. MNR*, [1998] 98 D.T.C. 6196 (F.C.A.).

⁴⁶ *Interfaith Development Education Association, Burlington v. MNR*, [1997] 97 D.T.C. 5424; [1997] 3 C.T.C. 271 (F.C.A.).

⁴⁷ *Action des femmes handicapées (Montréal) v. The Queen*, [1998] 98 D.T.C. 6528; [1998] 4 C.T.C. 1 (F.C.A.).

their rights by participating in workshops organized by others and publishing pamphlets. While the court held that the goals of the organization were laudable, its activities were not charitable because they were not sufficiently beneficial to their intended beneficiaries. The organization was found to be merely providing information of both a general and a specialized nature, often prepared by others.

The first case in which the Supreme Court of Canada considered and discussed the issues of “political purposes” and “political activities” was the seminal 1998 decision of *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*,⁴⁸ referred to above. The case did not turn on the issue of political activities. However, the court did recognize that an organization had to define the scope of its activities as charitable and all its resources had to be devoted to these activities. It also recognized that political purposes and activities which are merely ancillary and incidental to charitable purposes are themselves charitable.

The decision of the Supreme Court of Canada in *Vancouver Society* represented a significant shift in the law in Canada regarding what would be recognized as charitable at law under the head of advancement of education. It is worth noting that this was the first decision of the Supreme Court of Canada on the definition of charity in over 25 years.⁴⁹ The organization was established to provide educational forums and workshops to assist immigrant and visible minority women to seek employment opportunities and to integrate into Canadian life. The issue was whether the organization’s purposes and activities were exclusively charitable. The court held that to “limit the notion of ‘training of the mind’ to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education, which is of little use in modern Canadian society.”⁵⁰ Instead, the court adopted a more inclusive definition of education. The court held that the advancement of education includes “informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as

⁴⁸ *Vancouver Society*, *supra* note 26.

⁴⁹ David P. Stevens, “Update on Charity Taxation,” *Report of Proceedings of Fifty-Third Tax Conference*, 2001 Tax Conference (Toronto: Canadian Tax Foundation, 2002), 28:1-41, at 28:4.

⁵⁰ *Vancouver Society*, *supra* note 26, at para. 169.

these are truly geared at the training of the mind and not just the promotion of a particular point of view.”⁵¹ In the case of education, the good advanced by the charity in question is knowledge or training. So long as information or training is provided in a structured manner and for a genuinely educational purpose to advance the knowledge or abilities of the recipients, and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within advancement of education.

The court further held that education does not include educating people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination. Knowledge can take many forms, including theoretical or practical, speculative or technical, scientific or moral. Education requires activities that provide an “actual teaching or learning component,” but “[s]imply 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.”⁵² Formal or traditional classroom instruction is not a prerequisite, and “an informal workshop or seminar on a certain practical topic or skill can be just as informative and educational as a course of classroom instruction in a traditional academic subject.”⁵³ Education can be “directed toward a practical end and not just the ‘formal training of the mind’ or the ‘improvement of a useful branch of human knowledge.’”⁵⁴

Subsequent to the *Vancouver Society* decision in 1999, a number of cases were decided on the basis that even though the objects of the organization were within the definition of “education”, such activities constituted political activities which were not ancillary or incidental to the organizations’ charitable activities.⁵⁵

⁵¹ *Vancouver Society*, *supra* note 26, at para. 168.

⁵² *Vancouver Society*, *supra* note 26, at para. 171.

⁵³ *Vancouver Society*, *supra* note 26, at para. 171.

⁵⁴ *Vancouver Society*, *supra* note 26, at para. 172.

⁵⁵ For example *Alliance for Life v. M.N.R.*, 99 D.T.C. 5228; [1999] 3 C.T.C. 1 (F.C.A.), *The Challenge Team v. Revenue Canada*, 2000 D.T.C. 6242; [2000] 2 C.T.C. 352 (F.C.A.), and *Action by Christians for the Abolition of Torture v. The Queen*, 2003 D.T.C. 5394 (F.C.A.).

In the 1999 decision of *Alliance for Life v. M.N.R.*,⁵⁶ the promotion of respect for all human life from the moment of conception onwards and encouragement of the creation of pro-life groups in communities across Canada was held to be political in nature, not for the advancement of education. The court found that the organization's catalogue materials, press releases, mission statement, editorials and reports contained viewpoints on social and moral issues that were not ancillary and incidental to its charitable activities. Specifically, the court held that:

I find it difficult to view the dissemination of the appellant's library packages and catalogue materials in this way. While it is true that some of the materials therein may be viewed as scientific or certainly as not particularly one-sided, little attempt is made to promote genuine debate on such important issues as abortion and euthanasia but, rather, to advocate strong opposing positions. ... I do not find in much of the disseminated materials any real desire to ensure objectivity. It is not, in my view, farfetched to regard the bulk of these materials as "political."... [D]espite the objects stated in the appellant's constituting document its true mission is more likely that of advocating its strongly held convictions on important social and moral issues in a one-sided manner to the virtual exclusion of any equally strong opposing convictions.⁵⁷

In the 2000 decision of *The Challenge Team v. Revenue Canada*,⁵⁸ the court held that an activity is not educational if it is undertaken solely to promote a particular point of view, although educating people from a particular political or moral perspective may be educational in the charitable sense, in that it enables listeners to make an informed and critical choice. The court held that the burden is on the organization to establish “not only that its purposes are charitable, but that its activities further that purpose without impermissibly promoting a point of view.”⁵⁹

⁵⁶ *Alliance for Life v. M.N.R.* [1999] CarswellNat 625 (F.C.A.).

⁵⁷ *Alliance for Life*, *supra* note 56 at para. 68 and 69.

⁵⁸ *Challenge Team v. Revenue Canada* 2000 D.T.C. 6242; [2000] 2 C.T.C. 352 (F.C.A.).

⁵⁹ *Ibid.*

The most recent decision dealing with charities engage in political activities is *Action by Christians for the Abolition of Torture (ACAT) v. H.M.Q.*⁶⁰ in 2002. The purpose of the organization was the abolition of torture throughout the world. It was held that the activities of requesting the government for change in conduct or policy were not compatible with its charitable purpose, and exercising moral pressure on governments was considered a political purpose or activity, regardless of the fact that this was a universally recognized value and not a controversial social issue within the arena of political debate. Also, the letter-writing campaign constituted more than ten percent of the organization's activities so had essentially become an end in itself of a political nature.

E. CANADA REVENUE AGENCY ADMINISTRATIVE POLICIES

The administration of the ITA over registered charities is vested with the Charities Directorate of Canada Revenue Agency ("CRA"). The guidance and policies published by CRA reflect how CRA interprets and applies the law; however, they do not have the force of law.

1. Pre-2003 Policies

Over the years, CRA has released a number of publications regarding its administrative policies on the extent of political activities that may and may not be conducted by registered charities. Prior to 1978, CRA had been fairly tolerant of charities engaging in political activities.⁶¹ CRA's *Information Circular* 78-3, "Registered Charities: Political Objects and Activities" released in early 1978 had to be withdrawn after much opposition and protest from the charitable sector.⁶² Another *Information Circular* 87-1, "Registered Charities – Ancillary and Incidental Political Activities", was released by CRA

⁶⁰ *Action by Christians for the Abolition of Torture (ACAT) v. H.M.Q.* 2002 F.C.A. 499; 225 D.L.R. (4th) 99; D.T.C. 5394; [2003] 3 C.T.C. 121.

⁶¹ Peter R. Elson, "A Short History of Voluntary Sector-Government Relations in Canada", *The Philanthropist* Vol. 21, No.1 (2007) 36, at 59.

⁶² See Arthur Drache, "Political Activities: A Charitable Dilemma", *The Philanthropist* Vol.2, No. 4 (1980) 21, at 22 and Elson *supra* note 61 at 59.

on February 25, 1987, following the amendment of the ITA in 1986. Circular 87-1 again faced much criticism from the charitable sector for being overly restrictive.

2. Consultation and Reform Efforts in the Early 2000s

The current CRA policy on political activities, *Policy Statement CPS-011 “Political Activities”*⁶³ (“2003 Policy”) was released on September 2, 2003, which replaced *Information Circular 87-1*. The 2003 Policy was the result of over two years of collaborative dialogue between the Government of Canada and the broader voluntary sector, made up of both registered charities and non-profit organizations that are tax exempt under paragraph 149(1)(l) of the ITA, but cannot issue charitable receipts. The cooperative approach was undertaken in order to strengthen the relationship between both CRA and the voluntary sector, under a joint initiative called the Voluntary Sector Initiative.

In 1998, a discussion paper recommended significant changes, including a proposal for a new term “public benefit organization” to replace the term “charity” in Canada under the ITA.⁶⁴ This paper was relied on extensively by the subsequent report of the Voluntary Sector Roundtable, chaired by Ed Broadbent, entitled *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector*, in February 1999 (the “Broadbent Report”)⁶⁵ concerning how to promote accountability and governance in the voluntary sector. After the release of the Broadbent Report, voluntary sector members and federal officials met in three “Joint Tables” to make recommendations in relation to improving the regulation, administration and accountability of charities and other non-profit organizations, and to examine federal funding support. On August 28, 1999, the Joint Tables released their joint report, *Working Together, A Government of*

⁶³ Canada Revenue Agency, Policy Statement CPS-022, “Political Activities”, September 2, 2003 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>).

