

Occasional Paper

Charity versus Politics: Reforming the Judicial, Legislative and Administrative Treatment of the Charity- Politics Distinction

Adam Parachin



The Pemsel Case
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"The law of charity is a moving subject"
– Lord Wilberforce

About Us

Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.



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Charity versus Politics: Reforming the Judicial, Legislative and Administrative Treatment of the Charity-Politics Distinction*

Introduction

Charity law has a rule – the doctrine of political purposes – distinguishing charity from politics. This rule prohibits charities from being established and/or operated for political purposes. Since the activities of charities are indicative of their purposes, the restriction against political purposes carries with it limitations on political activities. The law is right to distinguish charity from politics. But the doctrine of political purposes as currently constituted is flawed and should be reformed. Its stated rationales are implausible, its specific requirements are uncertain and its restrictions are excessive. These shortcomings could easily be remedied by reforms to the judicial, legislative and administrative treatment (by the Canada Revenue Agency (the “CRA”)) of the charity – politics distinction. This paper is organized along these categories – the judicial, the legislative and the administrative. Problems are identified and solutions proposed under each category.

Significance of the Charity – Politics Distinction

(A) General

The charity – politics distinction may at first seem benign. But the appearance of banality is a façade.

In Canada, the common law informs the meaning of “charitable purposes”. This is true even in the context of the *Income Tax Act* (the ITA).¹ In brief, this means charitable purposes are purposes of public benefit following under one or more of the following categories: the relief of poverty, the advancement of education; the advancement of religion and other purposes beneficial to the community, not falling under any of the preceding categories.²

In *McGovern v Attorney General*,³ Slade J. famously reasoned that trusts for political purposes are non-charitable at common law. He reasoned that this includes trusts of which a “direct and principal purpose” entails any of the following:⁴

- (i) to further the interests of a particular political party; or
- (ii) to procure changes in the laws of this country;⁵ or

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¹ RSC 1985, c. 1 (5th Supp.), as amended. Unless otherwise stated, statutory references in this article are to the ITA.

² See, for example, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 583 and *Guaranty Trust Co. of Canada v. Minister of National Revenue*, [1967] S.C.R. 133 at 141.

³ [1981] 3 All ER 493 (“*McGovern*”).

⁴ *Ibid.* at 508-9.

⁵ On its face, this formulation implies that it might not be political to oppose proposed changes to the law. Other cases have, though, clarified that it is political to both seek and oppose proposed changes to the law. See, for example, *Re Koepler’s Will Trusts* [1984] Ch 243 at 260 and *Re Hopkinson* [1949] 1 All ER 346 at 350.

- (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.

It may not be immediately obvious why distinguishing these purposes from charitable purposes should prove controversial. Practically no one argues that charities should be established to, say, promote a particular political party. However, the breadth of the doctrine of political purposes, as well as its practical, doctrinal and policy significance, are much greater than is at first apparent.

(B) Breadth

Many examples could be cited to illustrate the unexpected breadth of the doctrine of political purposes. Here are but three.

(i) Political By Implication

It would be one thing if political purposes were confined to purposes that are expressly political. But under current law political purposes also include purposes that are by implication political.

Consider, for example, a purpose that avoids expressly calling for reform to law, public policy and/or the administrative practices of government. The purpose could nonetheless be political if its achievement would tend to require such reform. This occurred in the leading case *McGovern v Attorney General*. The purpose in question was to abolish human torture. Such a purpose, it was reasoned, is political because *abolishing* torture would seem to require, and thus imply the need for, a change to law. It made no difference that the purpose was not explicitly articulated as a law reform purpose.

In practice this means that a charity's purposes can be political even if they are facially (or by their express terms) apolitical. As a result, charities are obliged under current law to ensure that their programming and purposes neither explicitly nor by necessary implication call for reform to law, public policy and/or the administrative practices of government (domestic or foreign).

(ii) Persuasion and Controversial Purposes

While it has never been resolved under Canadian law that "persuasion" and/or "controversial purposes" are necessarily political, the idea that promoting a point of view on a controversial issue is political has been courted in a few of the authorities.⁶

It is not clear where this idea originated. It probably stems from one or more of the following errant lines of reasoning (with refuting responses):

⁶ See the discussion of the authorities in the Appendix.

Reasoning	Reply
<p>Mere persuasion does not qualify as a charitable purpose under the “advancement of education”. Mere persuasion is therefore a political purpose.</p>	<p>Even accepting that persuasion does not meet the formal strictures of advancing education, this does not preclude persuasion from being one of the means through which other charitable purposes are pursued.</p>
<p>Political purposes entail persuasion in relation to controversial matters – e.g., persuasion in support of law reform. Political purposes are therefore present when persuasion and controversy are present.</p>	<p>This reasoning produces “false positive” results. It finds political purposes even when they are absent. There is no reason to conclude that charitable purposes are absent simply because persuasion and controversy are present.</p>

Importantly, the authorities flirting with the hypothesis that it is political to promote a point of view on a controversial issue dealt with organizations with mandates to effect reform to law and/or government policy. As a result, these cases do not establish that promoting a view absent a law or policy reform objective is necessarily political. But they nonetheless reveal the tremendous potential for the doctrine of political purposes, in the wrong hands at least, to severely regulate the speech of charities. Much of the communications charities engage in could be said to entail promoting points of view on controversial issues. If this is political, then what is left?

(iii) Practical Effects Outweigh Formal Requirements

The quieting effect of the doctrine of political purposes is probably more severe than can be discerned from a technical assessment of its formal requirements. This is because the doctrine marries imprecise rules with dire consequences for non-compliance.⁷ To mitigate the risk of inadvertently falling offside the doctrine’s many shades of grey, anecdotal evidence suggests that charities often prefer a conservative approach to advocacy designed to ensure that they stay well clear of the grey zones.

To cite just one example of the law’s imprecision, the authorities agree that politics can (within limits) be the means for attaining charitable purposes.⁸ But there is no bright line determining precisely when politics ceases to be the means for charitable purposes and morphs into a non-

⁷ Institutions with political purposes are ineligible to receive and/or maintain charitable status. Also, as we shall see below, registered charities devoting resources to political activities other than those described in subsections 149.1(6.1) and (6.2) of the ITA are subject to suspensions of their gift receipting privileges under paragraphs 188.2(e) and (f).

⁸ See, for example, subsections 149.1(6.1) and (6.2) of the ITA (discussed below). See also *Re Public Trustee and Toronto Humane Society et al* [1987] O.J. No. 534 at para 33 to 48 and *McGovern supra* note 3 at 509 and 511.

charitable purpose incompatible with charitable status. The uncertain boundary very likely inspires at least some charities to push the limits. “If there is no clear limit, it would be difficult for the CRA to establish that we went beyond the limit.”

However, the anecdotal evidence suggests that many charities, acting on a “better safe than sorry” philosophy, severely restrict or altogether avoid advocacy so that they remain distant from the fluid border distinguishing charitable from political purposes. Considering the CRA’s effectively perfect success rate on these matters before the Federal Court of Appeal, there is something to be said for a conservative approach to advocacy.

(C) Doctrinal and Policy Significance

Another reason why the doctrine of political purposes is of such interest to charity lawyers is that it raises issues of law and policy that go well beyond the narrow question of what is properly “charitable” versus “political”. It is a “gateway doctrine” in the sense that it opens the door to many of charity law’s most fundamental, and often murky, doctrinal questions. These include:

How does charity law test for “public benefit”?

How is it determined when a charity’s activities cease to be the means to charitable ends and become non-charitable ends in themselves?

How, if at all, should charity law regulate dual character activities – i.e., activities of a charity that will achieve both charitable and non-charitable purposes?

What referents should charity law draw upon to determine the meaning of charity? Should charitable status be granted or denied on the basis of some normative conception of charity or economic assessments of an organization’s deservedness for a tax subsidy?

What difference, if any, should it make if charities pursue human rights advocacy as distinct from other kinds of advocacy?

