SUBMISSION

to the

SPECIAL COMMITTEE OF THE SENATE

ON THE CHARITABLE SECTOR

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NOVEMBER 5, 2018
I would like to thank the Special Senate Committee on the Charitable Sector for the opportunity to make a contribution to your important work. I have followed your deliberations from the very beginning and watched as the members of the committee have grappled with these complex issues. I have to commend you for the way in which your understanding has progressed over the past few months.

Your work convinces me that yours is a chamber of sober and intelligent second thought.

I started my volunteer life in 1967 learning, much to my chagrin, that dogs don’t like people dropping pamphlets in mailboxes. I still am a volunteer and I still avoid dogs.

I worked for over thirty years with charities and nonprofits in the Departments of Secretary of State, Multiculturalism and Citizenship and Canadian Heritage. I was a member of Revenue Canada’s Charities Consultative Committee in the 1980s and of the Joint Regulatory Table of the Voluntary Sector Initiative.

**Lack of Policy Direction**

The major challenge with the current legislative framework for charities is, to paraphrase Susan Manwaring in her presentation to this Committee, that the rules are a patchwork of provisions with no evidence of a guiding hand.

My experience, in working on this file from 1983 to 2010, was that the Department of Finance did not want to address the major charitable issues. While there was recognition of the weakness in the current definition of charity, they resisted movement because it is easier to deal with a broken system than to fix it. They were afraid a review would raise as many questions as it would solve.

For the work of this Committee to be rewarded, the Department of Finance needs to be engaged to create a more modern regulator, to have the sector play a role in the accountability of the regulator and to address the definition of charity.

**Definition of Charity**

The core of the Canadian definition of charity stems from the Pemsel case of 1891, you know 127 years ago. This case was ground breaking at the time as it set out four heads of charity:
- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes of benefit to the community.

That being said, one must remember that its context was a homogenous white male-dominated society. There was no need for multiculturalism. Women didn’t have the vote or full citizenship. Indigenous peoples across the Empire were regarded as needing to be civilized. (This was truly a product of its time.)

Education was restricted in that it was a noble endeavour. Debates presented both sides of the issue; which has bedevilled people working against torture, pornography and similar issues today.

Pemsel talked about the relief of poverty as opposed to eradication of the factors that cause poverty. In 2014, the CRA told Oxfam Canada that it could no longer try to “prevent poverty”. Instead, it was told that it should only try to alleviate poverty. The concern was that preventing poverty might benefit people who are not already poor.

This is the orthodoxy of preventing personal benefit as a result of charitable work. In order to not help a few, we leave the majority behind. This is not only my view; it is the view of disadvantaged and marginalized communities.

That is the definition of charity in Canada today and, I would argue, there has been little progress since 1891. This conception of charity systematically limits the type of groups eligible for status. My experience working with organizations representing women, ethno-specific and racialized individuals and indigenous people bears this out. It is no coincidence that many of these groups are those areas not included in Victorian society in 1891.

Why is this important? Let’s have the opinion of some of your witnesses.

Debbie Douglas of the Ontario Council of Agencies Serving Immigrants talked to this Committee about finding the “magic words” a group needs to in order to gain charitable status. She stated that racialized groups have problems gaining status.

Paulette Senior of the Canadian Women’s Foundation said the same about trying to fund organizations of women and girls.

Stephen Huddart of the McConnell Foundation talked about this in trying to support indigenous people in inner city cores.

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1 It was another 8 years before Kipling published The White Man’s Burden.
2 ‘Preventing poverty’ not a valid goal for tax purposes, CRA tells Oxfam Canada’ Dean Beeby, The Canadian Press, July 25, 2014, 7:30 am ET, CBC.
Bruce Miller talked about the philanthropic pledge made by foundations to indigenous groups. Many foundations pledged to help indigenous people, but find the rules prevent them from doing so.

These disadvantaged groups cannot get charitable status, so they cannot provide tax receipts for donations. Just as important, these groups are not qualified donees, so charities can’t support them.

Agency agreements with non-charities can be set up, but they are cumbersome administrative burdens for both parties and run afoul of the direction and control restrictions of the CRA. In other words, two large parts of the fundraising world are closed to these organizations.

All those efforts are blocked because of the lack of movement in a Canadian definition of charity. In my experience, it is more than that. The current Canadian definition of charity limits the participation of these groups and pushes them to the margins of Canadian society. There is little recognition that the work they do is important and the people they work with matter. They are not treated as full citizens.

**Lack of Movement in the Definition**

The government may suggest that there has been some movement in the definition of charity. They would point to the creation of Registered Canadian Amateur Athletic Associations, the National Arts Serving Organizations (NASO) and the proposal to look at giving charitable status to newsgathering organizations.

The Registered Canadian Amateur Athletic Associations were created in anticipation of the 1976 Montreal Olympics. While this has been successful in funding national organizations, it has siphoned off donations to regional and local sports bodies. It can also be argued that registering these national groups eased the pressure on CRA to register regional and local sports organizations.

To date, 27 National Arts Serving Organizations (NASO) are registered charities, but the path to charitable status has been rocky and many of these groups would argue, less than successful. The objectives of many of these groups have been curtailed in order to fit into the NASO format.

The proposal to support newsgathering organizations is, as Committee members have mentioned, a bit of a head scratcher. Even if it comes to fruition, this would be only the third group to be given charitable status in the 51 years; this is not exactly a record of progress.