⁶⁴ Arthur B.C. Drache with F.K. Boyle, *Charities, Public Benefits and the Canadian Income Tax System: A Proposal for Reform* (Toronto: Kahanoff Foundation Non-Profit Sector Research Initiative, 1998).

⁶⁵ Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector* (Ottawa: The Panel, February 1999) (hereinafter referred to as the “Broadbent Report”).

Canada/Voluntary Sector Joint Initiative,⁶⁶ which delineated three areas requiring strategic investment and attention: (1) improving the relationship between the government and the sector; (2) enhancing the capacity of the sector to serve Canadians; and (3) improving the legislative and regulatory environment in which the sector operates.

Part of the initiative to enter into a dialogue was the development of a document entitled *Accord Between the Government of Canada and the Voluntary Sector*, signed in December 2001 between the Government of Canada and the voluntary sector (“Accord”).⁶⁷ The Accord sets out the common values, principles, and commitments that are to shape the future practices of both the voluntary sector and the federal government. In accordance with the Accord's provisions, a *Code of Good Practice on Policy Dialogue* was developed,⁶⁸ which is a tool for deepening the dialogue between the sector and the government in the public policy process.

The Advocacy Working Group was one of two voluntary sector-only working groups of the Voluntary Sector Initiative. The Advocacy Working Group worked to ensure that advocacy was fully recognized and supported within the voluntary sector and outside of it. Its focus was to create the legal, financial and regulatory framework necessary to support the advocacy work of the voluntary sector. A number of helpful papers and reports were released by the working group in 2002.⁶⁹ There were also numerous papers

⁶⁶ Federal/Voluntary Sector Joint Tables, *Working Together, A Government of Canada/Voluntary Sector Joint Initiative* (28 August 1999).

⁶⁷ Voluntary Sector Initiative, *An Accord Between the Government of Canada and the Voluntary Sector*, 2001 (online: http://www.vsi-isbc.org/eng/relationship/pdf/the_accord_doc.pdf).

⁶⁸ Voluntary Sector Initiative, *Code of Good Practice on Policy Dialogue*, 2002 (online: http://www.vsi-isbc.org/eng/policy/pdf/codes_policy.pdf).

⁶⁹ The Advocacy Working Group released two Papers: "Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses" provides detailed background and context on the issue of advocacy from the perspective of the voluntary sector and establishes a framework for further discussion; and "The Sound of Citizens' Voices" is a position paper from the AWG that outlines current concerns and makes recommendations to enhance, support and recognize the advocacy work of voluntary sector organizations. Both papers were released in January 2002 to stimulate productive, creative and innovative discussion. The position paper was revised and re-released in September 2002. The Advocacy Working Group released a report: "Report to Participants: Winter 2002 Consultations on Advocacy - The Sound of Citizens' Voices": The consultations focused on the AWG position paper, Advocacy - The Sound of Citizens' Voices, and our purpose was to learn if it reflects the voluntary sector's beliefs and experiences with advocacy. The report was released in July 2002. (online: http://www.vsi-isbc.org/eng/policy/advocacy_group.cfm).

and articles around the same time advocating for reform to expand the ability of charities to engage in advocacy and political activities.⁷⁰

As part of this consultation and reform process in the early 2000s, the following are some of the key policy considerations put forward by various groups in support of expanding the limits on charities to engage in political activities:

a) Juridical incapacity

As discussed earlier, in order for a purpose to be found charitable, it must be determined that it provides a benefit for the public. This requires a judgment call on the part of the courts, and the ability of judges to make this kind of ruling on the public benefit of an organization's purposes has been questioned by various commentators. In essence, the problem is that courts do not have the competence to determine the public benefit of political purposes.

A number of articles pointed out that the courts are an inappropriate forum to determine when a proposed change in the law would be desirable for the country. Instead, this should be left to the legislators to decide, since the courts do not generally want to impinge on the power of legislators to determine what the law should be.⁷¹ Strayer, J.A. in the *Human Life* decision⁷² “stressed the difficulty he had with the courts being asked to determine whether advocacy of opinions on important social issues was for a purpose beneficial to the community”, and “agreed that this area of the law requires better

⁷⁰ For example: Peter Broder, “The Legal Definition of Charity and Canada Customs and Revenue Agency’s Charitable Registration Process”, *The Philanthropist* Vol.17, No. 3 (August 2001) 3; Richard Bridge, “The Law Governing Advocacy by Charitable Organizations: The Case for Change”, *The Philanthropist* Vol. 17, No. 2 (2000) 2; Laurie Rektor, “Advocacy-The Sound of Citizens’ Voices-A Position Paper from the Advocacy Working Group”, Voluntary Sector Initiative Report <http://www.vsi-isbc.org/eng/regulations/reports.cfm> (September 2002); IMPACS, “Charities: Enhancing Democracy in Canada”, IMPACS (2003); Deborah J. Lewis, “A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education”, 25 *Queen’s Law Journal* 679-712 (2000).

⁷¹ Peter Broder, “The Legal Definition of Charity and Canada Customs and Revenue Agency’s Charitable Registration Process”, *The Philanthropist* Vol.17, No. 3 (August 2001) 3, at 25 and 26. See also Richard Bridge, “The Law Governing Advocacy by Charitable Organizations: The Case for Change”, *The Philanthropist* Vol. 17, No. 2 (2000) 2, at 11 and 12.

⁷² *Human Life*, *supra* note 45.

definition by Parliament which is the body in the best position to determine what kinds of activity should be encouraged in contemporary Canada as charitable and thus tax exempt.”⁷³

It is interesting that it was pointed out in 2008 that the courts are merely required to rule on whether there is a public benefit in a given purpose.⁷⁴ One commentator has suggested that it is possible for the courts to take a more general approach that there is in fact a public benefit for there to be public debate over matters that may or may not fall within the legally recognized categories of charity.⁷⁵ However, it was also acknowledged that “the conceptual problems plaguing the doctrine of political purposes are symptomatic of a more fundamental problem confronting the law of charity, namely, the absence of an overarching theory of ‘charity,’ that can help make sense of what the law should and should not consider charitable.”⁷⁶

b) Difficult administration of charities

Another argument pointed out by the sector is that the lack of clarity in the rules and inconsistent application of these rules by CRA will make it difficult for charities to know what activity would be recognized to be political or charitable, which in turn would create frustration with boards and management because the stake of offending these rules would risk revocation by CRA. This, in turn, would make it difficult for charities to raise funds for activities that involve advocacy.⁷⁷ Furthermore, it has been observed that such confusion also creates fear and anxiety, both inside and outside of the charitable sector so that for many charities, “this means that they will not advocate on any issue and for others it means that they will advocate less than they are legally entitled to” and “outside of the

⁷³ *Human Life*, *supra* note 45 at p.16.

⁷⁴ Adam Parachin, “*Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes*”, 45 *Alta. L. Rev.* 871 – 899 (2008) at para.46.

⁷⁵ *Ibid.* at para. 47.

⁷⁶ *Ibid.* at para. 101.

⁷⁷ Bridge, *supra* note 71 at 12-13.

sector the fear is related to the assumptions that advocacy is controversial, threatening and is not real charity.”⁷⁸

c) Valuable role of charities in public policy debate

A further argument is that restrictive rules on charities’ involvement in public policy debate would prevent charities from fully participating in these debates and not being able to provide input from their unique understanding of the issues in question.⁷⁹ A survey of public opinion by the Muttart Foundation in 2000 found that over three-quarters of those interviewed thought that charities understand their needs better than the government.⁸⁰ Since charities can make valuable contributions to public policy debate, they should be permitted to devote a portion of their energy and resources to advocacy.⁸¹ It was also pointed out that the input of charities in public policy debate is invaluable because it helps charities to participate in ways to solve problems in society, rather than solely directing their resources in curing social problems. Charities can be an effective representation of a public interest voice and represent the marginalized and disadvantaged.⁸² However, opponents to this argument have asserted that charities have no role to play in public policy debate, which is reserved for political parties.⁸³

d) Unfair preference for advocacy by businesses

Another argument is that there is unfairness and inconsistency in the treatment of business and charities, in that businesses are encouraged to engage in political activities while charities are not. For example, businesses can deduct lobbying, advertising and advocacy expenses, and therefore able to reduce their income tax. Businesses are also

⁷⁸ Laurie Rektor, “*Advocacy-The Sound of Citizens’ Voices-A Position Paper from the Advocacy Working Group*”, Voluntary Sector Initiative Report <http://www.vsi-isbc.org/eng/regulations/reports.cfm> (September 2002) at p.4.

⁷⁹ Bridge, *supra* note 71 at 13-14.

⁸⁰ Broder, *supra* note 71 at 27, referring to Muttart Foundation and Canadian Centre for Philanthropy, *Talking About Charities*, (Edmonton: 2000) at 5.

⁸¹ Bridge, *supra* note 71 at 13-14.

