

Advocacy and education

by David Matas

(Revised remarks prepared for delivery on receipt of the Community Legal Education Association Advocate of Public Legal Education award, 9 February, 2016, Winnipeg, Manitoba)

Thank you for this award. I have been engaged in advocacy with the law as a source of ammunition. The law has given me weaponry to fight the human rights struggles in which I decided to engage.

For the positions I have advocated, the court room has been the arena for a human rights battle. Law libraries and legal websites have been the arsenals from which the weapons were drawn. The arms have not just been human rights law, but, as well, administrative law, the law of evidence, the law of civil procedure, international law, and criminal law.

Because my advocacy has been legal, so has been opposition to the positions that I have espoused. These debates about the issues I have addressed have been debates about the law, what the law means, whether the law should be reformed, whether the Canadian Charter of Rights and Freedoms conflicts with legislation or the common law, whether international law conflicts with local law, whether foreign law is better or worse than Canadian law.

Those who follow the back and forth on the issues in which I have been engaged would, I hope, agree with me. Whether they do or not, they are bound to acquire more legal knowledge than they had before.

My advocacy work has been focused on attempting to learn the lessons of the Holocaust - the Nazi murder of six million Jews and the attempt to eliminate the whole Jewish people - and to act on these lessons. The lessons which I thought I learned and on which I attempted to act were fourfold - the need to protect refugees, the importance of bringing

mass murderers to justice, the value of prohibition of hate speech and the necessity to protest human rights violations wherever they occur.

Each of these lessons has a legal component. Indeed, two of them, bringing mass murderers to justice and prohibiting hate speech, are essentially legal. It is impossible to do either without the law.

My advocacy on bringing mass murderers to justice was initially focused on Nazi war criminals, but always encompassed the general principle that all mass murderers be brought to justice. Advocacy on this issue meant elaborating on the importance of justice, the value and need for justice.

Advocacy on prohibiting hate speech brought me face to face with free speech absolutists. Human rights advocacy I realize is often not one dimensional, opposing rights against wrongs, but rather rights and against rights and determining where the balance lies. The hate speech/free speech debate was essentially this sort of debate, attempting to find a balance between competing legal and human right values.

I have spent most of my professional career as a lawyer for refugees and refugee claimants, advocating their causes and cases. It is easy to state in the abstract the need to protect refugees. When it comes to make determinations in specific cases, there are a variety of specific factual and legal issues which need to be addressed - the credibility of the claimants, the meaning of the refugee definition, the relationship between inclusion - protecting those at risk - and exclusion - excluding from refugee protection those who have committed serious violation of human rights, and so on.

The law is morally neutral. It can be a force for harm as well as good. The classic examples of law as harm were the Nazi regimes of Europe as well as the apartheid system of South

Africa. In these regimes, violations of human rights were embedded in law. Promoting respect for human rights sometimes involves relying on law; it also sometimes involves opposing the law.

Many of my colleagues in the human rights field rely on international law for standards and set them against local law or local behaviour. Yet, international law is as easily manipulated by wrongdoers as local law. I have seen international law distorted to serve ideological ends, particularly in an attempt to demonize and delegitimize Israel, and have tried to combat that distortion. That effort has meant delving into the nitty gritty of international law.

All of this advocacy work that I did had other objectives than advancing public legal education. But the link between advocacy which relies on the law or even contests the law and public legal education is more than just happenstance. Done properly, public legal education and advocacy are linked.

I want to take advantage in the rest of my remarks to advocate that position, the need to recognize the linkage between advocacy about the law and public legal education. The linkage may seem obvious. Yet, it is widely rejected.

Charity law distinguishes between education and advocacy. Education is a charitable activity. Advocacy is not.

The Canada Revenue Agency is quite strict about the difference. They write in a policy statement:

"courses, workshops, and conferences may not be charitable if they ultimately seek to create a climate of opinion or to advocate a particular cause."¹

¹ Policy Statement CPS-022, Political Activities, September 2, 2003

The Canada Revenue Agency policy statement refers to and relies on a 2000 British case of *Southwood*.² The Court of Appeal upheld the refusal of the Charity Commission to register the Project on Demilitarization or Prodem as a charity. Chadwick L.J. for the Court wrote:

"Prodem's object is not to educate the public in the differing means of securing a state of peace and avoiding a state of war. Prodem's object is to educate the public to an acceptance that peace is best secured by 'demilitarisation'. ... It is because the court cannot determine whether or not it promotes the public benefit for the public to be educated to an acceptance that peace is best secured by 'demilitarisation' that Prodem's object cannot be recognised as charitable."

The Canadian courts have adopted a similar approach. According to the Supreme Court of Canada majority in a 1999 case, an activity is not educational in the charitable sense when it is undertaken "solely to promote a particular point of view".³

Despite the seeming categorical nature of the statements of the Canada Revenue Agency and the Supreme Court of Canada, there is an exception, written into the Income Tax Act. The Act states that political activities are to be considered charitable where they are ancillary and incidental to a charitable purpose and non-partisan.⁴ The Australia High Court has held that generation of public debate about the best means of achieving an object which is charitable is itself charitable.⁵

² *Southwood v. A.G.*, [2000] ECWA Civ. 204

³ Iacobucci J. *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, at paragraph 169

⁴ Sections 149.1(6.1) and 149.1(6.2)

⁵ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42

Advocacy of public legal education is charitable, because public legal education is charitable. Thomas Gray in 1751 wrote: "Where ignorance is bliss tis folly to be wise".⁶ Despite that view, there is today not much of a constituency for public legal ignorance.