The manner in which these questions are addressed in the specific context of the charity – politics distinction matters because it flavours how these issues will be approached in the many other charity law contexts in which the same (or similar) issues arise.

In addition to pure questions of doctrine, the charity – politics distinction raises some fundamental questions of policy. These include: Should we aspire for charities to be seen but not heard, to be mere suppliers of goods and services governments fail to supply (adequately or at all)? Or should we accept that the ideals animating charitable works are not so easily sanitized of their idealism, that advocacy and traditional charitable programming are complementary expressions of the same charitable impulse?

The Judicial: Courts and the Common Law Rationales for the Doctrine of Political Purposes

(A) Problems with the Status Quo

(i) General

The doctrine of political purposes is a common law doctrine. Its aim is to refine the common law meaning of charity by distinguishing between charitable and political *purposes*. (We will give

more focused consideration in Part 4 below to the use of political *activities* to achieve charitable *purposes*.) Given its common law pedigree, it makes sense to evaluate the doctrine of political purposes by assessing how well it lives up to the aspirations and methodology of the common law. Assessed against this standard, the doctrine of political purposes fares particularly poorly. The focus here will be on the rationales courts have supplied in support of distinguishing charitable from political purposes with a view to recommending reform to the judicial treatment of the charity – politics distinction. Those rationales tend to be shallow, implausible and/or self-defeating.

(ii) Why do the stated rationales for the charity – politics distinction matter?

It may seem like an academic digression to critically assess the rationales behind the distinction between charitable and political purposes. However, these rationales have tremendous practical and policy significance due to charity law's common law heritage.

Common law is a system of judge-made law. This means that the definitions of charitable purposes and political purposes, given that they are of common law origin, are not neatly set out in the four corners of any specific statute(s). They have instead been developed iteratively over the course of many years of judicial decisions. If we want to understand how charitable and political purposes have been constructed by the common law, we therefore have to locate and interpret the numerous court decisions dealing with this topic.

Fundamental to the common law system is the expectation that judges will not merely decree rules and outcomes but will instead provide reasoned explanations for them. Reasons for judgment are vitally important to the common law method because they enable, among other things, justification (why is the rule "X" rather than "Y"?), interpretation (why was a given case decided in a particular way?) and prediction (what does a given case, or body of cases, tell us about how future cases will be decided?).

If we do not know why a given rule of law exists – the "mischief" it is meant to address – we will struggle to understand why that rule was applied in a particular case and by extension to predict how and when that rule should apply in future cases. In addition, reasoned explanations enable the common law to engage in self-reflection and to continually work itself pure of thin and/or out-dated justifications for common law doctrines. If the justifications offered in support of a common law doctrine are flawed or out-dated, the common law can strive to abandon the doctrine, modify it and/or develop better justifications.

In short, the justifications and explanations that courts offer for the existence and case-by-case applications of a particular doctrine are practically important. They supply a revealing reference point for assessing whether a common law doctrine is due for reform.

(iii) Evaluating the Rationales

The reasons courts have offered in support of the doctrine of political purposes facilitate neither the predictive nor justificatory aspirations of common law reasoning. To the contrary, rather than

enable prediction, explanation and justification, these reasons strain credulity. And that is putting it politely.⁹

Generally speaking, the reasons courts have offered as justifications for the doctrine of political purposes fall prey to one or more of the following criticisms: (1) they are demonstrably false, (2) they are shallow and unconvincing (inconsistent with established reasoning in charity law decisions) and (3) they are self-defeating, sowing the seeds of the doctrine's ultimate demise.

(1) Demonstrably False

The modern doctrine of political purposes originates in the case *Bowman v Secular Society*.¹⁰ In this case, a testamentary gift to an institution named The Secular Society Limited was challenged by the testator's next of kin.¹¹ The House of Lords upheld the gift. Certain judges elaborated on what the result would have been if (which was *not* the case) the Society had been given the property in the capacity of a trustee rather than as the donee of an absolute gift. Characterizing the matter in this way required that consideration be given to whether the objects of the Society were charitable.¹² One member of the court, Lord Parker, characterized the objects of the Society as being "purely political".¹³ This led Lord Parker to reject the possibility that the Society's objects were charitable at law with the observation that "a trust for the attainment of political objects has *always* been held invalid".¹⁴

As it turns out, Lord Parker got the law wrong. His commentary on the charity – politics distinction has been described as "inaccurate",¹⁵ "not one which is established with any certainty by high authority in England",¹⁶ "difficult to reconcile with certain decided cases",¹⁷ based upon a

⁹ For a more detailed and sustained treatment of the topic, see the following resources (and the resources cited therein): J Chia, M Harding and A O'Connell, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*" (2011) 35 Melbourne University Law Review 353, A. Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 Alberta Law Review 871-900, A. Parachin, "Charity, Politics and Neutrality" (2015-2016) 18 Charity Law & Practice Review 23-56, A. Parachin, "Charity Versus Politics: Law, Policy and Reform" *National Charity Law Symposium*, The Canadian Bar Association, May 27, 2016, Toronto, and A. Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mulé and Gloria DeSantis, eds., *The Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal, McGill University Press, 2017), 33-62.

¹⁰ [1917] A.C. 406 (H.L.) ("*Bowman*").

¹¹ The next of kin argued that the gift to The Secular Society could not be upheld by the laws of England on the basis that its objects, which involved furthering secularisation, were contrary to the Christian faith.

¹² The argument in favour of the view that the Society took as a trustee was that the testator had intended to gift the residue for the purposes of the Society rather than to the Society itself. On this interpretation, the gift could be considered as the settlement of a purpose trust. Since the only purpose trusts generally recognized by the law are *charitable* purpose trusts, this required that consideration be given to whether the purposes of the Society were charitable at law.

¹³ *Bowman*, *supra* note 10 at 442.

¹⁴ *Ibid.* Emphasis added.

¹⁵ P. Michell, "The Political Purposes Doctrine in Canadian Charities Law" (1995) Vo. 12. No. 4 *The Philanthropist* 3 at 4.

¹⁶ C. Wright, "Case and Comment" (1937) XV *The Canadian Bar Review* 566 at 568.

¹⁷ O. Tudor, *Tudor on Charities; a practical treatise on the law relating to gifts and trusts for charitable purposes*, 5th ed. (London: Sweet & Maxwell, 1929) at 41.

“paucity of judicial authority”,¹⁸ “clearly wrong”,¹⁹ “considerably overstated”,²⁰ “not supported by an examination of reported cases”,²¹ and “unconvincing”.²² Contrary to Lord Parker’s observation, no case prior to *Bowman* drew the same distinction between charitable and political purposes.²³ Trusts with overt law reform mandates had in prior cases been recognized as charitable.²⁴ Examples include charities whose purposes included promoting temperance legislation,²⁵ securing the abolition of vivisection²⁶ and establishing a new bishopric.²⁷ Nonetheless, Lord Parker’s errant observation spawned the modern doctrine of political purposes. All subsequent cases applying the doctrine of political purposes either cite *Bowman* or cite cases that cite *Bowman*.

Lord Parker’s historical error in *Bowman*, one might say, is not revealing of very much. Even if Lord Parker was wrong to suggest that the charity – politics distinction had “always” been a feature of charity law, it does not follow that that distinction should never have become a part of the law. Lord Parker’s historically inaccurate explanation in *Bowman* did not preclude a better explanation in subsequent cases. But the explanations did not get better. This is why Lord Parker’s error is worth mentioning. It exposes a heredity of faulty reasoning. It was not just a poor start. To the contrary, it set the tone for what was to follow.

(2) Shallow and Unconvincing

The reasons courts have offered to explain the non-charitableness of the *McGovern* categories of political purposes²⁸ tend to be shallow and unconvincing. We will consider two here: (1) tax expenditure considerations and (2) “neutral reasoning”.

(a) Tax Expenditure Considerations

Some courts have flirted with the idea that political purposes are non-charitable because they are unworthy of income tax concessions.

