November 28, 2018:

Submission to the Senate of Canada Special Committee on the Charitable Sector

I - Introduction

I am writing at the invitation of the Senate of Canada’s Special Committee on the Charitable Sector to address points raised during my appearance before the Committee on November 5, 2018. Specifically, I was asked to address in writing the new income tax measures dealing with political activities by registered charities (the “Proposed Rules”).

By way of context, I am an Associate Professor of Law at Osgoode Hall Law School (York University) specializing in the law of charity. I have published and lectured widely on the charity – politics topic. Prior to becoming a law professor, I wrote a graduate thesis on this very topic. My research on the charity – politics distinction was cited by the New Zealand Supreme Court in one of the leading decisions from abroad. I contribute my thoughts with a constructive spirit and sober awareness that this is a difficult problem lacking obvious solutions. In my respectful view, the Proposed Rules are not the best path forward.

II – Short Conclusion

The Proposed Rules raise a straightforward question: Is charitable status under the Income Tax Act (Canada) (the “ITA”) appropriately extended to institutions whose singular activity is pressuring government to adopt new or reform existing governmental programming? In my view, the answer

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1 Available at: https://www.fin.gc.ca/drleg-apl/2018/bia-leb-1018-eng.asp
is “no”. Registered charities have a tremendous capacity to enrich public policy dialogue and development. The terms and conditions of charitable status should permit registered charities to engage in sustained activities of this nature. But these kinds of activities should be a *supplement to*, rather than *total substitute for*, the provision of charitable goods and services to the public. In this submission, I briefly explain this concern (and a few others) raised by the Proposed Rules.

**III – Summary of Proposed Rules**

The Proposed Rules alter the current treatment of political activities by registered charities under subs. 149.1(6.1) and (6.2) of the ITA. They do so in two key ways.

First, the Proposed Rules expressly stipulate that “public policy dialogue and development activities” are charitable provided they are carried on in support of charitable purposes. The Proposed Rules do not legislatively define the phrase “public policy dialogue and development activities”. The accompanying Explanatory Notes prepared by the Department of Finance indicate that these activities “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”. The apparent intention behind legislatively deeming such activities to be charitable is for registered charities to be able to pursue their charitable ends *entirely* through such activities.

Second, the Proposed Rules expressly stipulate that registered charities are prohibited from directly or indirectly supporting or opposing any political party or candidate for public office. While the outgoing rules did not endorse this kind of advocacy as charitable, neither did they expressly prohibit it.

In the interests of brevity, my comments in this submission will be confined to the first of the above two reforms.

**IV – Discussion / Analysis**

**(A) Charities and Public Policy Dialogue and Development**

*Why is it important for charities to be able to engage in public policy dialogue and development?*

Charities have a tremendous capacity to enrich public policy dialogue and development. Charities often have direct experience with the kinds of marginalized communities that governments aspire to assist through governmental programming. Charities can help governments better calibrate their programming to reflect the needs and circumstances of underprivileged persons. The charitable

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4 For an analysis of the problems with the status quo, see the sources cited in *supra* note 2.
5 See the proposed new definitions of “charitable activities” in subs. 149.1(1) of the ITA and also proposed new subs. 149.1(10.1).
7 *Ibid.* The Explanatory Notes state that “some or all” of the activities of registered charities can be public policy dialogue and development activities.
8 See the proposed revisions to subs. 149.1(6.1) and (6.2).
sector is unique in its ability to nurture and give expression to other-centred idealism. We should aspire for this kind of idealism to have a voice in public deliberation. Charities are also repositories of knowledge that can inspire innovative solutions to complex problems. At a certain level, charity and government share a common concern over “doing good”. It would be odd if charities were completely barred from assisting governments pursue this shared goal.

*So what then is wrong with the Proposed Rules?*

A benign view of the Proposed Rules is that they merely increase the *amount* of political activity registered charities may undertake. On this view, the reform on the table is merely a difference of degree (more versus less political activity). Another view is that the Proposed Rules alter the legal *nature* of charity. On this view, the reform on the table is not merely a difference of degree (more versus less political activity) but rather a difference of kind (a potentially significant evolution in – or distortion of – the essential nature of “charity”). The latter view captures my concern.