The matter is different for opposition to many of the causes I advocate. Indeed, it is largely because there is no consensus of opinion already in favour of these causes that I have taken them on.

With all due respect to the United Kingdom Court of Appeal, the Supreme Court of Canada, and the Canada Revenue Agency, my view is that advocacy and public education should not be separated. Contributing to public debate can be educational. Public education through advocacy serves the public interest.

Indeed, the contrary stance of separation of advocacy and education, though it has, as we can see, been widely adopted, is itself objectively surprising. Democracy is built on a foundation of advocacy as a truth seeking process.

John Stuart Mill wrote in 1869 in his work *On Liberty* that truth is "a question of the reconciling and combining of opposites." We arrive at the truth, so he wrote, through "the rough process of a struggle between combatants fighting under hostile banners."⁷ Gloria Steinem has put it this way: "The truth will set you free. But first it will piss you off."

It is particularly surprising that the legal profession in the common law world would endorse, albeit with an exception, a separation between advocacy and education. The whole common law legal structure is built on the adversarial system.

⁶ "Ode on a Distant Prospect of Eton College"

⁷ Chapter II: Of the Liberty of Thought and Discussion

One justification for that system is that it determines the truth. So this justification goes, each party knows more about his or her own case than anyone else and can be expected to bring forth any favourable information that impartial investigators might overlook. Furthermore, each party has a stake in the outcome and is motivated to bring all favourable information to the attention of the decision maker. Ellen Sward in 1989 wrote

"Giving the parties a voice [in court proceedings] helps to ensure that the court has full information on which to base its decision." ⁸

Advocacy is not just right now some poor overlooked sister in the education family. Advocacy is foundational to democracy and the rule of law. We deny the link of advocacy to education at our peril.

Of course, not all advocacy is educational. The Canada Revenue Agency Policy Statement on Political Activities imposes constraints on education for it to be charitable which should apply equally to advocacy. The Canada Revenue Agency writes that

"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."

All that should be true of public interest advocacy.

The Law Society of Manitoba professional code of ethics requires that lawyers, when acting as an advocate, must not ,

⁸ Ellen E. Sward, "Values, Ideology, and the Evolution of the Adversary System", Indiana Law Journal Volume 64 Issue 2 Article 4 Spring 1989

- (e) assist in any fraud, crime or illegal conduct;
- (f) knowingly misstate the contents of a document ... the substance of an argument or the provisions of a statute or like authority;
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence;" ⁹

These are standards that advocates should respect outside of court as well as inside, whether they are lawyers or not, for their advocacy to be charitable.

Advocacy to be charitable should not be incitement to hatred or discrimination. It should not be war propaganda or incitement to terrorism.

A purpose is charitable if it generates a public benefit. A debate about means to achieve a public benefit is itself a public benefit. The pursuit of one of those means in particular through advocacy should be considered a public benefit.

Considering all advocacy of any position, even within respectable limits, as charitable may be too broad. However, considering only advocacy which urges a public benefit as charitable is too narrow. Advocacy of a means to achieve a public benefit should be considered charitable even if there is legitimate debate about whether the means advocated does indeed achieve a public benefit.

For example, take the advocacy the *Southwood* case addresses. Whether or not demilitarisation or militarisation would lead to peace, peace itself is a public benefit and there is a legitimate debate about which of these means is most likely to lead to peace. Advocacy of either should be considered charitable.

Or consider the hate speech/free speech debate. Both freedom of speech and freedom

⁹ Rule 5.1-2

from discrimination are public interests. There is a legitimate debate, when society is confronted with incitement to hatred, how both interests in combination can best be realized, whether through prohibition of incitement to hatred or more speech. Advocacy of positions on either side of the debate should be considered charitable.

US courts treat public participation in the legislative and government process as a public benefit. US law provides:

"the development and dissemination of information advocating or seeking to improve understanding of a particular set of ... views is charitable, whether because it is educational ... or because it contributes to a market place of ideas that is beneficial to the community." ¹⁰

The former Conservative government engaged in aggressive audits of several charities to determine the extent to which they engaged in non charitable advocacy work. The Liberal government, shortly after it came into office, wound down those audits, cancelling audits of six charities which had not yet begun.¹¹

The mandate letter from Prime Minister Justin Trudeau to Revenue Minister Diane Lebouthillier indicated that the Prime Minister expected the Minister to

"Allow charities to do their work on behalf of Canadians free from political harassment This will include clarifying the rules governing 'political activity,' with an understanding that charities make an important contribution to public debate and public policy. A new legislative framework to strengthen the sector will emerge from this process."

¹⁰ Comment upon section 28 of the Restatement of the Law Third, Trusts, 2001 at pages 23-24.

¹¹ Canada Revenue Agency "Minister Lebouthillier announces winding down of the political activities audit program for charities" January 20, 2016

The link between education and advocacy in the law of charities is now an issue of uncertainty and turmoil. There will be clarification and legislation. I would hope to see clarification to allow as charitable public legal education through advocacy in causes that may themselves not be charitable.

I want to express finally my appreciation for your giving me the award. This award does not mean, I know, that the Community Legal Education Association agrees with everything I have just said. I am grateful for your giving me the opportunity to say it.

.....

David Matas is a lawyer in private practice based in Winnipeg, Manitoba, Canada