¹⁸ *National Anti-Vivisection Society v. I.R.C.*, [1948] A.C. 31 at 63.

¹⁹ N. Brooks, *Charities: The Legal Framework* (Ottawa: Secretary of State, 1983) at 139.

²⁰ Francis Gladstone, *Charity, Law and Social Justice* (London: Bedford Square Press, 1982) at 98.

²¹ Kernaghan Webb, *Cinderella’s Slippers? The Role of Charitable Tax Status in Financing Canadian Interest Groups* (Vancouver: SFU-UBC Centre for the Study of Government and Business, 2000) at 132.

²² *Ibid.* at 134.

²³ Michael Chesterman has observed that an earlier decision, *Re Scowcroft*, [1898] 2 Ch. 638, is supportive of the doctrine of political purposes. Chesterman contends that “if a trust for ‘religious and mental improvement’ was also substantially intermingled with furtherance of the principles of the Conservative Party, this would debar it from charitable status.” M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) at 182. The court in *Scowcroft*, however, explicitly held that a trust for religious and mental improvement was a good charitable trust even if it was specifically limited to the advancement of Conservative principles. *Scowcroft* at 641/42.

²⁴ See Peter Luxton, *The Law of Charities* (Oxford, Oxford University Press, 2001) at 225.

²⁵ *Farewell v Farewell* [1892] O.J. No. 173 (Ont. H.C.J.)

²⁶ *In re Foveaux* [1895] 2 Ch. 501. This purpose apparently necessitated a change to the law.

²⁷ *Re Villers-Wilkes* [1895] 72 L.T. 323. The case references a legislative bill that was introduced for the purpose of constituting a bishopric for Birmingham.

²⁸ *Supra* note 3 and related text.

Charitable status carries with it income tax (and other) advantages.²⁹ Registered charities generally do not pay income tax.³⁰ “Gifts” to registered charities are recognized through a tax credit (for individuals),³¹ a tax deduction (for corporations)³² and capital gains tax exemptions for certain gifts of capital property.³³ When courts determine whether any particular institution is charitable at common law they are in practice regulating access to these income tax advantages and by extension the tax expenditures (foregone tax revenue) associated with them. It is therefore not entirely surprising that courts at times appear to have evaluated the charitableness of purposes by asking whether they – the purposes – should attract tax concessions.³⁴

But there is a big difference between the question “is this purpose charitable *and thus worthy of being subsidized through tax concessions?*” and the question “is this purpose worthy of being subsidized through tax concessions *and thus charitable?*”. The former treats the legal meaning of charity as determinative of the institutions worthy for a charity tax subsidy. The latter treats worthiness for a charity tax subsidy as a determinant of the legal meaning of charity.

In one of the leading Canadian cases on political purposes, the court connected the doctrine of political purposes with the following observation:³⁵

[I]n the Canadian context the activities of a registered charity are, in effect, subsidized out of the public purse in that donations are deductible for income tax purposes.

While it is understandable that courts would find this reasoning attractive – how can they help but take notice that they are policing access to charity tax concessions? – it is an indeterminate approach to defining charity.³⁶ How does emphasizing the tax dimensions to charitable status assist a court in any meaningful way to distinguish between charity and politics specifically and charity and non-charity more generally? If a purpose is charitable at common law, it is worthy of a tax subsidy. If it is non-charitable, it is not. End of story. It turns the analysis on its head to reason that a purpose – *if it is worthy of a tax subsidy* – is therefore charitable or conversely that a purpose – *if it is not worthy of a tax subsidy* – is therefore political (or otherwise non-charitable). Courts have no way of assessing worthiness for a tax subsidy other than by determining if an organization is charitable at common law. Since tax concessions are not a reason to grant or deny charitable status, taking these concessions into account at the state of defining charity is bound to confuse matters.

²⁹ A. Parachin, “Legal Privilege As a Defining Characteristic of Charity” (2009) 48:1 Canadian Business Law Journal 36-75.

³⁰ Paragraph 149(1)(f) of the ITA.

³¹ Section 118.1 of the ITA.

³² Section 110.1 of the ITA.

³³ Paragraphs 38(a.1) – (a.3) of the ITA.

³⁴ A. Parachin, “The Role of Fiscal Considerations in the Judicial Interpretation of Charity”, in A. O’Connell, M. Harding and M. Stewart, eds., *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York, Cambridge University Press, 2014) 113.

³⁵ *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504 at para 26 per Stone J.A. See also *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126 at para 18.

³⁶ *Supra* note 29 and 34.

(b) Neutral Reasoning

The primary basis on which courts have explained the non-charitableness of the *McGovern* categories of political purposes has to do with the “public benefit” requirement.³⁷ A purpose must meet a public benefit standard in order to be recognized as charitable at law. This poses an impediment for political purposes because courts have reasoned that they must remain neutral on whether political purposes do or do not meet the public benefit requirement. In other words, very often the reason political purposes fail the test for charitable status is not because they are expressly found to be non-charitable – to be lacking in public benefit – so much as because courts have said they can go no further than offering “no comment” on the public benefit requirement. Since “no comment” on public benefit is inadequate for charitable status, non-charitableness is the result by default.

We could go as far as to functionally define “political purposes” as purposes that elicit from courts a “no comment” on the presence or absence of public benefit. Courts have never put the definition that bluntly but it is consistent with the reasoning of the cases. It follows that we can test the coherence of the charity – politics distinction by evaluating the reasons why courts have concluded a neutral stance is required of them in relation to the public benefit of political purposes. In short, none of these reasons are persuasive.

The Law is Perfect As It Is

One anemic idea that courts have embraced to rationalize the non-charitableness of law reform purposes is that the law must assume its own perfection. According to this reasoning, the law would “stultify” itself – cause itself to appear absurd – if it were to recognize the potential public benefit in purposes entailing law reform.³⁸ If the law is already perfect, courts cannot entertain the public benefit of purposes necessitating law reform.

The criticism of this reasoning is that the law need not and in fact does not assume its own perfection. This is more a matter of judicial will than anything else. Courts, when they choose to do so (which is often), comment on the desirability of law reform, including (ironically) the desirability of reforming the meaning of charity generally and the doctrine of political purposes specifically.³⁹ There is absolutely no reason why courts need to masquerade that the law is beyond reproach. It is farcical to maintain that the law must necessarily assume its own perfection.

³⁷ This is explained in greater detail in A. Parachin, “Charity, Politics and Neutrality” (2015-2016) 18 *Charity Law & Practice Review* 23-56

³⁸ This rationale, for example, was adopted by Lord Simonds and Lord Wright in *National Anti-Vivisection Society v I.R.C.*, [1948] A.C. 31 at 62 and 50, respectively, and by Slade J. in *McGovern*, *supra*, note 3 at 506. The reasoning traces back to a 19th century treatise on the law of charity - Amherst D. Tyssen, *The Law of Charitable Bequests* (London: Williams Clowes and Sons, Limited, 1888) – where the author observed as follows at page 177 in relation to the public benefit of purposes entailing law reform:

However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each Court on deciding the validity of a gift must decide on the principle that the law is right as it stands.

³⁹ In *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126, Strayer J.A. observed as follows at para 19 with reference to the distinction between charity and politics:

I would heartily agree that this area of law requires better 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.

Even if we assume the perfection of the law, how does this explain why purposes entailing reform to public policy and/or the administrative practices of government are political under the *McGovern* classification of political purposes? Are we also to assume the perfection of government? If so, does this not lay bare the absurdity of this line of reasoning?