⁸² IMPACS, “*Charities: Enhancing Democracy in Canada*”, IMPACS (2003) at p.10-12 and Rektor *supra* note 78 at 4.

⁸³ Bridge, *supra* note 71 at 14.

permitted to engage in these activities without limitation, while charities run the risk of losing their charitable status by engaging in such activities.⁸⁴

e) Political contributions

Political candidates and parties are also provided with favourable tax treatment in Canada. Contributions to registered political parties and candidates are entitled to tax relief.⁸⁵ The argument is not that deductibility of political contributions is wrong, but the complexity, inconsistency, and at times irrationality of income tax policy that prohibits charities from engaging in political activities, while “the state supports all sorts of individuals and groups, including business, without restricting their political involvement.”⁸⁶

f) Different treatment of different types of advocacy activities

Another argument is that although charities are restricted from engaging in advocacy directed toward swaying public opinion or lobbying politicians, the rules appear to be much more generous for charities to engage in advocacy before the courts.⁸⁷ This means that changes to the law can still be produced in the courts since there are no restrictions on this method of advocacy. It is even more interesting to note that since the imposition of the Canadian Charter of Rights and Freedoms, bringing a challenge to change the law can, in many circumstances, be brought about most effectively through the courts rather than by lobbying politicians or attempting to sway public opinion. This raises obvious contradictions with the restrictions placed on other avenues of advocacy.⁸⁸

⁸⁴ Bridge, *supra* note 71 at 15-16; and Broder, *supra* note 71 at 27.

⁸⁵ Bridge, *supra* note 71 at 16-17. Subsection 127(3) of the ITA grants a deduction to individuals from income tax for “monetary contributions” to a registered party, a provincial division thereof, a registered association or a candidate, as those terms are defined in the *Canada Elections Act*. At present, the deduction limits is generally: 75% on the first \$400, 50% on then next \$350, 33 1/3% on the next \$525, and nil on any excess over \$1,275. Corporations can no longer make federal political contributions, as subsection 404.1(1) of the *Canada Elections Act* was repealed under the *Federal Accountability Act*.

⁸⁶ *Ibid*, at 16.

⁸⁷ Bridge, *supra* note 71 at 17.

⁸⁸ *Ibid*.

g) Tax policy preventing subsidy of private political activity is flawed

An argument to support not expanding the ability of charities to speak out is based on a tax policy that there should be limits on the degree to which an individual can subsidize the private political activity of another. The reasoning goes like this: 1) Donations to charities provide an income tax advantage or credit for donors; 2) The tax implications are that other taxpayers must pay more income tax (a subsidy) as a result of the credit given to donors; and 3) Such a subsidy is acceptable when charities deliver services, but must be restricted if charities speak on policy matters in their charitable fields.⁸⁹ It was pointed out, however, that a fundamental flaw with this argument is that tax expenditures by the federal and provincial governments through charitable donation receipts amounted to just over 2% of the total revenue of Canada's charities in 2003;⁹⁰ it does not take into account the valuable input that could be provided by charities; and charities are required to engage in activities for the public good rather than to pursue "private political activities."⁹¹

h) Unfounded fiscal impact concerns

There have also been concerns raised about the negative financial consequences that could result if the ten percent restriction on political activities was removed or modified. For instance, a large and unmanageable increase in donations for charitable advocacy might develop. This increase could have serious negative implications to the bottom line of governments through the escalation of tax credits and tax expenditures.⁹² The problem with this concern is that this is a very difficult prediction to make with little evidence to

⁸⁹ IMPACS, "*Charities: Enhancing Democracy in Canada*", IMPACS (2003) at p.8.

⁹⁰ IMPACS, *supra* note 89 notes as follows at p.8:

The basic arithmetic is this: Canadians claimed donations of approximately \$5 billion last year. Federal and provincial tax credits are worth 40% or \$2 billion (the "tax expenditure"). Charities' budgets total about \$90 billion annually. Most income is from service contracts won by charities. \$2 billion is approximately 2.2% of the total budget of charities.

⁹¹ *Ibid*, at p.9.

⁹² *Ibid*.

substantiate it. It is nearly impossible to foresee these sorts of incremental costs to the government.⁹³

i) Violation of Charter rights

A further argument is that by restricting the ability of a charity to advocate, we are violating one of the most fundamental freedoms enshrined in the Canada Charter of Rights and Freedom.⁹⁴ It is argued that regardless of the motivation behind the expression, it is vital that ideas continue to be aired freely rather than causes being limited as a result of their income tax treatment. Unfortunately, this argument has not been successful before the courts. The Federal Court of Appeal has held that there was no violation of freedom of expression for two charities that had their registered status revoked on the grounds that they were too political. In *Alliance for Life*,⁹⁵ the Court quoted with approval an earlier decision that made the point:

With respect to the Charter argument based on alleged infringement of freedom of expression, the basic premise of the appellant is untenable. Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he contributes for this purpose. The appellant is in no way restricted by the *Income Tax Act* from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held.⁹⁶

Nevertheless, it is argued that by impeding charities from adding their often well-informed voices and opinions to the public debate, the government is in effect achieving

⁹³ *Ibid.*

⁹⁴ IMPACS, *supra* note 89 at p.12.

⁹⁵ *Alliance for Life*, *supra* note 56.

⁹⁶ Bridge, *supra* note 71 at p.24.

indirectly through tax policy what it cannot do directly, i.e. explicitly prohibit charities from expressing their opinions.⁹⁷

3. Policy on Political Activities Released in 2003

The 2003 Policy represents a welcomed expansion of what CRA had traditionally considered political activities. It acknowledges the Accord's observation of the need of the federal government "to engage the voluntary sector in open, informed and sustained dialogue in order that the sector may contribute its experience, expertise, knowledge and ideas in developing better public policies and in the design and delivery of programs."⁹⁸ The 2003 Policy indicates that CRA recognizes the sector's criticism of CRA's previously restrictive view, which prevented the charitable sector from informing the public about issues of concern or participating adequately in the process of developing public policy.⁹⁹ As a result, CRA indicated that the 2003 Policy reflects the following conclusions:¹⁰⁰

- The information charities give on public policy issues should be presented in an informative, accurate, and well-reasoned way to enable society to decide for itself what position to take;
- A charity cannot be established with the aim of furthering or opposing the interests of a political party, elected representative, or candidate for public office; or for the purposes of retaining, opposing, or changing the law, policy, or decision of any level of government in Canada or a foreign country;
- Charities may choose to advance their charitable purposes by taking part in political activities, if they are connected and subordinate to their purposes; and
- Political activities no longer include attempts to inform public opinion on an issue, to enable charities to more effectively carry out their public awareness programs.

The 2003 Policy provides guidance in clarifying the difference between political purposes and charitable purposes. It also sets out three types of activities, namely political activities that charities are prohibited from conducting; charitable activities that further

⁹⁷ *Ibid.*

⁹⁸ Accord, *supra* note 67, at 2.1.1.

⁹⁹ CRA 2003 Policy, *supra* note 63 at section 2.

¹⁰⁰ CRA 2003 Policy, *supra* note 63 at section 2.

the charitable purposes of a charity but have a political nature; and a limited extent of certain political activities that charities are permitted to engage in. The following is a summary of the key provisions of the 2003 Policy.¹⁰¹

a) Meaning of Political Purposes

The 2003 Policy indicates that what would constitute a charitable purpose or a political purpose is in accordance with what has been determined by the courts. In this regard, the 2003 Policy echoes the law in the *McGovern* case in that political purposes are those that seek to:

- further the interests of a particular political party; or support a political party or candidate for public office; or
- retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.¹⁰²

In explaining the rationale of this CRA position, the 2003 Policy points out that it is a requirement that charitable purposes confer a public benefit, but political purposes do not do so since this would involve a debate of whether the subject matter being pursued is for the public good. Further, the 2003 Policy points out that the appropriate forum for political debate is Parliament, and it is not appropriate for a court to “take sides” in a political debate in order to determine whether a political purpose in question is for the benefit of the public.¹⁰³

Even if an organization does not have an express political purpose, its activities will be examined in order to determine if the charity has adopted an unstated collateral political purpose.¹⁰⁴ In this regard, if the charity is carrying out an activity that becomes

¹⁰¹ For a brief summary, see Terrance S. Carter and Suzanne E. White, *Charity Law Bulletin* No. 25, “New CCRA Policy Statement of Political Activities”, October 31, 2003 (online; <http://www.carters.ca/pub/bulletin/charity/2003/chylb25-03.pdf>); and Jennifer M. Leddy, *Charity Law Bulletin* No. 206, “The Parameters of Political Activities for Registered Charities”, April 28, 2010 (online; <http://www.carters.ca/pub/bulletin/charity/2010/chylb206.pdf>).

¹⁰² CRA 2003 Policy, *supra* note 63 at section 4.

¹⁰³ *Ibid.*

¹⁰⁴ CRA 2003 Policy, *supra* note 63 at section 5.

predominant and is no longer subordinate to one of its stated charitable purposes, it may indicate that the charity is pursuing an unstated collateral political purpose, an unstated non-charitable purpose, or an unstated charitable purpose.

