

Nonprofits and Political Activity: Lessons From England and Canada

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In the debate about the IRS's regulation of exempt organizations' political activity, little attention has been paid to what we might learn from how other countries treat the political activity of charities and non-charitable nonprofits. Aprill compares the U.S. rules with those of two common law jurisdictions, England and Canada, in the context of their political activity and campaign finance laws.

This article was presented on January 17 at a symposium in Malibu, Calif., sponsored by Pepperdine University School of Law and Tax Analysts. Twenty of the nation's leading tax academics, practitioners, and journalists gathered to discuss the prospects for tax reform as it is affected by two crises facing Washington: dangerously misaligned spending and tax policies, resulting in a crippling \$17.4 trillion national debt; and the IRS's alleged targeting of conservative political organizations. A video recording of the symposium is available at http://new.livestream.com/pepperdine_sol/taxreform.

Commentators have long questioned whether the IRS should be the key regulator of section 501(c)(3) organizations. They have suggested a variety of other choices, including new state agencies, new federal agencies, private bodies, and hybrid private-public entities. The recent controversy over the IRS's handling of applications by Tea Party groups for exemption as section 501(c)(4) social welfare organizations has expanded reservations about the IRS's oversight — beyond charities to non-charitable exempt organizations.

The U.K. Charity Commission has been held up as a model alternative to IRS oversight of charities. Yet, little discussion has focused on how other countries treat political activity by charitable and non-charitable nonprofits or on what we might learn from their approach. In a small way, I begin that task here, by giving a brief overview of the applicable rules of two common law jurisdictions, England and Canada.¹ I use our categories of chari-

¹I want to give special thanks to my husband, Sanford Holo, for suggesting this topic, and to Douglas Rutzen, president of the International Center for Not-for-Profit Law (ICNL), for the material to which he directed me, in particular, ICNL, "Political Activities of NGOs: International Law and Best Practices," 12 *IJNL* 5 (Nov. 2009). I also thank the generosity of Paul Ryan, Rick

(Footnote continued in next column.)

table and non-charitable nonprofits and define political activity broadly to include not only candidate-related campaign intervention but also lobbying and even policy advocacy (although, to the extent possible, I will discuss the subcategories separately). To place those rules in context, this article also summarizes the countries' generally applicable lobbying and campaign finance laws.

England² and Canada offer a particularly compelling comparison with the U.S. treatment of nonprofits because we share common sources of law. All three countries trace their modern law of charity back to the 1601 Elizabethan Statute of Charitable Uses. All look to the decision of the House of Lords in *Special Commissioners of Income Tax v. Pemsel*³ as an important statement regarding the meaning of charity. That case divided the concept of charity into four principal divisions: relief of the poor, advancement of education, advancement of religion, and the catchall of other purposes beneficial to the community.

From these common roots, all three jurisdictions prohibit candidate-related campaign intervention by charities. They differ markedly, however, in the amount of other political activity they permit charities to undertake. Neither Britain nor Canada regulates such political activity by non-charitable nonprofits. Moreover, they both have campaign finance regulation very different from our own.

A. United States

To compare our rules with those of other countries, we need to first briefly review the state of affairs in the United States.

1. Charities. To be tax exempt as a charity under section 501(c)(3) — which includes entities formed for religious, scientific, literary, and educational purposes — and thus be entitled to deductible contributions, an organization cannot, to any degree, "participate in, or intervene in (including the

Hasen, Justin Levitt, Terrance Carter, and Debra Morris in reviewing an earlier draft. Much of the discussion herein relies on articles appearing in volume 12 of *The International Journal of Not-for-Profit Law*, titled "NGOs in the Political Realm." As noted, additional information on other countries' charitable activities derives from material published by the Council on Foundations, and material on other countries' campaign finance laws derives from material published by the Library of Congress.

²The Charity Commission regulates charities in both Britain and Wales, but not Scotland or Northern Ireland. For ease of reading and with apologies to Wales and the Welsh, I will use "England" and "English" instead of England/Wales or English/Welsh.