Deference to Parliament

Another idea is that courts should remain neutral on the public benefit of political purposes as a way of deferring literally all questions of law, policy and administrative reform to Parliament. Remaining neutral is, on this reasoning, a way to avoid intruding (or even the appearance of intruding) into the domain of Parliament. On this view, the doctrine of political purposes preserves the supremacy of Parliament as the body with exclusive jurisdiction over law, public policy and administration in our system of law. In a judgment that is representative of the relevant jurisprudence, Slade J. in *McGovern* held that courts are precluded from concluding that a change in the law is of public benefit since doing so would “usurp the functions of the legislature”,⁴⁰ result in the court “prejudicing its reputation for political impartiality”,⁴¹ and “be a matter more for political than for legal judgment”.⁴²

The criticism of this reasoning is that it considerably overstates the extent to which the recognition of political purposes as charitable could possibly inject courts into the domain of Parliament. The cases promote the false idea that finding public benefit in, say, a purpose entailing law reform necessarily entails a court accepting that there is public benefit in the particular law reform being advocated. The implication is that granting charitable status to reform institutions would result in reforms being advocated to Parliament with the apparent imprimatur of the judiciary. It would practically be as though the judiciary was itself advocating those reforms to Parliament, or so the reasoning goes.

But consider how courts have managed to find other purposes to possess public benefit while simultaneously maintaining appropriate distance from those purposes. In the context of religious purposes, where public benefit analysis is laden with sensitivities, courts have accepted that it is adequate to find public benefit in “religion” without having to take the next step and also find public benefit in the specific doctrines of specific religions. So once courts resolve that a “religion” is being advanced, questions about the public benefit of that religion’s individual doctrines generally do not arise.⁴³ It is simply accepted that there is public benefit in advancing “religion” without having to assess public benefit at a more granular level. We can describe this methodology as abstracting religious purposes to a level of non-controversy. Rather than accept

⁴⁰ *McGovern*, *supra* note 3 at 506.

⁴¹ *Ibid.* at 507.

⁴² *Ibid.* at 507. Similar reasoning has been endorsed in Canadian decisions. See, for example, *Positive Action Against Pornography v Minister of National Revenue* [1988] 1 C.T.C. 232 at para 16, *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126 at para 12, *Alliance for Life v Minister of National Revenue* [1999] 3 C.T.C. 1 at paras 26 and 50 and *Action by Christians for the Abolition of Torture v R* [2003] 3 C.T.C. 121 at para 39.

⁴³ In *Gilmour v Coats* [1949] AC 426 (H.L.), Lord Reid at 459 held that:

[The law] assumes that it is good for man to have and to practise a religion...The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.

The court in *Gilmour v Coats* went on to do the very thing it said courts do not and should not do – vet a religious doctrine (here, the doctrine of “intercessory prayer”) for validity. But this is highly unusual.

the public benefit of specific (and potentially controversial) religious beliefs, courts accept the public benefit of “religion”.

There is much to commend this approach to public benefit analysis. It enables courts to find value in religion without necessarily endorsing all the beliefs of any specific religion. It avoids the contradiction that could otherwise arise from the recognition of religions with conflicting doctrines as charitable. More important for present purposes is that it allows courts to bless religious purposes with charitable status while preserving their distance from specific religious doctrines.⁴⁴

Choice is literally the only thing that stops courts from applying a similar approach to public benefit analysis in the context of reform oriented purposes. Courts could, if they chose to do so, also abstract political purposes to a level of non-controversy. That is, rather than vet the specific reforms being promoted by an advocacy organization for public benefit, courts could instead simply choose to accept that there is benefit in the advancement and public deliberation of reform proposals (provided at least that the reform proposals dovetail with charitable purposes) just as they choose to accept that there is benefit in “religion” without vetting individual religious doctrines for public benefit. Doing so would address concerns over Parliamentary deference as it would distance courts from specific reform agendas in a similar way to how public benefit analysis in the context of religion distances courts from specific religious doctrines.

In fact, this very technique was used by the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*.⁴⁵ Declining to follow the doctrine of political purposes, a majority of the court concluded that an institution organised and operated for the purpose of generating public debate as to how best to deliver foreign aid was charitable. The majority reasoned that agitation for legislative and policy changes through public debate could be considered beneficial without any need to vet the specific positions being advocated for public benefit. This reasoning locates public benefit not in the specific lines of debate being advanced but rather in the good of public debate. This reasoning only follows if specific and controversial lines of debate are abstracted to a level of non-controversy—the good of public debate.

So the idea that the conventions of Parliamentary Supremacy somehow categorically mandates a neutral stance on the public benefit of reform purposes is not at all convincing. To the extent that political purposes raise concerns relating to Parliamentary Supremacy, those concerns are of the courts’ own making.

Neutral Conception of Charity

The idea that courts should strive for a neutral stance on the public benefit of political purposes also appears to reflect – although courts have been less explicit on this point – a discomfort on the part of courts over endorsing (or being seen as endorsing) advocacy that is “nakedly value-laden”.⁴⁶ It is probably no coincidence that the leading cases on political purposes in Canada

⁴⁴ A similar technique was applied in relation to abortion in *Everywoman’s Health Centre v Minister of National Revenue* [1991] FCJ 1162. The court abstracted and reframed the clinic’s abortion services as ‘health care’ services so that benefit could be located in the uncontroversial purpose of providing health care

⁴⁵ [2010] HCA 42.

⁴⁶ This point is explained in greater detail in A. Parachin, “Charity, Politics and Neutrality” (2015-2016) 18 *Charity Law & Practice Review* 23-56.

feature advocacy causes resting on unprovable moral perspectives on such topics as abortion,⁴⁷ pornography⁴⁸ and torture.⁴⁹ The institutions labelled political and thus non-charitable in these cases advanced controversial moral conceptions of the “good”. The merit of the positions being advanced by these organizations could not be verified through neutral referents. That is, they were not based on factual claims that could be observed to be true or false. These cases dealt with pure moral perspectives ultimately backed only by the value commitments of the organizations advancing them.

The challenge for a court is that this lays bare the non-neutral value judgments that go into public benefit analysis. Here, a court cannot easily dress its endorsement of the purposes before it under the cover of “the facts” or the scientific method. Neither could it mask the value judgments at play here by resorting to a fashionable form of moral reasoning such as would have been possible if the advocacy organizations had framed their causes as a vindication of protected human rights. Instead, the court in its public benefit analysis had to squarely confront the moral perspectives before it *as moral perspectives*.

In one of these cases, *Human Life International v Minister of National Revenue*,⁵⁰ Strayer J.A. of the Federal Court of Appeal explained his refusal to comment on whether the pro-life organization before the court did or did not satisfy the public benefit standard as follows:⁵¹

[T]his kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?

Note how Strayer J.A. attributes the non-charitableness of political purposes to the desirability of neutrality. His essential point is that courts should remain neutral in relation to the desirability of “forms of conduct” being “urged on other members of the community”. His concern appears to have been one of preserving the neutrality of courts in relation to what *in principle* is and is not a “proper form of conduct” to be advocated to others. The idea would appear to be that courts should not form and express non-neutral value judgments in relation to purposes entailing such advocacy.

But aspirations for judicial neutrality seem misguided in this area of law. Administering the common law meaning of charity necessarily and unavoidably requires that courts make non-neutral and controversial value judgments. To be sure, the common law concept of charity is inescapably non-neutral in practically every way. Charity law entails the non-neutral celebration of non-neutral purposes. A significant percentage of what charities do – and properly so – is concerned with changing the way that people think about, experience and relate to such purposes as poverty relief, religion, the environment, *etc.* Value judgments are not a reluctant

⁴⁷ See, for example, *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126 and *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504.

⁴⁸ *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340.

⁴⁹ *Action By Christians for the Abolition of Torture (ACAT) v Minister of National Revenue* [2002] FCA 499. See also McGovern, *supra* note 3.

⁵⁰ *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126.

⁵¹ *Ibid.* at para 13.

but rather a celebrated feature of this area of law. The very point of the exercise is to set aside a group of value-laden purposes – those qualifying as charitable – and to broadcast the message that they are uniquely worthy of being promoted and sustained.

So it is difficult to reconcile the appeal to ideal of neutrality in the cases distinguishing charity from politics with the manifestly non-neutral nature of charity. Neutrality is less a constraint than a choice.