Lastly, the 2003 Policy indicates that some purposes can only be achieved through political intervention and legislative change and will thereby always be political purposes, such as purposes that suggest convincing or needing people to act in a certain way, which is contingent upon a change to law or government policy. An example would be a purpose to improve the environment by reducing the sulphur content of gasoline that would likely require changes in the law that regulates sulphur content of gasoline.¹⁰⁵

b) Three Types of Activities

In order to clarify what activities are political in nature that may or may not be conducted by charities, the 2003 Policy categorizes such activities into three types: namely charitable activities that are permitted without limits, prohibited partisan political activities, and permissible non-partisan political activities to which charities can only devote a limited extent of their resources.¹⁰⁶ Each of these types of activities is further explained below.

When a registered charity is choosing whether or not to carry out political activities, it must keep these guidelines and limitations in mind. It is important that a charity ensures that the activities they are carrying out are either charitable or permitted political activities, while abstaining from prohibited activities. They also have to check that the political activities undertaken fall within the expenditure limits, and that any resources expended on permitted political activities cannot be included in the amount used to meet a charity's disbursement quota. It is also vital that a charity keeps careful records of all expenditures with respect to permitted political activities.

¹⁰⁵ *Ibid.*

¹⁰⁶ CRA 2003 Policy, *supra* note 63 at section 6.

c) Charitable Activities

Charities may carry on activities that further their charitable purposes without limit, as long as the activities are neither partisan activities nor “political activities” as defined in the 2003 Policy described below. Many charities will have to communicate with the public or public officials at some point in carrying out their purposes. These forms of communication can be considered charitable activities, subject to certain limitations. They include public awareness campaigns, communicating with an elected representative or public official, and releasing the text of a representation to the public.

i) Public Awareness Campaigns

A charity may conduct public awareness campaigns to provide useful knowledge to the public to enable them to make decisions about the work a charity does or an issue related to that work. Such campaigns will be *presumed* by CRA to be charitable as long as: (1) the campaign is connected and subordinate to the charity’s purpose; (2) the information provided is based on a position that is well-reasoned, not information the charity knows or ought to know is false, inaccurate, or misleading; (3) the campaign materials do not contain primarily emotive content; (4) the activity does not fall within the definition of “political activities” contained in the 2003 Policy; and (5) campaign materials indicate how interested parties can get background information, as well as the charity’s contact information.¹⁰⁷

The 2003 Policy clarifies that organizations that engage in public awareness campaigns are distinct from organizations established to advance education as a charitable purpose. Making reference to the *Vancouver Society* and *Challenge Team* cases, the 2003 Policy explains what advancement of education in the charitable sense means.¹⁰⁸ The 2003 Policy indicates that to advance education in the charitable sense means:

- training the mind;

¹⁰⁷ CRA 2003 Policy, *supra* note 63 at sections 7.1 and 7.2.

¹⁰⁸ *Vancouver Society*, *supra* note 26. *Challenge Team v. Revenue Canada*, [2002] 2 C.T.C. 352.

- advancing the knowledge or abilities of the recipient;
- raising the artistic taste of the community; or
- improving a useful branch of human knowledge through research.¹⁰⁹

CRA further indicates that propaganda is not education and the advancement of education further requires the following: (a) must be reasonably objective and based on a well-reasoned position (i.e. a position that is based on factual information that is methodically, objectively, fully, and fairly analyzed; as well as to present serious arguments and relevant facts to the contrary); (b) must not rely on incomplete information or on an appeal to emotions; and (c) must not ultimately seek to create a climate of opinion or to advocate a particular cause.¹¹⁰

ii) Communicating With an Elected Representative or Public Official

Communicating with an elected representative or public official to make representations, regardless of whether such representations are invited or not, can be an activity that is charitable, even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed. These representations must, however, relate to an issue that is connected to the charity's purposes, be well reasoned, and not contain false, inaccurate or misleading information.¹¹¹ To clarify the application of this policy, the 2003 Policy defines "elected representative" to mean "a person who is a member of the Parliament of Canada or the legislature of a province, territory, or municipal council, and includes an elected member of a legislative body, a school board, or a ruling member of government in a foreign country;" and defines "public official" to mean "any person employed by any level of government in any country that is responsible for the laws, policies, or decisions made

¹⁰⁹ CRA 2003 Policy, *supra* note 63 at section 8.

¹¹⁰ *Ibid.*

¹¹¹ CRA 2003 Policy, *supra* note 63 at section 7.3.

in a given field.”¹¹² In this regard, the 2003 Policy reminds charities that they may need to be registered under the applicable lobbying legislation.¹¹³

Releasing the text of a representation to the public through a press release or website will also be considered charitable, provided that the full text of the presentation is released and there is no explicit call to political action, either in the text or in reference to the text. A charity may also explain in a newsletter that it intends to make, or has made, a representation and is willing to distribute the information to anyone who wants a copy.

However, if there is an explicit call to political action in any part of the representation or in reference to it, the activities could be recognized as a political activity and all of the resources associated with the representation could be considered devoted to a political activity.¹¹⁴ For purposes of the 2003 Policy, “a call to political action” is defined to mean “an appeal to the members of the charity or to the general public, or to segments of the general public, to contact an elected representative or public official to urge them to retain, oppose or change the law, policy or decision of any level of government.”¹¹⁵ While an activity involving a call to political action would not be recognized as a charitable activity; it could be recognized as political activity that a charity may be permitted to engage in up to certain limits as explained below, as long as the activity is not partisan.

The following are examples of the type of activities that would be considered by CRA to be charitable:¹¹⁶

- distributing a charity’s research on a topic relevant to its charitable purposes to the public and to all election candidates during an election campaign; publishing a research report online;
- presenting a research report to a Parliamentary Committee (which may include a proposal solution to a political issue based on a well-reasoned position) and giving an interview to the media about the said report and representation

¹¹² CRA 2003 Policy, *supra* note 63 at Appendix I.

¹¹³ CRA 2003 Policy, *supra* note 63 at footnote 7.

¹¹⁴ CRA 2003 Policy, *supra* note 63 at section 7.3.1.

¹¹⁵ CRA 2003 Policy, *supra* note 63 at Appendix I.

¹¹⁶ CRA 2003 Policy, *supra* note 63 at section 14.1.

(provided that the interview is a not part of a media campaign arranged by the charity to publicize its conclusion);

- distributing a research report to all Members of Parliament in order to inform elected representatives about the charity’s work on an issue that is connected and subordinate to its purposes and based on a well-reasoned position; and
- participating in an international policy development working group and joining a government advisory panel to discuss policy changes.

d) Prohibited Activities

While charities can conduct activities that further their charitable purposes as explained above, they cannot engage in partisan political activities, even if these activities may further their charitable purposes. In this regard, paragraphs 149.1(6.1)(c) and 149.1(6.2)(c) of the ITA prohibit charities from engaging in those political activities that “include the direct or indirect support of, or opposition to, any political party or candidate for public office.” The 2003 Policy provides that a partisan political activity involves the direct or indirect support of, or opposition to, any political party or candidate for public office.¹¹⁷

The 2003 Policy indicates that when a political party or candidate for public office supports a policy that is also supported by a charity, the charity must not directly or indirectly support the political party or candidate for public office. However, it would be a charitable activity, as explained above, for the charity to promote the policy in question, and may make the public aware of its position on an issue, provided that (a) it does not explicitly connect its views to any political party or candidate for public office; (b) the issue is connected to its purposes; (c) its views are based on a well-reasoned position; and (d) public awareness campaigns do not become the charity’s primary activity.¹¹⁸

In addition, a charity must not single out the voting pattern on an issue of *any one* elected representative or political party; but it may provide information to its supporters

¹¹⁷ CRA 2003 Policy, *supra* note 63 at section 6.1.

¹¹⁸ *Ibid.*

or the public on how *all* the Members of Parliament or the legislature of a province, territory or municipal council voted on an issue connected with the charity's purpose.

Examples of partisan activities provided in the 2003 Policy include: a charity publishing a newsletter just before an election supporting a particular candidate for an election; a charity distributing leaflets during an election campaign highlighting lack of government support for the charity's goals which may mobilize public opinion against the current government; a charity preparing dinner for campaign organizers of a political party; and a charity inviting different election candidates to speak at different events held by the charity (even though the charity does not endorse any specific candidate), rather than inviting all candidates to speak at the same event, and giving each the same amount of time to speak on their general platform.¹¹⁹

A charity can charge fair market rent to a political party for occasional meetings, which, in itself, does not always indicate a charity's support of such a party, especially in rural areas where sometimes a registered charity may have the only hall that can accommodate such meetings.¹²⁰ However, CRA recognizes that it is possible that support of a particular political party (and therefore partisan activity) can manifest itself in other ways. For example, the charity could charge fair market rent to one political party, but be reluctant to rent the premises to all others; or the charity could have a frequent and continued association with the same political party; or a party's local headquarters could be located in a building owned by a charity.