³A.C. 531 (1891).

publishing or distribution of statements), any campaign on behalf of (or in opposition to) any candidate for public office.”

The IRS has interpreted these requirements in various kinds of guidance. The public office can be at any level — federal, state, or local. And public office includes elected judgeships, school boards, or dog catchers — as long as they are elected by the public. The election need not be contested or involve the participation of political parties. Candidates for public office are generally those who have offered themselves or been proposed by others for elective office. However, charities can undertake some nonpartisan activities related to elections, including get-out-the-vote campaigns and voter registration. They can also invite candidates to speak and host candidate forums, as long as the structure of those events ensures they are nonpartisan.

Section 501(c) also limits charities in “carrying on propaganda, or otherwise attempting, to influence legislation.” Today we call that category lobbying. Under the general rule, a charity is exempt under section 501(c)(3) as long as no substantial part of its activities consists of lobbying. Under an alternative offered under section 501(h) and detailed in section 4911, charities can elect to be subject to specified dollar limits for lobbying expenditures, up to a maximum of \$1 million, on a sliding scale based on the organization’s size.⁴ In practice, few charities — no more than 1 to 2 percent — make this election. The Supreme Court upheld limits on substantial lobbying by section 501(c)(3) organizations against a First Amendment challenge in *Regan v. Taxation With Representation*,⁵ a case that the Court cited favorably just last term in *Agency for International Development v. Alliance for Open Society International*.⁶

Under IRS guidance, for purposes of the “no substantial part” general rule, legislation includes action by Congress, any state legislature, local gov-

erning bodies, and by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by an executive branch, independent administrative agencies, or judicial bodies. Attempting to influence legislation includes direct contacts with legislators and their staffs to propose, support, or oppose legislation, as well as efforts to urge the general public to contact legislators or their staffs to propose, support, or oppose legislation. Neither policy discussion nor education is lobbying. Conveying nonpartisan analysis, study, or research on legislative matters to legislators is not lobbying, as long as that analysis is not intended to support a particular position. Communicating with members of the organization on issues of common interest is not lobbying. If, however, members are urged to contact legislators or their staffs or members of the general public in support of or opposition to specific legislation, lobbying is taking place. Moreover, for organizations making the section 501(h) election, the definition of lobbying is particularly generous in the case of grass-roots lobbying, requiring that a communication encourage recipients to take action regarding the legislation.

Charities, however, can engage in issue advocacy without limit. The line between indirect campaign intervention and issue advocacy can be difficult to discern. Rev. Rul. 2007-41, 2007-1 C.B. 1421, lists several factors to help make this distinction. These factors include whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office and whether the statement expresses approval or disapproval for one or more of the candidates’ positions or actions. The ruling cautions that although a communication must be considered in context, it is “particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.”

2. Non-charitable nonprofits. The code lists more than 25 categories of organizations exempt from income tax under section 501(c) that, unlike section 501(c)(3) organizations, are generally not entitled to receive deductible contributions. Those that have received the most attention in the area of candidate-related campaign intervention are section 501(c)(4) social welfare organizations, section 501(c)(5) labor organizations, and section 501(c)(6) trade associations.

Section 501(c)(4) specifies that organizations exempt under its provisions must be operated “exclusively for the promotion of social welfare.” However, reg. section 1.501(c)(4)-1(a)(2), which dates back to 1959, allows the organization to be “primarily engaged in promoting in some way the common good and general welfare of the people of

⁴Under this election, organizations with an operating budget of up to \$500,000 can spend 20 percent of the budget on lobbying expenditures. Those with operating budgets exceeding \$500,000 but not more than \$1 million can spend \$100,000 plus 15 percent of the operating budget exceeding \$500,000. Those with operating budgets exceeding \$1 million but not more than \$1.5 million can spend \$175,000 plus 10 percent of the budget in excess of \$1 million. Those with operating budgets exceeding \$1.5 million can spend \$225,000 plus 5 percent of the budget in excess of \$1.5 million. Organizations with budgets of \$17 million or more are restricted to the \$1 million limit. Within these overall limits, there are additional limits on the amount that can be spent on grass-roots lobbying, which is encouraging members of the public to contact legislators.