(3) Self-Defeating

The appeal to neutrality in the cases distinguishing charity from politics is vulnerable to one further criticism – it is self-defeating. Rather than validate the charity – politics distinction, premising this distinction on the ideal of neutrality ensures its futility. If the concern behind the charity – politics distinction is that courts should remain neutral on the public benefit (or lack thereof) of advocacy, it stands to reason that charities can engage in advocacy provided they do so in ways that eliminate or mute the perceived need for neutrality. Once the neutrality objection to the charitableness of politics is removed from view, there is little left in current law to sustain the charity – politics distinction.

An obvious strategy is for charities to advance their advocacy as human rights claims. It is presupposed, at least in jurisdictions with entrenched charters of rights, that courts have a legitimate role to play in the interpretation and enforcement of human rights. As a result, no court could maintain the facade that it is duty bound to remain neutral on the merits of any given interpretation of constitutionally protected human rights. This is no small problem. Practically every charity that has been found to be political in the Canadian cases could repackage its advocacy as a defence of constitutionally protected human rights claiming that it is no longer political.⁵²

This very issue recently came before the UK First-Tier Tribunal in *The Human Dignity Trust v The Charity Commission*.⁵³ At issue in this case was the charitableness of a trust – the Human Dignity Trust (“HDT”) – established and operated to engage in constitutional human rights litigation. Specifically, HDT brought constitutional challenges against laws criminalizing same-sex relationships in various jurisdictions around the world. The Charity Commission took the position that HDT (among other things) had a political purpose. HDT maintained that it was established for the charitable purpose of advancing human rights.⁵⁴ The UK First-Tier Tribunal concluded that HDT was charitable at law. On the charity – politics distinction, the Tribunal reasoned as follows:⁵⁵

⁵² See, for example, A. Parachin, “Human Rights and Charity — Regulatory Challenges.” (2016). *The Philanthropist*. Retrieved from <http://thephilanthropist.ca/2016/09/human-rights-and-charity-regulatory-challenges>.

⁵³ [2014] FTTT 0013 B(GRC). For a more detailed discussion, see A. Parachin, “Charity, Politics and Neutrality” (2015-2016) 18 *Charity Law & Practice Review* 23 at 34-7.

⁵⁴ In the UK, the advancement of human rights is a charitable purpose under para 3(1)(h) of the *Charities Act 2011*, 2011 c. 25. Similarly, upholding human rights is recognized as charitable in Canada. See “Upholding Human Rights and Charitable Registration”, Canada Revenue Agency, CG-001, May 15, 2010.

⁵⁵ *Supra* note 53 at para 99 (emphasis added).

It seems to us that the constitutional process involved in *interpreting and/or enforcing* superior constitutional rights might, on one analysis, be seen as *upholding the law of the state* concerned rather than changing it...

The premise behind this reasoning was that there is a “legitimate role for the court in interpreting and enforcing superior constitutional rights”.⁵⁶ As a result, the usual concerns over deferring to Parliament all questions of law, policy and administrative reform were absent (or at least muted). In addition, although the tribunal did not make this point, it is safe to say that concerns over the optics of courts endorsing value laden advocacy are going to be muted where advocacy takes expression as defences of constitutionally protected human rights as opposed to as policy preferences backed by undressed moral conviction.

None of this is meant to suggest that human rights are inherently political. That’s not the point. The point is that human rights advocacy presents charities with an avenue to sidestep the “neutrality oriented” objections to the charitableness of political advocacy. Given the enormous breadth of advocacy causes that could conceivably meet the lax standard set out in *Human Dignity* – “*interpreting and/or enforcing superior constitutional rights*” – human rights advocacy could be an exception that effectively ends the rule.

All of this is the direct result of courts having premised the charity – politics distinction on flimsy bases that are neither capable of explaining nor sustaining the distinction.

(B) Solving the Problem

The remedy for shallow reasoning is better reasoning. Is there an alternative basis on which to rationalize the doctrine of political purposes or is the doctrine simply not capable of being rationally justified? I think a better explanation is possible. Having set out a detailed account of this elsewhere, I will merely provide a summary explanation here.⁵⁷

Political purposes as defined under current law share a common feature – they entail a call on government to behave differently than it is currently behaving. Political purposes by definition entail advocating that government reform law, shepherd a new public policy, alter its administrative practices or influence which political party forms the next government. So when we are considering whether a better explanation for the non-charitableness of political purposes is possible, it seems as though *that* – the potential non-charitableness of altering the behaviour of government vis-à-vis law, public policy and administration – should be the focus of our inquiry. Our essential question is whether it should make a difference to the charitableness of an organization if it seeks to pursue its mission *through government*. In short, I think that this does indeed make a difference.

The doctrine of political purposes could be rationalized on the basis that it preserves the distinctiveness of charity and government. The gist of this perspective is that government and charity, though they sometimes pursue similar ends, are distinct from one another. Charity is a private (in the sense of nongovernmental) voluntary institution. On this view, charity is not simply concerned with attaining ends qualifying as charitable. It is concerned with attaining those ends in a particular way – through voluntary means. The distinctiveness of charity and government finds

⁵⁶ *Supra* note 53 at para 96.

⁵⁷ See A. Parachin, “How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act” (2017) 65:2 Canadian Tax Journal 391-418 and A. Parachin, “Reforming the Regulation of Political Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?” (2016) 91:3 Chicago-Kent Law Review 1047-78.

support in the scholarly literature. It is consistent with the idea that the voluntary nature of charity makes it distinct from the coercive nature of government.⁵⁸ Likewise, it is consistent with the contention that voluntarism, as in private autonomous choice, makes charity distinct from government, which operates more coercively.⁵⁹ It also draws on the conceptualization of the charitable sector as a separate sovereign.⁶⁰ The distinctiveness of charity and government also helps to explain why trusts established for the purpose of carrying out governmental policy have not been recognized as charitable.⁶¹ In addition, it explains the policy position of the Charity Commission of England and Wales that charitable trusts must be independent from government.⁶² In the view of the Charity Commission, if the purpose of a trust is ultimately to implement the policies of government, or if the trust operates such that it merely carries out the directions of government, then it will not qualify as charitable.

The Charity Commission's position is particularly instructive. It supports the idea that governments cannot "do government" through charities. The charity – politics distinction can be understood as simply applying this principle in reverse. When we say that activities directed at pursuing reform to law, public policy and/or the administrative practices of government are "political activities" we can explain this as follows: Just as governments cannot "do government" through charities, charities cannot "do charity" through governments. Since government and charity are separate and distinct, government cannot be the means for charitable ends any more than charity can be the means for governmental ends.

Why is the distinctiveness of charity and government a better explanation for the non-charitableness of politics relative to the explanations courts have offered? The fatal flaw afflicting the explanations courts have offered in support of the charity – politics distinction is that they say little to nothing about the normative boundaries of "charity". As we have seen, they instead premise the distinction on false statements about the precedents – that the precedents have always distinguished charity from politics – the nature of law – that the law must assume its own perfection – and the institutional limits of the judiciary – that courts must aspire to neutrality in their interpretations of charity. All of this rings hollow, lacking any obvious connection to what ultimately matters, which is the proper meaning of charity.

If nothing else, the distinctiveness of charity and government at least gives us a concrete idea about charity upon which to construct the charity – politics distinction. It simply does a better job of helping us to understand the outcomes of many of the cases, to criticize the outliers and to predict how future cases should be decided. It also nips in the bud the suggestion – though as discussed in the Appendix not firmly established in law – that persuasion in relation to controversial issues is properly a non-charitable political purpose. Thought leadership in relation to controversial issues does not involve government, provided at least it stops short of advocating

⁵⁸ D. Jensen, "Charitable Purposes and Political Purposes (Or Voluntarism and Coercion)", (2015-2016) 18 *Charity Law & Practice Review* 57-78.

⁵⁹ M. Harding, *Distinguishing Government from Charity in Australian Law*, Sydney L. Rev. 559, 578 (2009). Elsewhere, Harding has drawn on the ideals of autonomy and altruism to rationalize and recommend reform to the doctrine of political purposes. See M. Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014), chapter 6.