The prohibition on charities to engage in partisan activities often becomes an issue for charities engaging in political activities around the time of an election, since there is a higher likelihood at that time that a member of the board or a volunteer will accidentally take part in something partisan. At the last federal election held in 2007, CRA issued "Advisory on Partisan Political Activities" to remind registered charities that there are

¹¹⁹ CRA 2003 Policy, *supra* note 63 at section 14.2.

¹²⁰ Canada Revenue Agency, Policy Commentary CPC-007, "Partisan Political Activity – Whether charging fair market rent to a political party for use of charity's premises constitutes direct or indirect support of a political party," October 14, 1992, modified December 3, 2002 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-007-eng.html>).

limitations on certain types of political activities (the “Advisory”).¹²¹ In addition to providing a useful summary of the 2003 Policy, the Advisory indicates that during election campaigns, CRA steps up monitoring of activities of registered charities and will take appropriate measures if a registered charity undertakes partisan political activities.

CRA’s Policy Commentary CPC-001 indicates that the attendance by registered charity officials, in their official capacity, at a fundraising dinner for a politician is not acceptable because it conveys the impression of partisan political activity by a registered charity.¹²² However, the Advisory clarifies that the restrictions on the involvement of charities with political parties, candidates and elections is not intended to restrict statements or actions on such political matters by employees or members of a charity, including its leaders, who happen to be speaking or acting in their individual capacity. For example, these individuals may choose to assist any candidate or political party in a personal capacity, but should not use their position with the charity in any campaigning activities in such a way as to suggest that the charity endorses any candidate. Also, individuals can publicly voice their views on such matters, but should not make partisan comments in speeches at their charity functions or in charity publications. In situations outside charity functions and publications, these individuals (particularly leaders) speaking and writing in their individual capacity are encouraged to indicate that their comments are personal rather than intended to represent the views of the organization.

e) Permitted Activities

Paragraphs 149.1(6.1)(a) and (b) as well as 149.1 (6.2)(a) and (b) of the ITA permit charities to devote part of their resources to political activities that are ancillary and incidental to their charitable purposes, as long as the activities are non-partisan

¹²¹ Canada Revenue Agency, “Advisory on Partisan Political Activities”, September 24, 2007 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/dvsry-eng.html>). In 2004, CRA also issued a similar but shorter advisory “Important Advisory on Political Activities Guidance and Partisan Politics”, June 11, 2004 (online: http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/pltcl_ctvts-eng.html).

¹²² Canada Revenue Agency, Policy Commentary CPC-001, “Partisan Political Activities – whether the attendance by a registered charity official at a political fundraising dinner is considered a partisan political activity” February 6, 1990, modified December 3, 2002 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-001-eng.html>).

[paragraphs 149.1(6.1)(c) and 149.1 (6.2)(c)]. Therefore, between the two extremes of charitable activities that charities may engage in without any limits and partisan activities which charities are not permitted to engage in at all, there is a spectrum of activities that are political in nature which the 2003 Policy defines to be “political activities.” In this regard, the 2003 Policy indicates that a charity may take part in political activities if they are “non-partisan and connected and subordinate to the charity’s purposes.”¹²³

i) Definition of “political activities”

“Political activities” is not defined in the ITA. For purposes of CRA’s administration, the 2003 Policy indicates that an activity would be presumed by CRA to be a political activity if a charity:

- explicitly communicates a call to political action (i.e., encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
- explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or
- explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.¹²⁴

While a charity may engage in political activities, it is still required under paragraphs 149.1(6.1) and (6.2) to devote *substantially all* of its *resources* to charitable purposes and activities. Subsection 149.1(1.1) of the ITA provides that expenditures on political activities by a registered charity are not considered to be amounts expended on charitable activities.

¹²³ CRA 2003 Policy, *supra* note 63 at section 6.2.

¹²⁴ *Ibid.*

ii) Definition of “resources”

The word “resources” is not defined in the ITA. CRA generally considers it to include the total of a charity’s financial assets, as well as everything the charity can use to further its purposes, such as its staff, volunteers, directors, and its premises and equipment.¹²⁵

iii) Meaning of “substantially all”

“Substantially all” is also not defined in the ITA. CRA usually considers substantially all to mean ninety percent or more of a charity’s total resources. This leaves no more than ten percent of a charity’s total resources available to be expended on political activities.

CRA’s administrative discretion concerning the limits on expenditures on political activities has been extended in certain situations by the 2003 Policy. First, in view of the fact that smaller charities may experience a greater negative impact by the 10% rule, CRA is prepared to provide more flexibility for smaller charities, increasing the allowable limit to 20% for charities with less than \$50,000 annual income in the previous year, 15% for charities with annual income between \$50,000 and \$100,000 in the previous year, and 12% for charities with annual income between \$100,000 and \$200,000 in the previous year.¹²⁶

Second, CRA is also prepared not to revoke charitable registration if a charity was to overspend beyond the 10% limit in an isolated particular year. As well, CRA is also prepared to accept that infrequent, short-term, one-of-a-kind political activities in excess of the 10% limit would not disqualify a charity under the substantially all test. CRA will take into account whether there are any unique one-time conditions that cause a charity to devote an unusual amount of its resources to political activities in a given year by examining the year under review and comparing it to the charity’s past expenditure

¹²⁵ CRA 2003 Policy, *supra* note 63 at section 9.

¹²⁶ *Ibid.*

patterns and behaviour over one or more previous years. Finally, CRA will permit a charity to use the unclaimed portion of the resources that it was allowed to spend but did not spend on political activities from up to two preceding years.¹²⁷

iv) Meeting disbursement quota

All registered charities are required to expend a portion of its assets annually in accordance with a disbursement quota, which is a prescribed amount that registered charities must disburse each year in order to maintain their charitable registration. Failure to comply with the disbursement quota may result in the imposition of interim penalty sanctions on the charity, or even the loss of its charitable status. The calculation of the disbursement quota generally consists of two parts, an 80% disbursement quota and a 3.5% disbursement quota. However, the March 2010 federal budget announced legislative changes to eliminate the 80% disbursement quota and increase the exemption from the 3.5% disbursement quota.¹²⁸

Only disbursements on charitable activities and gifts to qualified donees¹²⁹ can be used to meet a charity's disbursement quota. Since subsection 149.1(1.1) of the ITA provides that expenditures on political activities by a registered charity are not considered to be amounts expended on charitable activities, charities cannot use the amounts they

¹²⁷ CRA 2003 Policy, *supra* note 63 at section 9.1.

¹²⁸ Draft amendments to the ITA were released on August 27, 2010 for consultation. See <http://www.fin.gc.ca/n10/10-074-eng.asp>. See also Karen Cooper and Terrance S. Carter, "Significant Benefit for Charities in 2010 Federal Budget DQ Reform" *Charity Law Bulletin* No. 197, March 8, 2010 (online: <http://www.carters.ca/pub/bulletin/charity/index.html>).

¹²⁹ Subsection 149.1(1) of the ITA provides that qualified donees are organizations that can issue official donation receipts for gifts that individuals and corporations make to them under paragraphs 110.1(1)(a) and (b) and 118.1(1). They consist of registered charities, registered Canadian amateur athletic associations, certain low-cost housing corporations for the aged, municipalities, provincial and federal governments, the United Nations and its agencies, prescribed universities outside Canada, charities outside Canada to which the federal government has made a gift in the past year, and registered national arts service organizations. In February 2004, it was proposed to amend sections 110.1 and 118.1 of the ITA by including municipal or public bodies performing a function of government in Canada. This proposed amendment has been brought forth and included in Bill C-33 in November 2006, which died on the Order Paper since the federal Parliament was prorogued on September 14, 2007. The proposed amendment was again re-introduced in Bill C-10 on October 29, 2007. Bill C-10 again died following the dissolution of the federal Parliament on September 7, 2008. Most recent, it was again included in draft legislative proposals released on July 16, 2010.

devote to their political activities to help them meet their disbursement quota. Therefore, they should check to make sure they will have no difficulty meeting their quota before considering any expenditure on political activities.¹³⁰ However, if a charity was to make a gift to another charity to help support that other charity's political activities, then the transferor charity can use the gift to meet its own disbursement quota, but the recipient charity will not be able to use its expenditure on political activities to meet its own disbursement quota.¹³¹ s

v) Record keeping and reporting

Since charities that engage in political activities will need to be able to demonstrate that they do not expend over the allowable limit, it is essential that they keep careful records on how they have utilized their resources on political activities. Due to the broad meaning of the term "resources" including staff, volunteers, directors, and its premises and equipment, the records to be kept by a charity is not only limited to financial records, but records involving all areas of resources, including human resources, physical premises, etc.¹³² In addition, keeping accurate records is especially important where unique one-time circumstances are involved or if a charity wants to utilize unspent allowable limits from previous years.

In tracking how resources are expended on a political activity, the 2003 Policy indicates that where expenditures relate in part to political activities and in part to other activities (for example a staff person whose duties are in part responsible for operating a charitable program and in part for a political program), a reasonable allocation of the expenditures should be made and the methodology should be consistent from year to year. However, where substantially all (90% or more) of an expense is for charitable activities (e.g. 95% of the staff's duties and time is to operate a charitable program, and 5% on a political program), then the whole expense can be considered a charitable expense.