⁵461 U.S. 540 (1983).

⁶133 S. Ct. 2321 (2013).

the community” (emphasis added), although it also specifies that “promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.” Nowhere has the IRS ever defined what constitutes primary activity, and some practitioners argue that 49 percent of a section 501(c)(4) organization’s activities can consist of candidate-related campaign intervention.⁷ GCM 34233 and Rev. Rul. 61-177, 1961-1 C.B. 117, respectively, have extended to section 501(c)(5) and (c)(6) organizations the same permission and amorphous limitations regarding political campaign intervention.

Unlike section 501(c)(3) organizations, organizations exempt under section 501(c)(4), (c)(5), or (c)(6) do not face lobbying limits under tax law. Those statutory provisions make no mention of legislative activities, and the IRS has recognized, albeit in quite different ways, that an organization can be exempt under section 501(c)(4), (c)(5), or (c)(6) even if its sole activity is advocacy, as long as the primary purpose for the legislative activity is to achieve the organization’s exempt purposes.⁸

3. Lobbying and campaign finance regulation. If EOs engage in political activity, they may encounter additional laws. In some cases, registration and disclosure under the Lobbying Disclosure Act of 1995 may be required. As detailed below, some political campaign interventions — namely, contributions to political action committees and some types of expenditures on candidate-related advertising — come within the purview of the Federal Election Commission and are subject to campaign finance disclosure requirements.

FEC regulatory authority derives from the Federal Elections Campaign Act of 1971 (FECA) and the Bipartisan Campaign Reform Act of 2002 (BCRA). If a non-charitable EO contributes to a PAC, the committee must disclose to the FEC (and the public) the name of the contributing organization and the amount of its contribution. If a non-charitable EO pays for communications that constitute express candidate advocacy (for example, that include words such as “support,” “oppose,” “vote for,” or “vote against”) or for television and radio communications that name a candidate within a specified

period close to a federal election, the organization must disclose to the FEC the amount spent on the communications.⁹ Also, limits apply to contributions to candidates and the committees that support them, including expenditures coordinated with candidates that are deemed to be gifts to the candidates themselves. For example, in 2013 and 2014, individuals can give up to \$2,600 per candidate or candidate committee per election, while corporations (including non-charitable EOs) and unions cannot contribute to candidates. However, as a result of recent judicial decisions, there are no limits on contributions to PACs when the funds are used for specified election-related independent spending known as “independent expenditures.” Consequently, non-charitable EOs are permitted to make unlimited contributions to independent expenditure PACs, but the PACs must disclose those contributions.

Important for comparison purposes, the Supreme Court over the years has invalidated several FECA and BCRA campaign financing limitations on First Amendment grounds. In the seminal case of *Buckley v. Valeo*,¹⁰ for example, the Court struck down the expenditure limits in FECA, finding that they imposed “direct and substantial restraints on the quantity of political speech.” In *Citizens United v. Federal Election Commission*,¹¹ it struck down a provision of the federal campaign finance laws that prohibits corporations and unions from using their general treasury funds to make independent expenditures.

For some other communications of a non-charitable nonprofit that are not subject to FEC regulation, the organization must make disclosures to state regulators. If the campaign intervention by that organization is not regulated by the FEC or the states but comes within the IRS’s definition of campaign intervention, which is broader than the FEC’s definition, the organization will be subject to tax under a subsection of section 527, the provision applicable to political organizations, on the lesser of its investment income or the amount spent on political campaign intervention.

B. England

The U.K. Charity Commission serves as the independent regulator of charities in England. Its role

⁷In light of the controversy surrounding Tea Party organizations’ applications for exemption under section 501(c)(4), proposed section 501(c)(4) regulations issued in November 2013 request comments on the amount of candidate-related campaign intervention social welfare organizations should be permitted. See REG-134417-13.

⁸If these non-charitable EOs lobby, the organizations must inform members of the extent to which their dues are not deductible or themselves pay a proxy tax under section 6033.