⁶⁰ E. Brody, "Of Sovereignty and Subsidy Conceptualizing the Charity Tax Exemption", 23 *J. Corp. L.* 585 (1998).

⁶¹ Harding, *supra* note 59 at 561–63.

⁶² Charity Commotion for England & Wales, *The Independence of Charities from the State – RR7* (2001). Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358888/rr7text.pdf.

specific action by government. So if the doctrine of political purposes is concerned with maintaining the distinctiveness of charity and government, it follows that this kind of advocacy should not be considered political.

In sum, the doctrine of political purposes rests on the distinction at common law between charitable and political purposes. The reasons courts have offered to explain the non-charitableness of political purposes fall short. They are unpersuasive and incapable of sustaining the charity – politics distinction. There is, though, an alternative basis – the distinctiveness of charity and government – on which to rationalize the non-charitableness of political purposes.

The Legislative: Subsections 149.1(6.1) and (6.2) of the ITA

(A) General

While the common law is primarily concerned with the distinction between charitable and political *purposes*, the provisions of the ITA dealing with the charity – politics distinction are concerned with political *activities*. These provisions – subsections 149.1(6.1) and (6.2) – follow a now familiar cycle. The cycle begins when policymakers conclude that the ITA’s usual reliance upon the common law of charity is imperfect for income tax purposes in some particular way. The concern is typically that the common law, however adept at identifying charitable *purposes*, is at times too lax or too imprecise in its regulation of activities. There is merit to this concern. The common law, owing to its fixation on the purposes of charities, tends to have a comparatively relaxed posture vis-à-vis activities.⁶³

Generally speaking, the common law intervenes in relation to activities only once it becomes apparent that they – the impugned activities – are supporting non-charitable purposes. Short of that, the common law generally leaves it to charities to determine for themselves the activities through which to achieve their charitable purposes. The purpose focused methodology of the common law works well but sometimes greater precision is desirable. For example, there may well be particular activities – e.g., political activities or business activities – that policymakers have reasons to prohibit or restrict long before concerns arise that non-charitable purposes – e.g., political purposes or for-profit purposes – are being pursued. Alternatively, there may be activities in relation to which policymakers want to establish more clearly defined boundaries than what the common law supplies.

The next step in the cycle entails the adoption of legislative provisions in the ITA intended to “improve” on the common law.⁶⁴ This is where things tend to go awry. Attempts to regulate the activities of charities through targeted legislative interventions under the ITA often make things worse. Here is the problem: policymakers have yet to figure out how to seamlessly mesh legislated rules in the ITA with common law principles. This problem is attributable to a knowledge deficit. It takes knowledge of the common law of charity to effectively override or supplement it through legislative interventions. Policymakers have at times struggled to channel this knowledge into the ITA.

The ITA’s provisions dealing with political activities illustrate the problem perfectly.

⁶³ See, for example, A. Parachin, ‘How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act’ (2017) 65:2 Canadian Tax Journal 391-418 at 400-404.

⁶⁴ See, for example, subsections 149.1(6.1) and (6.2) of the ITA dealing with political activities and paragraphs 149.1(2)(a), (3)(a) and (4)(a) of the ITA dealing with business activities.

(B) What Rule Do Subsections 149.(6.1) and (6.2) Establish?

For ease of reference, here is the text of subsections 149.1(6.1) and (6.2).

149.1(6.1)—For the purposes of the definition "charitable foundation" in subsection (1), 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)—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.

Subsections 149.1(6.1) and (6.2) were introduced in 1985. They were meant to codify a simple idea – that politics can be the means to charitable ends. These provisions create a deeming rule. Registered charities devoting resources to “political activities” are deemed to be devoting resources to charitable purposes (in the case of charitable foundations)⁶⁵ and charitable activities (in the case of charitable organizations)⁶⁶ provided certain criteria are met. Political activities are in effect deemed to be charitable where the criteria are met.

First, “substantially all” resources must be devoted to charitable purposes (in the case of charitable foundations) and charitable activities (in the case of charitable organizations).⁶⁷ Second, the political activities must be “ancillary and incidental” to charitable purposes (in the case of charitable foundations)⁶⁸ and charitable activities (in the case of charitable

⁶⁵ Subsection 149.1(6.1).

⁶⁶ Subsection 149.1(6.2).

⁶⁷ See the opening language of subsections 149.1(6.1) and (6.2).

⁶⁸ See paragraph 149.1(6.1)(b).

organizations).⁶⁹ Third, the political activities must not include the direct or indirect support of, or opposition to, any political party or candidate for public office.⁷⁰

Notably, subsections 149.1(6.1) and (6.2) do not define the phrase “political activities”. As is explained below, leaving this phrase undefined was a significant mistake.⁷¹

(C) What Mischief Do Subsections 149.1(6.1) and (6.2) Attempt to Solve?

We have seen that charities are not permitted to have political purposes. But to what extent can they use political activities as the means for attaining charitable purposes? The deeming rule in subsections 149.1(6.1) and (6.2) was intended to address this question. It is important to understand why this question arose in the first place. It would appear from subsections 149.1(6.1) and (6.2) that policymakers failed to fully grasp the problem these provisions were meant to solve. We can understand that problem as primarily relating to the significance of adjectives in the law of charity, specifically the adjectives “political” and “charitable” in the phrases “political activities”, “charitable activities” and “charitable purposes”.

Just as is the case now, there were two categories of registered charities at the time that subsections 149.1(6.1) and (6.2) were enacted: charitable foundations and charitable organizations. Then as now, charitable foundations had to be “constituted and operated for exclusively *charitable purposes*”⁷² and charitable organizations were defined as organizations “all the resources of which are devoted to *charitable activities*”.⁷³ Then (as now) the question was (is) whether *political* activities are inconsistent with the above requirements for *charitable* purposes and *charitable* activities. We can only get at that issue by first considering the logic that informs whether activities are labelled with the adjective “charitable” or “political”.

The common law of charity generally employs a purpose focused methodology for characterizing activities.⁷⁴ The feature qualifying an activity as a charitable activity or non-charitable activity is that it is carried on to achieve, respectively, a charitable purpose or a non-charitable purpose.⁷⁵ To say that a charitable organization must devote all its resources to charitable activities is therefore to say something about its purposes: the organization’s activities must be carried on to achieve charitable purposes (otherwise the organization’s activities would not be charitable). To say that a charitable foundation must be constituted and operated for exclusively charitable purposes is ultimately just a different way of saying the very same thing: the foundation’s

⁶⁹ See paragraph 149.1(6.2)(b).

⁷⁰ See paragraphs 149.1(6.1)(c) and (6.2)(c).

⁷¹ In the 2012 federal budget, subsection 149.1(1) was amended to reflect that a political activity “includes” the making of a gift to a qualified donee to support the political activity of the qualified donee. But there is no legislative indication as to what constitutes a “political activity” in the first place.

⁷² See the definition of “charitable foundation” in subsection 149.1(1).

⁷³ See the definition of “charitable organization” in subsection 149.1(1).

⁷⁴ See, for example, *Vancouver Society of Immigrant and Visible Minority Women* [1999] 1 S.C.R. 10 at paragraphs 53, 54, 56, 58, 152, and 154. See also Maurice C. Cullity, “The Myth of Charitable Activities” (1990) 10:1 *Estates and Trusts Journal* 7-29.

⁷⁵ In *Toronto Volgograd Committee v Minister of National Revenue* [1988] 1 C.T.C. 365, Stone J. reasoned (see paragraph 8) that the ITA’s charity provisions would be “difficult if not impossible to administer” if the expenditures of charities (and by implication the activities of charities more generally) had to be characterized as charitable and non-charitable without regard for the purposes for which they were incurred (or carried out).

activities must be carried on to achieve charitable purposes (otherwise the foundation's purposes would not be exclusively charitable).