¹³⁰ CRA 2003 Policy, *supra* note 63 at section 11.

¹³¹ *Ibid.*

¹³² CRA 2003 Policy, *supra* note 63 at section 12.

Similarly, if the expense relates substantially to a political activity, the whole expense should be counted as a political expense.¹³³

The 2003 Policy also emphasizes that a charity should choose record-keeping methods suited to its operations, provided that the method chosen is consistently applied, complies with the requirements of the ITA, and is sufficient to disclose its position.¹³⁴ In addition, charities must ensure that details about its political activities are accurately disclosed and reported in its annual Registered Charity Information Return (form T3010).

The following are examples given in the 2003 Policy of permitted political activities within the allowable limits: buying a newspaper advertisement to pressure the government to change a particular law; organizing a march to Parliament Hill to put pressure on the government to change its policy; organizing a conference or workshop that explicitly promotes a charity's point of view on an existing or proposed law, policy, or decision that relates to the way the charity achieves its purposes; hiring a communication specialist to arrange a media campaign to expressly communicate that a law should be retained or changed; using a mail campaign to urge supporters and the public to contact the government (which is a call to political action); or organizing a rally on Parliament Hill to pressure the government to change the law.¹³⁵

f) Other Issues

Lastly, the 2003 Policy clarifies that charities that intend to carry out activities that go beyond the permissible limits imposed on charities may establish a separate and distinct non-charity to do so, as long as the charity does not provide funding or other resources (including staff, premises, etc.) to that organization for any otherwise impermissible political activities.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ CRA 2003 Policy, *supra* note 63 at section 14.3.

Such a non-charitable entity would not be subject to the limits and restrictions that apply to charities, and it has complete freedom within the law to support any cause it chooses.¹³⁶ One option to establish such a non-charitable entity would be to utilize a tax-exempt “non-profit organization” under paragraph 149(1)(l) of the ITA.¹³⁷ Non-profit organizations are generally exempt from income tax, but are not permitted to issue official donation receipts. All non-profit organizations are required under the ITA to meet 4 requirements, namely (1) it is not a charity at common law, (2) it is established exclusively for non-profit purposes, (3) it is operated exclusively for non-profit purposes, and (4) no part of its income is paid to its members for private benefit.

4. Sector Response to the 2003 Policy

Following the release of the 2003 Policy, a number of prominent Canadian charities expressed the view that the 2003 Policy presented an improvement over the previous CRA policies, but that more work needed to be done in order to give charities greater input into the political process in Canada.¹³⁸ The Canadian Centre for Philanthropy (as it was known then, now known as Imagine Canada), for example, which participated in the drafting of the 2003 Policy, stated on page 1 of its *Issue Alert* dated September 19, 2003, that:

...public awareness campaigns are more precisely defined in the new document and more generous rules for smaller charities in calculating their political activity are included....[but] the Centre’s view continues to be that a legislative amendment is required to free charities to speak out on issues about which they are knowledgeable.¹³⁹

Similarly, the Institute for Media, Policy and Civil Society outlined its position on the new 2003 Policy in a letter to the Minister of National Revenue as follows:

¹³⁶ CRA 2003 Policy, *supra* note 63 at section 6.

¹³⁷ CRA, *Interpretation Bulletin* IT-496R, “Non-Profit Organizations”, August 2, 2001 (online: (see CRA’s website at <http://www.cra-arc.gc.ca/E/pub/tp/it496r/it496r-e.html>))

¹³⁸ Terrance S. Carter and Suzanne White, “New CCRA Policy Statement on Political Activities”, *Charity Law Bulletin* No.25, October 31, 2003 (online: <http://www.carters.ca/pub/bulletin/charity/2003/chylb25-03.pdf>).

¹³⁹ *Ibid*, at 9.

The draft represents an incremental improvement over the present administrative guidelines published by the CCRA. However, it is fundamentally flawed because it must comply with the poorly drafted and unworkable language in sections 149.1(6.1) and 149.1(6.2) of the Income Tax Act. In our view, amendment of these troublesome provisions is essential in order to resolve the current problems faced by Canadian charities in this field.¹⁴⁰

The Community Foundations of Canada also indicated that the 2003 Policy is an improvement over the previous guidelines:

The CCRA's New Guidelines, though based on a faulty policy premise and inadequate legislation, do provide incremental improvements and increased clarity for community foundations as they establish their funding priorities.¹⁴¹

5. Religious Charities

Notwithstanding the above rules regarding restrictions on the type and extent of political activities that registered charities may engage in, the application of the rules for religious charities is generally in such a way that does not impinge on a religious charity's general ability to advocate under the rubric of the advancement of religion. This is because advancement of a religion, by its very nature, typically involves proselytizing or the propagation of beliefs, and may encompass a wide range of activities that relate to the religion. As such, religious charities inherently need to be afforded more flexibility when they engage in advocacy.¹⁴²

Courts in most common law jurisdictions have affirmed that advancement of religion, at its core, involves the promotion, dissemination and propagation of one's religious beliefs to others, and "freedom of religion involves freedom in connection with

¹⁴⁰ *Ibid.*

¹⁴¹ Richard Bridge, "Innovation and Problem Solving: a Bolder, More Active Role For Community Foundations", Institute for Media, Policy and Civil Society - Community Foundations of Canada (January 2004) at 6.

¹⁴² For an overview on this issue, see Terrance S. Carter, "Advancing Religion as a Head of Charity: What Are The Boundaries?" October 2006 (online: http://www.carters.ca/pub/article/church/2006/advrel_oct06.pdf).

the profession and dissemination of religious faith and the exercise of worship.”¹⁴³ In the Australian case of *Church of the New Faith v. Commissioner of Pay-Roll Tax*, the court acknowledged that a central element of religion is the acceptance and promotion of moral standards of conduct which give effect to a belief.¹⁴⁴ This principle was perhaps best expressed in the *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council* decision, where it was stated that “[t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.”¹⁴⁵

Furthermore, courts have acknowledged that advancement of religion extends beyond worship and includes related activities, such as addressing social, moral and ethical issues. In relation to this inclusive approach, the Ontario Law Reform Commission stated that, “[t]he domain of religious activity is essentially, but by no means exclusively spiritual, and that there is a necessity for an established doctrine and an element of doctrinal propagation, both within and sometimes outside the membership.”¹⁴⁶ In *Re Scowcroft*, the court affirmed the principle that despite the fact that the nature of a particular activity may in and of itself not appear to be charitable, it may still be held to be charitable where it is done for the larger purpose of advancing religion.¹⁴⁷

In summary, the law in Canada has recognized that advancing religion can encompass activities that are not in and of themselves overtly spiritual in nature, but which nevertheless maintain the crucial element of being based within, and serving to promote, a

¹⁴³ *Walter v. A.G. Alta.*, [1969] S.C.R. 383, [1969] 66 W.W.R. 513 at 521.

¹⁴⁴ *Church of the New Faith v. Commissioner of Pay-Roll Tax*, 83 A.T.C. 4652, at 652.

¹⁴⁵ *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council*, [1957] 1 W.L.R. 1080 at 1090; 3 All E.R. 281 (Q.B.D.) at 285. Affirmed in *Russel Estate (Re)*, [1977] 6 W.W.R. 273, 1 E.T.R. 285.

¹⁴⁶ Ontario Law Reform Commission, *Report on the Law of Charities* (Queen’s Printer for Ontario, 1996) at c. 8-3(b).

¹⁴⁷ *Re Scowcroft*, [1898] 2 Ch. 638. In *Re Scowcroft*, the court accepted that a gift of a reading room “to be maintained for the furtherance of Conservative principles and religious and mental improvement” was made for the purposes of advancing religion, and was therefore charitable. In *Re Hood*, [1931] 1 Ch. 240, the court determined a gift that was made to spread Christianity by encouraging others to take active steps to stop drinking alcohol was a charitable gift, since it was made for the purpose of advancing religion.

recognized religious doctrine. It is within this context that a religious organization whose work places an emphasis upon a practical application of religious principles should be able to be recognized as charitable under the head of advancement of religion. Chief Justice Gleeson of the Australian court correctly points out that “[p]eople sometimes react with surprise and even indignation when church leaders make a public affirmation of religious doctrine. But what is to be expected of church leaders if they do not, from time to time, do that? Have people really considered what the social consequences would be if the great religions abandoned their teaching role?”¹⁴⁸

In this regard, CRA is working on a new guidance on advancement of religion as a charitable purpose. In a presentation by the former Director General of the Charities Directorate of CRA, Mr. Terry de March, a working draft of the CRA guidance was released. The ability of religious charities to engage in some political activities that are related to advancing the faith is clarified in the draft guidance as follows:

Organizations formed to support a political party or for the purpose of changing or opposing a change to the law or government policy in Canada or elsewhere cannot be registered as a charity. For example, if an entity is created with the main purpose of opposing or supporting a change in the law on a particular topic, that organization would not be charitable as advancing religion. That would be so even though their positions on the issue were based on religious doctrine or belief. On the other hand, if a more broadly based religious organization with a wider range of activities that advance religion occasionally opposes or supports a change in the law related to their religious beliefs this would be permissible within the allowable limits for political activity as distinct from an unacceptable political purpose.¹⁴⁹

Nevertheless, religious charities in Canada still need to be aware of CRA’s position on political activities. There is a danger that religious organizations engaged in activities other than pure religious worship and teaching doctrines, particularly if they involve political activities, could become vulnerable to having their charitable status revoked or

¹⁴⁸ Anthony Murray Gleeson, “The Relevance of Religion” (2001) 75 A.L.J. 93 at 95.