⁹In the rare case of a donor specifically designating funds to be used for that advertising, the name of the donor must also be disclosed. Also, in some cases section 501(c)(3) organizations must make disclosure to the FEC because they have made a communication naming a candidate within the specified periods.

¹⁰424 U.S. 1, 38 (1976).

¹¹558 U.S. 310 (2010).

and functions often serve as a point of comparison with our American system, which combines regulation by state attorneys general and the IRS.

1. Charities. Charities in England must be established for the public benefit and to carry out one of the 13 charitable purposes set forth in the Charities Act 2011. Charitable purposes explicitly include not only relief of poverty and advancement of education, but also advancement of citizenship or community development, advancement of human rights, and the advancement of environmental protection or the environment. Charities in England are exempt from most forms of direct taxation. Charities delivering goods for services above a specified floor are subject to a VAT. Rather than benefiting indirectly from contributions through a deduction provided to donors, charities benefit from cash donations by individuals under the gift aid scheme, under which the charity can generally reclaim the tax the donor has paid on the income used to make the gift.

The Charity Commission's 2008 pamphlet, "Speaking Out: Guidance on Campaigning and Political Activity by Charities," explains what charities can and cannot undertake in this area. In some aspects, the parallels between the rules of England and those of the United States are striking. Both, for example, distinguish between charitable purposes and charitable activities. Thus, under neither set of rules can a charity be established for the purpose of securing or changing the law. Both countries prohibit charities from engaging in any form of party political activity and from supporting or funding a political party, candidate, or politician.¹² Both permit charities to raise awareness or educate or mobilize the public's support or change public attitudes on particular issues — what Rev. Rul. 2007-41 calls issue advocacy. However, the British Communications Act 2003, lacking constitutional provisions similar to the First Amendment, forbids the use of political advertising, which is defined to include advertising in the public media that is aimed at influencing public opinion on matters of public controversy. That legislation has no exception for charities.

As the 2008 pamphlet sets out, however, charities in England may undertake activity "which is aimed

at securing, or opposing any change in the law or in the policy or decisions of central government, local authorities or other public bodies" if that activity is undertaken in support of the organization's charitable purpose. That is, as long as the activity is related to the organization's purpose and not its sole activity, an English charity may engage in substantial lobbying, unlike an American charity, which must limit its lobbying activities. Thus, the practice in England adds weight to the position of commentators on American law who support ending the limitation on the amount of lobbying American charities can conduct.

2. Non-charitable nonprofits. Non-charitable nonprofits can take a variety of forms but are often organized as unincorporated associations or companies limited by guarantee, which are taxed in the same way as for-profit companies for tax purposes. As the International Center for Not-for-Profit Law explains, non-charitable nonprofit organizations in England are subject to no restrictions on any of their political activities by virtue of being nonprofits.¹³ They are, however, subject to campaign finance law.

3. Lobbying and campaign finance regulation. In a mirror image of our elections laws, the United Kingdom imposes various expenditure limits on political parties and candidates, but none on contributions. In the 2005 general election, for example, the national campaign expenditure limits were £30,000 per constituency contested, for a total of about £19 million.¹⁴ Independent organizations in 2011 could spend no more than £988,000 in support of a political party in the 12 months before a general election, and no more than £500 in support of an individual candidate in the month before the election.¹⁵ Donations exceeding £5,000 to the main political party, or more than £1,000 to a constituency, must be reported to the Electoral Commission, the independent elections watchdog and regulator of party and election finance, as well as all party campaign expenditures. Moreover, as noted above, the United Kingdom also forbids the use of broadcast media for political advertising.

In January 2014 British peers accepted a government plan to reform lobbying and charity campaign spending, in the face of bitter opposition from the nonprofit sector but, somewhat surprisingly, not

¹²The 2008 pamphlet gives a succinct explanation for this position:

A charity cannot give general support to a political party, because all political parties have a range of policies. So if a charity endorses a party because it agrees with one policy (say on climate change), it is effectively supporting the party as a whole and will be endorsing the party's wider policies (say on taxation, education, defence, etc.) which are nothing to do with the charity's purposes.