The Proposed Rules intentionally enable “single methodology” charities. By this I mean charities pursuing their missions through the singular methodology of pressuring governments for law and policy reform. Single methodology charities of this sort could presumably qualify as registered charities under the Proposed Rules notwithstanding that they provide no tangible goods and services to the public. Their singular activity could be to call on government to adopt new or reform existing policies and/or laws. The only constraining factor under the Proposed Rules would be that the advocated law and policy reforms would have to further one or more of the four “heads” of charity as identified in the leading decision *Commissioners for Special Purposes of the Income Tax v. Pemsel*: 

10 the relief of poverty, the advancement of religion, the advancement of education and other purposes of public benefit.

Consider, for example, a charity established for the relief of poverty. Under current law, this charity would have to provide to its target population (“poor” persons) goods and/or services capable of relieving poverty. Under the Proposed Rules, it would appear that this charity could instead do nothing but pressure the government to adopt new or alter existing governmental strategies for relieving poverty. In other words, the Proposed Rules appear to deliberately countenance the possibility of charities furthering their mission (be it the relief of poverty or any other charitable purpose) entirely and singularly *through government*.

Views will inevitably vary as to whether we should go down this path. If we go down this path, we should at least do so with the self-awareness that we would be significantly altering the legal nature and legal conception of charity.

Charity evolved into a distinct legal category worthy of special legal treatment because it is a unique species of private (as in non-governmental) activity through which publicly beneficial ends are furthered. The essential goal of charity law has not been to improve government *per se* but

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10 [1891] A.C. 531.
rather to promote, subsidize and affirm publicly beneficial *private* activity carried on outside of (or alongside of) government.\(^{11}\)

In my view, this is why pressuring government to behave (or not behave) in some particular way should not be the *singular* method through which charities pursue their charitable missions. Where is the charity (as we have long since understood “charity”) if the *only* activity is pressing for a *governmental* solution to a given social or economic problem?

One might ask then: “If charity and government are so distinct, then why allow charities to play *any* role in influencing government?” To some extent the answer is pragmatic. For the reasons noted above, it simply makes good public policy for the law and policy making processes of government to avail themselves of the experience, wisdom and values of the charitable sector. But there is more to it than pragmatism.

“Charity” is an adaptive concept. The meaning of charity is intended to evolve and adapt with society. Charity law in the modern era should evolve to reflect the reality that “charity” and “government” are not as easily compartmentalized as may have previously been the case. Government and charity are increasingly engaged in common pursuits in such areas as poverty relief, health and education. In these and other areas, charities are sometimes the vehicles through which governments achieve their aims. For this reason alone, charity law should not insist on an outdated “bright line” distinction between charity and government by which charities are altogether required to stay out of government notwithstanding the increasing entanglement of charity and government in modern life.

The solution, though, is not to open the floodgates by expressly permitting charities to pursue their charitable ends *entirely* through agitation for law and policy reform. The longstanding tradition in charity law is for incremental adaptation and modernization of the meaning of charity.\(^{12}\) In the context of advocacy, incremental reform means liberalizing the limits on advocacy activities rather than abandoning limits altogether. If the outgoing limit is too restrictive, we should aspire to permit more advocacy without going as far as to endorse charities doing nothing but agitating for new governmental action. As I said, this kind of activity should be a *supplement to*, rather than *total substitute for*, the provision of charitable goods and services.

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\(^{12}\) See, for example, *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 150.
(B) Other Concerns With the Proposed Reforms

In addition to the above principled concern over the Proposed Rules, there are also some process and technical concerns.

Process Concerns

It would be procedurally peculiar for Parliament to adopt new legislative rules on this matter in advance of the appeal in Canada Without Poverty v AG\(^{13}\) ("Canada Without Poverty") concluding. Canada Without Poverty is a ground-breaking decision in which the Ontario Superior Court of Justice found that the current provisions in the ITA dealing with the political activities of charities (subs. 149.1(6.1) and (6.2)) pose an unconstitutional restriction on freedom of expression. The Federal Government has appealed the decision to the Ontario Court of Appeal on the express basis that the lower court erred in law. At the time of writing, there is no judgment from the Court of Appeal. The appeal has not even been argued at this time.

To proceed now would be to charge forward in advance of knowing the extent to which, if at all, the policy options available to Parliament on this matter are constrained by the Charter of Rights and Freedoms. It seems ill-advised to proceed with new legislative rules before the appeal process resolves the constitutional standards to which any new legislative rules must conform.

Under the circumstances, I see two mutually exclusive procedural options: (1) await the conclusion of the appeal process in Canada Without Poverty before adopting new legislative rules or (2) accept the decision of the lower court in Canada Without Poverty (i.e., abandon the appeal) and adopt new legislative rules based on the constitutional principles identified by the lower court. Legislating new rules while simultaneously appealing the decision in Canada Without Poverty literally makes no procedural sense.