¹⁴⁹ Terry de March, “CRA Guidelines on Advancement of Religion as a Charitable Purpose” and PowerPoint presentation to the Modernising Charity Law Conference of the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology in April 16 to 18, 2009 (online: <https://wiki.qut.edu.au/display/CPNS/DAY+2+-+MCL+Conference+Papers>).

being denied charitable status in the first instance, on the basis that they engage in too much overt political activity. As one commentator has suggested:

If anything, the best way to deal with the problem is to ensure that any organization that alleges to be religious should have a primary purpose and thrust that are indeed religious; that any political pronouncements a religious charity makes are incidental, and that they are clearly tied to religious observance. Otherwise it would seem difficult to defend actions on the basis of advancement of religion.¹⁵⁰

6. CRA Policy on Charities Promoting Racial Equality

On the same day that the 2003 Policy was released, CRA released a Policy Statement on Registering Charities that Promote Racial Equality,¹⁵¹ which provides guidance on charities established to promote racial equality.

The policy clarifies that CRA has been relying on *Re Strakosch*,¹⁵² which found “appealing racial feeling within the community” to be a political purpose. This decision acknowledged that promoting race relations through educational methods might be considered charitable as advancement of education and, as a result, applicants whose purposes and activities are clearly worded to fit within the advancement of education category of charity have been registered in Canada.¹⁵³ CRA explains:

However, given the significant change in Canadian legislation and public policy since that decision, CRA recognizes that the reconsideration of whether promoting positive race relations is still a political purpose is overdue. One of the reasons a political purpose cannot be charitable is that political issues are ultimately for Parliament to decide. With Parliamentary recognition of the promotion of positive race relations and the elimination of racial discrimination in Canada, it appears possible to move beyond the *Re Strakosch* case. Promoting racial equality is consistent with existing, broadly-based legislation and public policy. This establishes it as undoubtedly beneficial to the public, and no longer political. As a result,

¹⁵⁰ Carl Juneau, *Defining Charitable Limits: Advocacy, Education and Political Activities* (Law Society of Upper Canada – Department of Continuing Legal Education, 1998).

¹⁵¹ Canada Revenue Agency, *Policy Statement CPS – 021 “Registering Charities that Promote Racial Equality”* September 2, 2003 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-021-eng.html>).

¹⁵² *Re Strakosch* [1949] 1 Ch. 529 (C.A.).

¹⁵³ CRA, *Policy Statement CPS– 021*, *supra* note 151 at para. 4.

CRA accepts the promotion of racial equality as manifestly beneficial to the public.¹⁵⁴

7. CRA Policy on Charities Assisting Ethnocultural Communities

In 2005, CRA released a Policy Statement on Applicants Assisting Ethnocultural Communities,¹⁵⁵ which provides guidance on charities established to promote racial equality. This policy clarifies that ethnocultural work can involve advocacy, and while advocacy is not necessarily a political activity, it sometimes can be. A charity that advocates for disadvantaged individuals, to help them gain access to entitled services or resources, would be an example of acceptable advocacy. A charity is also free to speak on issues related to its purposes, but when it does so, it should consider the rules for such activities, since they establish whether the activity is charitable, political, or prohibited.¹⁵⁶

8. CRA Guidance on Charities Upholding Human Rights

Subsequent to the 2003 Policy, CRA released a Guidance on Upholding Human Rights and Charitable Registration in 2010¹⁵⁷, which provides guidelines on charities that are established to uphold human rights, such as activities that seek to encourage, support, and defend human rights that have been secured by law, both in Canada and abroad. It clarifies that while upholding the administration and enforcement of the law is a well-recognized charitable purpose, attempting to change the law in Canada or another country dealing with human rights is not a charitable purpose. Therefore, although part of charitable human rights work may entail seeking to clarify the status of particular rights, advocating for the establishment of new legal rights at the domestic or international level outside these limits disqualifies groups from charitable registration.¹⁵⁸

¹⁵⁴ *Ibid*, at para. 5.

¹⁵⁵ Canada Revenue Agency, Policy Statement CPS – 023 “Applicants Assisting Ethnocultural Communities”, June 30, 2005 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-023-eng.html>).

¹⁵⁶ *Ibid*, at para. 12.

¹⁵⁷ Canada Revenue Agency, *Guidance Upholding Human Rights and Charitable Registration*, May 15, 2010 (online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghts-eng.html>).

¹⁵⁸ *Ibid*, at section 3.2.

The guidance also points out that although the court in the *McGovern* case¹⁵⁹ refused charitable status to the Amnesty International Trust on the grounds that it was seeking to put pressure on governments to uphold human rights and, in particular, to stop using torture or imposing the death penalty were “political” purposes in the sense of seeking to change the law, the court did hold that “a trust for the relief of human suffering and distress would be capable of being charitable in nature” within the spirit and intendment of the preamble to the Statute of Elizabeth. Therefore, it was not the subject matter (human rights) itself that was not charitable, but the political nature of the organization’s activities that fell outside the scope of charity law.¹⁶⁰

Further, the guidance points out that this decision was rendered in a particular legal context, i.e. at a time when the United Kingdom had not yet ratified certain key human rights conventions or enacted measures to uphold the relevant human rights. The Amnesty International Trust’s activities were therefore aimed at changing the law and determined to be political as a consequence. Since that time, many countries, including Canada, have signed treaties and passed legislation protecting human rights, therefore changing the legal context significantly.

Although Canada had already passed the *Canadian Human Rights Act* in 1977, the subsequent entrenchment of the Canadian Charter of Rights and Freedoms in the *Constitution Act, 1982* reinforced the importance of human rights in the Canadian legal context. As a result of these changes in Canada, and similar legislative changes in many countries around the world, activities that were considered political at the time of the *McGovern* decision are no longer so, since no attempt to change the law is implied. To the contrary, such activities have become charitable as upholding the administration and enforcement of the law, which is a recognized charitable purpose under the fourth head.

¹⁵⁹ *McGovern*, *supra* note 21.

¹⁶⁰ *CRA Guidance Upholding Human Rights*, *supra* note 157 at section 4.1.

The guidance further made reference to the Canadian cases of *Lewis v. Doerle*¹⁶¹ in 1898 and *Action by Christians for the Abolition of Torture*¹⁶² case in 2002 for more guidelines.

F. LOBBYING LEGISLATION

Separate and apart from the regulatory regime under the ITA regarding the type and extent of political activities that may be conducted by registered charities, charities that engage in lobbying activities are also regulated under federal and various provincial lobbying statutes. However, there is no coordination between the two regimes. What constitutes a charitable activity, partisan prohibited activity or permitted political activity under the 2003 Policy may not be recognized as a lobbying activity regulated under lobbying statutes and *vice versa*. It is possible for charities to engage in lobbying activities within the parameters of the 2003 Policy and thereby they may need to comply with the regulations under lobbying statutes. Many charities are not aware of the existence of lobbying statutes, or are uncertain that some of their programs constitute lobbying and therefore require them to register under these statutes.

The federal *Lobbyist Registration Act* has been in place since 1988.¹⁶³ In December of 2006, the *Federal Accountability Act*¹⁶⁴ was enacted to improve the transparency of lobbying and the accountability of government decision-making. It amended the *Lobbyist Registration Act* and renamed it the *Lobbying Act*. These amendments came into force on July 2, 2008.

Many other provinces have also enacted similar legislation.¹⁶⁵ Although there are differences between these statutes (such as what constitutes lobbying, when registration is required, etc.), both of them apply to charities and non-profit organizations. A

¹⁶¹ *Lewis v. Doerle* [1898] O.J. No. 25. (C.A.).

¹⁶² *Action by Christians*, *supra* note 60.

¹⁶³ The *Lobbyist Registration Act*, R.S.C. 1985, c.44 (4th supp.) as am. by S.C. 1993, c.12, S.C. 1995, c.12, S.C. 2003, c.10 and S.C. 2004, c.7.

¹⁶⁴ S.C. 2006, c. 9.

¹⁶⁵ For example, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, Québec and Alberta.

comparative review of these provisional statutes is outside the scope of this paper. What follows is a brief overview of the application of the *Lobbying Act* (the “LA”) to charities.¹⁶⁶

1. Lobbying Activities

The LA provides for the public registration of those individuals who are paid to communicate with public office holders in attempts to influence government decisions. “Lobbying” is not defined in the LA. Instead, it requires registration if an individual, corporation or organization wishes to communicate, for payment, whether formally or informally, with a public office holder with regard to any of the following:¹⁶⁷

- the making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs;
- the awarding of federal grants, contributions or other financial benefits; and
- in the case of consultant lobbyists, the awarding of a federal government contract and arranging a meeting between their client and a public office holder.