¹³ICNL, *supra* note 1.

¹⁴Library of Congress, Campaign Finance: United Kingdom, available at <http://www.loc.gov/law/help/campaign-finance/uk.php>. See also Kathleen Hunker, "Elections Across the Pond: Comparing Campaign Finance Regimes in the United States and the United Kingdom," 36 *Harv. J. L. & Pub. Pol.* 1099 (2013).

¹⁵Jacob Rowbottom, "How Campaign Finance Laws Made the British Press So Powerful," *New Republic* (July 25, 2011).

from the Charity Commission.¹⁶ Under this new law, lobbyist registration rules will apply to charities; “organizations not standing as candidates or political parties” will have to register with the Electoral Commission if they spend a sufficiently large sum on campaigning; and campaigners will be subject to a limit of £9,750 for an individual constituency during election periods.¹⁷ Moreover, the definition of campaigning activities covered by the new law is broad and could include political activities permitted to charities. The Charity Commission has announced that it will update its guidance on political activities in light of this new legislation.

C. Canada

Canada also offers a useful comparison with U.S. law, given its proximity and the culture and values that the two countries share, in addition to common legal sources.

1. Charities. Canadian charities must be organized for charitable purposes and devote substantially all their resources to charitable activities. The Income Tax Act (ITA) does not define charity, and the Canada Revenue Agency (CRA) looks to the common law definition of charity for eligibility for charitable registration. As in the United States, Canadian charities are not subject to income tax. Further, individuals receive a tax credit and corporations receive a deduction for contributions to registered charities, which issue tax receipts.

Much like the American rule, charities are prohibited by statute from engaging in the direct or indirect support of, or opposition to, any political party or candidate for public office. Subsection 149.1(6.1) of the ITA, however, permits political activities that are ancillary and incidental to charitable purposes. In 2003 the CRA issued a major policy statement to explain what, and to what extent, political activities are permitted for a registered charity.¹⁸

As explained in the 2003 policy statement, a charity, as a charitable rather than political activity, may make the public aware of its position on an issue if its views are based on a well-reasoned position and if public awareness campaigns do not become the charity’s primary activity. Under the

2003 policy statement, activities are presumed to be political if they involve a “political call to action,” which would include what we deem grass-roots lobbying. A political call to action is defined in the 2003 policy statement as an appeal to members of the charity or 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. Direct communication by the charity with an elected representative or public official, however, can be considered a charitable activity rather than a political activity if it meets the 2003 policy statement’s requirements for charitable activities.

Note that the Canadian definition of political activities is broader than the lobbying that U.S. law limits. For Canadian charities, as indicated above, political activity includes a political call to action regarding public officials, elected officials, and policies, on a decision of any level of government in Canada or a foreign country.

According to the 2003 policy statement, charities are generally permitted to engage up to 10 percent of their resources in acceptable political activity. The term “resources” is not defined in the ITA but is generally considered to include not only financial assets but also staff, volunteers, equipment, and offices. Under the 2003 policy statement, smaller charities (those with up to \$200,000 in annual income) may spend a greater percentage of resources on political activities, according to a sliding scale. That sliding scale has some similarities to the section 501(h) election, but it is available only for charities much smaller than those to which sections 501(h) and 4911 can apply. As a result of 2012 amendments to the ITA, amounts devoted to political activities now include gifts to qualified donees (including registered charities) if it can reasonably be considered that a purpose of the gift is to support the donee’s political activities.

In sum, on one hand, Canada’s tax guidance on charitable political activity specifies how much political activity is permitted in a way that the amorphous “not substantial” test of U.S. law does not. On the other hand, given the broad definition of political activity, Canadian charities may be more constrained than U.S. charities.¹⁹

Also, in Canada, amounts devoted to political activities cannot be used to meet the amount that all charities are required to spend annually on charitable activities or on gifts to other organizations (that is, the disbursement quota) — an amount

¹⁶Alex Massey, “Why Did the Charity Commission Lobby Against Its Own Sector?” *CivilSociety.co.uk* (Jan. 20, 2014).