The government would also suggest that the definition of charity has expanded through the common law.
The Committee has heard differently. As Kathryn Chan stated on October 22 before this Committee, the definition of charity is not moving forward through changes to the common law. And she said this eight years after the creation of the Pemsel Foundation, which has tried to support more appeals of registration denials going to the Federal Court of Appeal. Use of the Federal Court of Appeal to move the definition of charity is not working.

RECOMMENDATIONS

Recommendation 1

That the Committee recommend the government create a codified definition of charity to bring Canada into the 21st century.

The government would look at comparable jurisdictions (such as Australia, England and Wales and Ireland) to seek guidance on how to create such a definition.

Canada needs to see how other jurisdictions have dealt with the definition of charity and codification of new charitable purposes. A series of meetings should be held to bring together the Department of Finance, the CRA, the more active provincial jurisdictions, legal practitioners and voluntary sector people to discuss expansion and codification of eligible charitable purposes. (At one time, other federal departments had the policy capacity to wade in on this issue. It is unclear if that still exists.)

Being a realist, if this recommendation is not accepted, then a number a smaller, but meaningful steps can be undertaken.

Recommendation 2

That the Committee recommend that the Tax Court of Canada should be the site of appeals from decisions of the regulator and these appeals should be held by way of hearing de novo.

The purpose of this recommendation is to create the conditions by which the definition of charity can expand through the common law. The Tax Court would be accessible to smaller groups seeking registration and they would be allowed to present evidence to bolster their case.
Recommendation 3

That the Committee recommend a change to section 149.1 of the Income Tax Act to eliminate reliance on charitable activities so that the focus of regulating charities is based on the charitable objects.

The focus should be on whether or not the purposes of an organization are charitable. If the purpose is charitable, then the activities of the group should only be examined to determine if they support that charitable purpose, are not seen as an end in themselves and do not violate laws.

Dealing with activities as well as purposes puts CRA in the unenviable position of having to parse out each activity carried out by a charity to its end in order to assess if the charity is complying or not with the Income Tax Act. At times, the results of such a review are overwhelming. One of the charities that underwent a political activities audit received a 35-page letter outlining how the group’s activities were offside.

There is no better condemnation that a system is not working than when a 35-page letter parsing out how and where each and every activity appears to be offside. This letter was sent to a group whose budget is under $400,000 a year. The letter appears to have been used to overwhelm and defeat the charity in question.

It also puts the courts in a similar position. Instead of looking at the broader concept of charitable purposes, they have to import an analysis of activities and go into details that, at the end of the day, do little to affect the charitable purpose of the organization. This analysis ties the courts’ hands and restricts any possible evolution of the common law of charities.

Recommendation 4

That the Committee recommend the charitable registration section of CRA undertake a systems audit to review how applications for charitable status are processed.

I have argued that the current ‘definition of charity’ limits access to registered charity status to a number of groups. My research has shown that it is even harder now to become a charity than 15 years ago.

The approval rate of applications for registration has decreased markedly since fiscal year 2002-03. I used four-year averages to come up with a composite approval rate. The rate has dropped from an average of 74.5% over the four years from 2002-03 to 2005-06 to 44.78% over the four years from 2014-15 to 2017-18. This is a drop of 29.72% or almost 30 more denials per 100 applications.
Other research that I have undertaken has shown that there is an increase in the number of revocations. These trends can only make more difficult for groups on the margins to gain charitable status.

A systems audit of the registration process should determine which communities benefit from gaining charitable status and which ones are shut out. It should be able to find out if there is a systemic bias caused by our current definition of charity.

**Recommendation 5**

*That the Committee recommend changes to the policy restrictions on direction and control so that charities can enter into less restrictive agreements with non-charities.*

Several witnesses before this committee have stated that it is very difficult for charities to give to non-qualified donees. Changing the rules around direction and control would allow charities to enter into agreements to support the objects of non-charitable groups allowing them to make their contributions to Canadian society.

The changes would allow charities to enter into agreements with non-charitable groups based on due diligence principles commensurate with the size and reach of the groups and the amount of funds involved in the agreement.

**Recommendation 6**

*That the Committee recommend changes to provisions of the Income Tax Act to allow CRA to publish the names of charities granted registration in the Canada Gazette.*

At the present time, it is difficult to determine which organizations have gained charitable status over the year. The only way to do this currently is to look at registered charities by date of registration through the charity database. Publication of the registration of charities would allow Canadians to see which groups are becoming charities.

**Recommendation 7**

*That the Committee recommend that the CRA increase the transparency of the Charities Directorate in its dealings with the public and charities.*

Measures would include:

- the publication of an annual report outlining the registrations and revocations for the year in question;
- the creation of an Oversight Committee made up CRA officials, representatives from the sector and legal community and others;
- periodic dissemination of information to the public regarding registration and revocation decisions; and
- other measures agreed upon by CRA and members of the sector.

The mission of the Charities Directorate “is to promote compliance with income tax legislation and regulations relating to charities”. Almost without exception, CRA’s communication with the public and charities is on adherence to the charities regime. There is no nurturing or promotion of the sector role. There is no public information mandate.

As I stated above, the number of charities has plateaued. This is caused by a decrease in the approval rate for registration and an increase in revocation of existing charities. These trends can only make more difficult for groups on the margins to gain charitable status.

But the Canadian public, indeed many in the sector itself, do not know this. It was only found out through years of research and a number of Access to Information Requests brought forward by researchers in the sector.

The CRA does not publish an annual report. Its Charities and Giving – What’s New emails are about compliance issues and not public information. The work of the Technical Issues Working Group is not widely shared.

The Canadian public and the charitable sector deserve to know how charities are faring in our society.

Thank you once again for the opportunity to present my ideas to the Committee.

Don McRae