This logic exposes the technical and conceptual problems posed by the phrase "political activities". Since activities are generally characterized by the common law of charity with reference to their purposes, a political activity is by definition an activity carried on to achieve a political purpose. But charities are not permitted to have political purposes. Charitable foundations must be "constituted and operated for exclusively charitable purposes". In practice this confines the activities of charitable foundations to charitable activities (since charitable purposes are not furthered by non-charitable activities). Charitable organizations are institutions "all the resources of which are devoted to charitable activities". In practice this confines the purposes of charitable organizations to charitable purposes (since non-charitable purposes are not advanced by charitable activities).⁷⁶ It would seem then that neither charitable foundations nor charitable organizations can engage in political activities, properly so-called.

Indeed, this was essentially the position taken by the CRA in its first published guidance on the political activities of registered charities – Information Circular No. 78-3. While the CRA did not explain the reasoning behind this conclusion, it presumably had to do with the notion that a political activity cannot exist independently of a political purpose. IC 78-3 drew criticism, including in the House of Commons, on the basis that it was too restrictive.⁷⁷ On May 1, 1978, then Prime Minister Trudeau announced its suspension.⁷⁸ After further debate, IC 78-3 was withdrawn on May 5, 1978.⁷⁹ But then a similar position to IC 78-3 was taken by the Federal Court of Appeal in *Scarborough Community Legal Services v Canada*.⁸⁰

In *Scarborough Community Legal Services*, the applicant for charitable status advocated for changes to law and public policy. At issue was whether this resulted in the applicant failing the requirement that charitable organizations must devote all their resources to charitable activities. The Minister of National Revenue concluded that it did. The Federal Court of Appeal upheld the Minister's decision to deny charitable registration. Justice Marceau reasoned as follows:⁸¹

I do not think that the meaning of the word charitable can ever be so extended as to cover a particular activity aimed, as I said, specifically and directly at influencing the policy-making process, whatever be the conditions or the context in which it is carried out.

⁷⁶ This is why the distinction between charitable organizations and charitable foundations lacks substance. Requiring exclusively charitable purposes (in the case of charitable foundations) and exclusively charitable activities (in the case of charitable organizations) amounts to different ways of requiring the same essential thing.

⁷⁷ See Canada, Parliament, House of Commons Debates, 30th Parliament, 3rd session, vol 5, (May 2, 1978) at p 5008. Retrieved from Canadian Parliament Historical Records http://parl.canadiana.ca/view/oop.debates_HOC3003_05/414?r=0&s=2.

⁷⁸ *Ibid.*

⁷⁹ See Canada, Parliament, House of Commons Debates, 30th Parliament, 3rd session, vol 5, (May 5, 1978) at p 5188. Retrieved from Canadian Parliament Historical Records http://parl.canadiana.ca/view/oop.debates_HOC3003_05/594?r=0&s=2.

⁸⁰ [1985] F.C.J. No. 166 ("*Scarborough Community Legal Services*").

⁸¹ *Ibid* at paragraph 13.

Again, the idea that activities should be characterized with reference to their purposes arguably played a role in this reasoning.⁸²

The holding in *Scarborough Community Legal Services* lent credence to the administrative position previously set out by the CRA in (by then withdrawn) IC No. 78-3. But this was not the only case to consider political activities. A more lenient approach to political activities had previously been countenanced, revealing that courts were struggling to develop and, as we shall see, articulate a consistent, measured and principled position on political activities.

For example, prior to *Scarborough Community Legal Services*, it had been accepted in *McGovern v Attorney General* that politics could within limits be one of the ways through which charities pursue their charitable purposes. A purist of common law logic would say that the simplest way to express this point would have been for courts to acknowledge that political activities is a potentially misleading phrase, i.e., to explicitly say that “political activities”, when they contribute to the attainment of charitable purposes, are more accurately described as “charitable activities”. But courts opted for a different, arguably less straightforward, method of expressing the same essential point.

This may have been because courts considered the simple formulation to be an unhelpful tautology (a self-fulfilling statement) akin to “politics is charitable when it is charitable”. Alternatively, courts may have been concerned that it is unhelpfully broad to use the phrase charitable activities as a catch-all phrase to describe literally all activities carried on for charitable purposes. Doing so lumps together otherwise unlike activities based on a single shared feature – their common linkage with charitable purposes. Even if all activities contributing to charitable purposes can be conceived of as charitable activities it does not follow that all such activities should be treated identically by the law. Dogmatically insisting that all activities contributing to charitable purposes be categorized as “charitable activities” makes it difficult to isolate for analysis and regulation any specific subset of activities warranting discrete treatment.

Whatever the reason, the alternative method of expression contributed by certain courts seems uniquely suited to causing confusion. For example, Slade J. in *McGovern v. Attorney General* explained that charitable status is not compromised by “non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose”.⁸³ Again, we see here the confusing nature of adjectival analysis. What specifically did Slade J mean by “non-charitable” activities that are “subsidiary or incidental” to charitable purposes?

Ordinarily, the phrase “non-charitable activities” refers to activities carried on for non-charitable purposes. On this view, non-charitable activities are precluded by the requirement for exclusively charitable purposes. But I understand Slade J. to have used the phrase “non-charitable activities” differently here. He appears to have concerned himself with the following question: How should

⁸² In paragraph 15, Justice Marceau explicitly denied that activities should be classified based *solely* on their purposes. He reasoned that the “activities of a group can hardly be rationally classified on the sole basis of their more or less close proximity to the general purposes for which the group was organized.”

But he nevertheless was clearly of the view that a regard for purposes is proper when characterizing activities. To be sure, in paragraphs 14-16, Justice Marceau gave the example of an institution with seemingly non-charitable purposes. He reasoned that such purposes will not preclude charitable registration if they can be understood not as ends (or purposes) in themselves but rather as the means to charitable purposes (that is, as charitable activities). The only possible basis on which this reasoning holds is if the charitableness of activities is contingent on their linkage with charitable purposes. How else could a seemingly non-charitable purpose be explained away on the basis that it is in reality the means to charitable ends and thus a charitable activity?

⁸³ *Supra* note 3 at 510.

the law respond when charities are authorized by their constating documents to “do things” we do not typically associate with “charity”? This – I think – is the kind of activity Slade J. was referring to with the phrase “non-charitable activities”: activities (like political activities) that do not enjoy the obvious or intuitive link with charitable purposes that is apparent with such acts as, say, running a soup kitchen.⁸⁴

Slade J.’s evident intention was to remind us that charity law is concerned with purposes, not activities. He reasoned that that which is seemingly non-charitable is benign – does not compromise charitable status – provided it is but one of the ways through which charitable purposes are pursued, i.e., provided it is, in his words, “subsidiary or incidental” to charitable purposes. We know this was his point because he summed up his analysis with the following observation:⁸⁵

[I]f 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.

But to describe any activity carried on in furtherance of charitable purposes as a non-charitable activity subsidiary or incidental to charitable purposes is to invite unnecessary confusion. How exactly is the activity non-charitable if it furthers charitable purposes?

Taking stock, there were two problems relating to political activities.

First, there was a substantive problem. The authorities conflicted on whether charitable purposes could be achieved through political means. Like IC No. 78-3, the holding in *Scarborough Community Legal Services* took a hard line, reasoning that charitable purposes could not be achieved through political means. Other authorities adopted a more liberal view, reasoning that a restriction on political purposes did not categorically preclude charitable purposes from being pursued through limited political means.

Second, there was a linguistic problem surrounding the use of adjectives in charity law. “Political activities” had become a loaded phrase, used by some courts to describe activities linked with political purposes and by others to describe activities permissible for charities within loosely defined limits. Worse yet political activities had also been confusingly labelled “non-charitable activities” that are permissible provided they are “subsidiary or incidental” to charitable purposes.