¹⁷See “Lobbying Bill to Become Law After Lords Rebellion Falters,” *BBC News: UK Politics* (Jan. 28, 2014).

¹⁸CPS-022. A recent study concluded that the 2003 policy statement is generally, but not entirely, consistent with recent Canadian case law and that where it diverges, the policy statement takes a more liberal approach. Maurice Cullity Q.C., “Charity and Politics in Canada — A Legal Analysis,” *The Pemsel Case Foundation*, at 27 (Dec. 2013).

¹⁹The recent study by Cullity observed that the English 2008 pamphlet “endorsed an approach that is more benevolent than the prevailing view in Canada.” *Id.* at 29.

generally equal to 3.5 percent of the value of property not used directly in charitable activities or administration. Assets not used directly in charitable activities or administration include cash in bank accounts, stocks, bond, mutual funds, lands, and buildings.

2. Non-charitable nonprofits. In Canada, the definition of non-charitable nonprofit under paragraph 149(1)(l) of the ITA (that is, nonprofit organization) is very broad:

A club, society or association that, in the opinion of the Minister, was not a charity . . . and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit.

This definition includes not only amateur sports clubs, social clubs, literary societies, and professional organizations, but also political parties. These organizations are exempt from income tax, but donors to them receive no tax benefits. There are no specific rules limiting any kind of political activity, including lobbying and campaign intervention, for any type of non-charitable nonprofit. However, these entities are subject to various generally applicable lobbying and campaign financing laws at the federal and provincial levels.

3. Lobbying and campaign finance regulation. Nonprofits may be required to register under Canada's Lobbying Act. Importantly, like England and unlike the United States, Canada limits the amount candidates and political parties can spend. Under the Canada Elections Act of 2000, these limits depend on the number of electors and the population density where they are running. Also, registered political parties, candidates, and third parties must make financial disclosures. The term "third parties" includes any group not directly contesting an election.

More recently, Canada introduced funding limits on all persons and organizations, other than political parties themselves, when an election is called. For example, for the 2014 calendar year, an individual can contribute C\$1,200 to a registered party.²⁰ Further, the Canada Elections Act restricts the amount third parties can spend on some forms of election advertising during election periods. For April 1, 2013, to March 31, 2014, the total expense limit is

C\$200,100.²¹ Section 319 of the act defines election advertising as "the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position of an issue with which a registered party or candidate is associated." Contributions to registered political parties and candidates are, however, partly deductible for individuals. Corporations cannot make federal political contributions.

D. Conclusion

Charities in all three countries examined are forbidden from direct or indirect campaign intervention, although the definition of campaign intervention undoubtedly differs in its details. This consistency is intriguing in light of the frequent criticism of section 501(c)(3)'s prohibition on campaign intervention. Lobbying limits vary. Compared with American charities, British charities have more freedom to engage in political activity other than candidate-related campaign intervention. Canadian charities have a clearer sense of the limits on their political activity than do U.S. charities, but, unlike the United States, Canada sweeps more than lobbying into the political activity category.

England and Canada impose no restrictions on the campaign intervention of non-charitable nonprofits as such. However, they regulate elections and campaign finance more strictly than we do. England limits both expenditures and the use of broadcast media. So does Canada, which also limits contributions. Thus, for those who believe in campaign finance limitations, the First Amendment considerations that have driven the Supreme Court to curb campaign finance regulation, such as in *Citizens United*, put particular pressure on tax regulation regarding EOs' political activities. This international excursion underscores the importance, even in light of substantial continued controversy, of revising and finalizing new Treasury regulations defining and limiting political campaign intervention by tax-exempt organizations, an effort begun in November 2013 with the issuance of proposed regulations defining candidate-related political activity for section 501(c)(4) organizations.²²

²¹See "Elections Canada: Limit on Election Advertising Incurred by Third Parties," available at http://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limit_t p&lang=e.

²²REG-134417-13.

²⁰"Elections Canada: Limits on Contributions," available at <http://www.elections.ca/content.aspx?section=pol&dir=lim&document=index&lang=e>.