My own view is that the Federal Government should proceed with (rather than abandon) the appeal. Abandoning the appeal would be unfortunate as the Canada Without Poverty decision raises some fundamental issues – e.g., the role, if any, the Charter of Rights of Freedoms plays in determining what is and is not charitable under the ITA – that transcend the narrow issue of advocacy by charities. Abandoning the appeal at this time means these unresolved issues will haunt the charitable sector until such time as they are addressed anew in a future judicial decision. But why wait? The Federal Government has indicated through its choice to appeal the decision that it disagrees with the lower court’s holding. Rather than abandon the appeal, the better option is to proceed with the appeal. The Proposed Rules can be brought forward in their current (or, if constitutionally necessary, modified form) when the appeal process resolves the constitutional law dimensions to this area of law.

Absence of Statutory Definition:

The Proposed Rules do not legislatively define the phrase “public policy dialogue and development activities”. Likewise, this phrase has no established meaning at common law. To my knowledge, no reported judicial decision throughout the Commonwealth has considered this specific phrase.

\(^{13}\) 2018 ONSC 4147.
The Canada Revenue Agency (the “CRA”) will therefore have to develop an administrative interpretation of this phrase unassisted by either legislation or common law. To proceed without a statutory definition would be to repeat a serious flaw – the absence of a statutory definition of “political activities” – that has afflicted the outgoing rules.14

At the end of the day, there is no escaping the need for definition. Parliament presumably has in mind certain activities that it wants to endorse for registered charities. It is not obvious why it is preferable to avoid expressly defining those activities, especially given the pervasive challenge posed by the absence of a definition of “political activities” under the outgoing rules.15

As indicated above, the Department of Finance’s Explanatory Notes state that the phrase “public policy dialogue and development activities” is intended to mean activities “seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”. Given that this is the intended meaning of the phrase, why studiously avoid legislatively defining it? Obviously, a statute as complex as the ITA cannot define every relevant phrase and concept. But in this instance, not defining the phrase “public policy dialogue and development activities” defers too much to the CRA. It would be one thing if the phrase had meaning at common law. But it does not. As drafted, the Proposed Rules leave too many gaps for the CRA to administrative fill, at least in my judgement.

**Federalism Concerns:**

The Proposed Rules modify the meaning of charity for purposes of federal income tax law only. The meaning of charity for most other purposes will continue to be governed by provincial law (e.g., common law in the common law provinces). This will leave us with a discrepancy between the meaning of charity under federal income tax law and its meaning under provincial law. In most cases, such a discrepancy will not bode significant practical consequences. But it some instances it could.

For example, trustees of charitable purpose trusts would continue to be bound by the common law of charity. Unless and until the common law evolves to reflect the meaning of charity under federal income tax law, trustees of politically active charitable purpose trusts could find themselves compliant with the federal income tax understanding of charity but in breach of trust under provincial law.

This is not in and of itself a reason not to proceed with the Proposed Rules. But it reveals a complication that arises when income tax law adopts a broader conception of charity than the common law.

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15 The outgoing rules (subs. 149.1(6.1) and (6.2)) attempted to permit “political activities” within limits. The absence of a legislative definition of “political activities” proved to be a major stumbling block.
(C) Alternative Reform

What kind of restrictions on advocacy should continue to exist? We cannot answer that question until we have a better sense of the extent to which, if at all, the Charter of Rights and Freedoms limits the government’s ability to restrict the activities of charities in this area. We will not know the answer to that question until the appeal process in Canada Without Poverty is concluded. This is precisely why the Federal Government should not enact new rules before this appeal is resolved.

Leaving aside the constitutional dimensions to this topic, there is much to commend from a charity law perspective an approach whereby advocacy for law and policy reform would be permitted provided it coexists with and, remains subordinate to, more traditional charitable programming. Under such an approach, it would be permissible for advocacy to be a sustained way through which charities pursue their charitable missions. It could not, however, be the only way.16

Relative to both the status quo and the current proposals on the table, this alternative possibility would respect both the positive role charities can play in the law and policy making processes of government but also the distinctive role of charities as non-governmental suppliers of publicly beneficial goods and services. It would be an incremental evolution in keeping with the charity law tradition of measured reform.

I would be pleased to follow-up if there are any questions arising from my brief.

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16 For a detailed explanation, see the resources cited in supra note 2.