Public office holders are defined in the LA as virtually all persons occupying an elected or appointed position in the Government of Canada, including members of the House of Commons and the Senate and their staff, as well as officers and employees of federal departments and agencies, members of the Canadian Forces and members of the Royal Canadian Mounted Police.¹⁶⁸

As indicated above, it is possible that an activity that is acceptable under the 2003 Policy as a charitable activity or permitted political activity be recognized as a lobbying activity under the LA and therefore will require registration. For example, distributing a research report by a charity to all Members of Parliament is a charitable activity under the 2003 Policy, but is recognized as a lobbying activity that requires registration; buying a

¹⁶⁶ For a helpful summary, see Guy Giorno, “The Nuts and Bolts of Lobbying by Charities-Prevention and Tactics”, 2007 National Charity Law Symposium (May 10, 2007), and Jane Burke-Robertson, “Lobbyist Registration Legislation: Impact On Ontario Charities And Non-Profit Organizations” *Charity Law Bulletin* No. 147, October 24, 2008 (online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb147.pdf>).

¹⁶⁷ Subsections 5(1) and 7(1) of the LA.

¹⁶⁸ Subsection 2(1) of the LA.

newspaper advertisement to pressure the government is a permitted political activity, and would possibly require lobbying registration if the advertisement appeals to members of the public to contact government officials directly; and organizing a march to Parliament Hill is a permitted political activity, but would likely not require lobbying registration unless there are direct appeals to members of the public to contact government officials directly, etc.¹⁶⁹

2. Charities as Lobbyists

The LA identifies three types of lobbyists. Firstly, consultant lobbyists, who are persons hired to communicate on behalf of their clients. These persons may be professional lobbyists (such as government relations consultants, lawyers, accountants, etc.), but could also be any individual who, in the course of their work for a client, communicates or arranges meetings with a public office holder. Secondly, in-house lobbyists for corporations are employees of a business who lobby for their employer as a significant part of their duties (20% or more). In this case, the registration is by its most senior paid officer of a corporation that lobbies.

The last type of lobbyist is an in-house lobbyist for charities and non-profit organizations in which one or more employees lobby. In this case, the entity is registered by the most senior paid officer as an organization that lobbies. As the registrant, the most senior paid officer of such an organization must register the names of all employees engaged in lobbying activities if the total lobbying activity of all such employees equals 20 percent or more of the duties of one equivalent full-time employee.¹⁷⁰ In explaining the application of the 20% rule, the bulletin provides the following helpful guidance as follows:

In the case of corporations or organizations, the officer responsible for filing the return must determine whether or not lobbying constitutes a significant

¹⁶⁹ Giorno, *supra* note 166 at 19 and 20.

¹⁷⁰ Pursuant to an interpretation bulletin issued by Office of the Commissioner of Lobbying of Canada entitled "A Significant Part of Duties ("The 20% Rule")" (August 11, 2009) (online: <http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00111.html>).

part of the duties of those employees who communicate with public office holders and who are subject to the 20% rule. This can be done using various approaches. One way is to estimate the time spent preparing for communicating (researching, drafting, planning, compiling, travelling, etc) and actually communicating with public office holders. For instance, a one-hour meeting may require seven hours of preparation and two hours of travel time. In this case, the time related to lobbying with a public office holder would be a total of 10 hours.

In situations where the time related to lobbying is difficult to estimate, the officer responsible for filing will have to estimate the relative importance of the lobbying activities by examining, for example, the various duties for which the employee is responsible and determining the proportion related to lobbying activities. Both methods may be used in conjunction if the situation is unclear. In any case, the officer responsible will be accountable for the decision as to whether or not a registration is necessary.

In order to provide a time basis for estimating the relative importance of lobbying activities, and considering that reporting requirements cover monthly periods, a period of one month should also be used. Assuming a five-day work week, an individual would have to lobby the equivalent of one day per week to reach the threshold. For instance, a requirement to register could be triggered for a corporation or an organization when the total amount of time spent lobbying by all paid employees equals 20% or more of the working hours of one employee.¹⁷¹

The following are examples of activities that are exempt from the requirement to register and should not be factored into a calculation of the significant part of duties:

- communications restricted to a straightforward request for publicly available information;
- preparation and presentation of briefings to parliamentary committees;
- employees making submissions to federal public office holders on the employer's behalf with respect to the enforcement, interpretation or application by that official of any existing federal statute or regulation; and
- routine dealings with government inspectors and other regulatory authorities.¹⁷²

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

For charities and non-profit organizations, since the lobbyist registration requirement only applies to lobbying activities engaged in by paid employees, lobbying conducted by volunteers would not require lobbying registration.

It is important to note that not only does the registration requirement apply to charities and non-profits, persons paid to lobby on their behalf are also required to register as “consultant lobbyists” as explained above. In this regard, consultant lobbyists can include members of charities and non-profits who are paid (not as their employees) for engaging in lobbying activities for these entities. For example, where the chairperson or a member of a board of directors of a charity communicates with federal public office holders in the course of his/her duties, the person would be required to register as a consultant lobbyist if the person is an outside director who is paid for his/her services beyond reimbursement of expenses. If such a person is a lawyer by profession, it would be necessary for the lawyer to distinguish whether the lobbying is in the context of his/her law practice or in his/her position as an officer for the non-profit. Technically, this issue would not arise in situations involving charities, since directors of a charity are considered to be quasi-trustees for the purposes of managing and investing its charitable property and are prohibited at common law from receiving any direct or indirect benefit from the charity. However, it is important to be aware of this, since a director or member of a charity may change from being a volunteer to being paid by the charity, which would trigger a requirement for the individual to register as a consultant lobbyist, and possibly for the organization to register as well if the individual becomes an employee.¹⁷³

An organization that falls within the LA guidelines must file a return within two months after the obligation to report arises, together with additional monthly and six month reports.¹⁷⁴ Failure to comply with the registration requirements or other provisions of the LA could lead to possible fines and even imprisonment.¹⁷⁵

¹⁷³ Jane Burke-Robertson, *supra* note 166.

¹⁷⁴ Subsections 7(2), 7(4) and 7(4.3) of the LA.

¹⁷⁵ Sections 14 and 14.1 of the LA.

G. ROOM FOR IMPROVEMENT?

Following the release of the 2003 Policy, there have been a number of articles written on what charities may do in working within the confines of the policy in order to continue having an impact on government policy debate while furthering the charitable purposes that they have been established to pursue.¹⁷⁶

However, there continue to be some voices from the charitable sector suggesting the need to continue pushing for reform to better improve the conditions under which charities may engage in political activities. For example, it has been pointed out that the 2003 Policy, though an improvement, is still not ideal, when compared to the level of political activities allowed by charities in England and Wales, which activities are recognized to be valuable contributions to policy making. Political activities in those countries are permitted as long as they do not become a charity's dominant activity, i.e. a 49% rule.¹⁷⁷ Others in the sector continue to push Canadian Parliament to take action to define what is charitable, and thereby clearly define what charities can and cannot do in relation to advocacy.¹⁷⁸

Not all of the concerns raised in the consultation and reform efforts in the early 2000s have been addressed. For example, the decision of whether a purpose or activity is “political” continues to be decided by the courts without guidance from Parliament, charities continue to be subject to the 10% restrictions on the extent of its resources that can be utilized for political activities, etc. However, the 2003 Policy clearly is an improvement over CRA's previous policies. For example, the 2003 Policy provides much clearer guidance on the type of “political” activities that can be engaged in, as well as

¹⁷⁶ Richard Bridge, “Innovation and Problem Solving: a Bolder, More Active Role For Community Foundations”, Institute for Media, Policy and Civil Society - Community Foundations of Canada (January 2004); Richard Bridge, “Helping Charities Speak Out: What Funders can Do”, *The Philanthropist* Vol. 20, No.2 (2005) 153 (Bridges 2005); and Elizabeth Mulholland, “New Ways to Keep Up our End of the Policy Conversation”, *The Philanthropist* Vol. 23, No. 2 (2010).

¹⁷⁷ Bridge 2005, *Ibid* at 155 and 156.

¹⁷⁸ For example, Andrew Kitching, “Charitable Purpose, Advocacy and the Income Tax Act”, Library of Parliament-Law and Government Division (February 28, 2006); Rob Rainer, “Charities should not be politically muzzled”, *The Lawyers Weekly* Vol. 27, No. 27 (November 16, 2007).

evidencing administrative discretion in expending the 10% to 20% for small charities, etc. In a recent article, it has been pointed out that “the resulting policy made few fundamental changes, but clarified the policy, allowing charities to realize that CRA regarded much of what had been called advocacy as, in fact, charitable activities designed to further the organization’s charitable purposes” so that “[t]he issue has attracted little attention or comment in recent years.”¹⁷⁹ The fact that there have been no cases involving the issue of political purposes or activities by charities in Canada since the release of CRA’s 2003 Policy suggests that the 2003 Policy has achieved a balanced approach in addressing this debate in Canada, at least for the time being.

¹⁷⁹ Bob Wyatt, “Overview From Canada: Modernizing Charity Law”, *The Philanthropist* 2009, Vol 22.2, 59, at 67.