The linguistic problem was accentuated by the ITA statutory definitions of charitable foundations and charitable organizations. As we have seen, in subsection 149.1(1) of the ITA charitable foundations are legislatively defined as institutions with “exclusively charitable purposes” and charitable organizations are legislatively subject to the requirement that “all the resources of which are devoted to charitable activities”. For the reasons noted above, these are separate ways of saying the exact same thing. The reference to exclusive charitable purposes in the case of

⁸⁴ *Ibid.* at 509, Slade J observed that “trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of such purposes, have incidental powers to carry on activities which are not themselves charitable.” Slade J. is attempting to describe activities that if viewed in the abstract – viewed divorced of the charitable purposes in which they are furtherance – would not be considered charitable.

⁸⁵ *Ibid.* at 511. In *Action by Christians for the Abolition of Torture v R* [2003] 3 C.T.C. 121, Décaré J.A. described the point at para 35 as follows:

The English and Canadian courts have consistently been aware of the fact that while, in general, charities and politics were not reconcilable, it was equally necessary, in practice, to acknowledge that in real life they are not mutually exclusive. The more omnipresent the state, the harder it is to overlook the political mechanisms when one is engaged in charitable work.

charitable foundations carries with it a restriction on activities, specifically it restricts against activities carried on for non-charitable purposes (non-charitable activities). Likewise, the reference to charitable activities in the case of charitable organizations carries with it a restriction on purposes, specifically it restricts against activities carried on for non-charitable purposes.

Even though the definitions of charitable foundations and charitable organizations are functionally identical, they are distinct optically. Given the common law convention of characterizing activities with reference to purposes, political activities – understood as activities carried on for political purposes – are discordant with the requirement that charitable foundations have exclusively charitable purposes. But that discordance is even more visible in the case of charitable organizations. A restriction against political activities can be immediately and intuitively detected in the statutory requirement that charitable organizations devote all their resources to charitable activities.

The ideal legislative solution would aspire to resolve both the substantive problem and the linguistic problem.

(D) Do Subsections 149.1(6.1) and (6.2) Achieve Their Goal?

Subsections 149.1(6.1) and (6.2) take up the above described mischief through a deeming rule. As we have seen, they legislatively deem political activities meeting certain criteria to be charitable.⁸⁶ These provisions codify a defensible principle – that politics can within limits be the means for charitable purposes. Had they been properly drafted these provisions would have curtailed debate over the amount and type of political activities consistent with charitable status. But they were poorly drafted, revealing that policymakers may not have had a complete sense of the problems they were trying to solve.

We will restrict our focus here to two significant shortcomings with subsections 149.1(6.1) and (6.2): (1) the failure to legislatively define “political activities” and (2) confusion surrounding the consequences of political activities failing to comply with the criteria of subsections 149.1(6.1) and (6.2). Most of the problems with these provisions stem from these two shortcomings.

(i) What are Political Activities?

The ITA does not define the phrase “political activities” as used in subsections 149.1(6.1) and (6.2).⁸⁷ Statutory design always requires a difficult policy choice by legislators as to which terms and phrases used in legislation warrant specific legislative definition. Should a given term or phrase carry its plain and ordinary meaning, its meaning under the general law or a specifically crafted legislative definition?⁸⁸ Often these questions reduce to a matter of judgment over which reasonable people can agree to disagree.

⁸⁶ As we have seen, subsections 149.1(6.1) and (6.2) are a bit more nuanced. If certain criteria are met, they legislatively deem resources devoted to political activities to be resources devoted to charitable activities (in the case of charitable organizations) and charitable purposes (in the case of charitable foundations). But the practical effect of this is to treat political activities as charitable activities.

⁸⁷ In the 2012 federal budget, subsection 149.1(1) was amended to reflect that a political activity “includes” the making of a gift to a qualified donee to support the political activity of the qualified donee. But there is no indication as to what constitutes a “political activity” in the first place.

⁸⁸ A cynical contribution (or, depending upon your perspective, a realistic contribution) might also add that there is the further question of whether leaving it for courts to resolve is politically preferable to expending political capital through a potentially controversial statutory definition.

But things are more nuanced in the context of the ITA's provisions dealing with charities. Here, the absence of a statutory definition of political activity has to be considered in light of the pre-existing policy choice to rely upon the common law for the meaning of charity. The question in this context is not merely whether a statutory definition of political activity can be dispensed with but more specifically whether it can be dispensed with in light of the longstanding policy choice to not statutorily define charity. In this context we have to be concerned not merely with whether a statutory definition would bring desirable legislative clarity – the usual question – but more fundamentally with whether the absence of a statutory definition would prove problematic in light of the ITA's pre-existing reliance upon the common law of charity – the more nuanced question.

The ITA's treatment of charity in section 149.1 is thoroughly infused with the logic of the common law of charity. So when we encounter the undefined phrase "political activity" in subs. 149.1(6.1) and (6.2), we are knee deep in common law logic. That logic is not likely to somehow escape our attention when it comes time to ask "what is a *political* activity?". So if we want to assess the wisdom of leaving the phrase "political activity" undefined, we need to remain mindful of how the common law of charity characterizes activities. We need to ask ourselves: From the perspective of the common law of charity, what does the adjective "*political*" in the phrase "*political* activity" denote?

Given the charity law convention of categorizing activities based on the purposes being pursued,⁸⁹ it is possible to reverse engineer an interpretation of political activities from the common law categorization of political purposes. On this view, a political activity is simply an activity carried on to further a political purpose. It is not at all surprising then that the CRA's administrative interpretation of political activities in CRA Policy Statement CPS-022 essentially means activities carried on to achieve one or more of the political purposes identified in *McGovern v Attorney General*.⁹⁰

Likewise, though the Canadian court decisions considering the charity – politics distinction have had surprisingly little concrete to say about the precise meaning of the phrase "political activities" as used in subsections 149.1(6.1) and (6.2), they too have at times embraced the idea that political activities are activities in pursuit of political purposes.

Some of the cases have managed to altogether sidestep the meaning of political activities by concluding that the institutions under review were of a "political nature"⁹¹ or were "inherently political".⁹² Sweeping generalizations of this sort have spared courts from having to delve into the activities – purposes distinction.⁹³ A similar tack has been for courts to indiscriminately say that

⁸⁹ *Supra* note 74.

⁹⁰ We have seen (*supra* note 3) that political purposes were defined in *McGovern* to mean purposes that entail furthering the interests of a particular political party or procuring changes in the laws, policy or administrative practices of a domestic or foreign government. The definitions of "prohibited activities" and "political activities" in section 6.2 of CPS-022 effectively parallel the *McGovern* construction of political purposes. In other words, the CRA treats political activities as activities linked with political purposes.

⁹¹ *Toronto Volgograd Committee v Minister of National Revenue* [1988] 1 C.T.C. 365 at para 14 (per Stone J.).

⁹² *Canada UNI Association v Minister of National Revenue* [1993] 1 C.T.C. 46 at para 5 (per Marceau J.A.).

⁹³ If an organization is of a "political nature" or is "inherently political", its ineligibility for charitable registration automatically follows without any particular need to explain this with reference to the activities – purposes distinction.

both the activities and the purposes of the organization under review are political.⁹⁴ One case expressly indicated that the phrase “political purposes” could be used “interchangeably” with the phrase “political activities”.⁹⁵ Whatever else may be said of this reasoning, it avoids the need to clearly explain what qualifies an activity as a political activity in the first place.

But in other cases, courts appear to have accepted – albeit more implicitly than explicitly – that political activities are by definition activities in pursuit of political purposes. So, for example, in one case the Federal Court of Appeal accepted the position taken by the CRA (then Revenue Canada) in the lead up to the litigation that it is not charitable to further “a particular purpose by political means”.⁹⁶ The implication of the CRA position accepted by the court is that political (rather than charitable) purposes are furthered by political means. Another case premised the conclusion that the activities under review were political on the finding that the activities were linked with political purposes.⁹⁷ This reasoning follows only if we accept that the feature qualifying an activity as a political activity is that it furthers a political purpose.

Other cases have buttressed the conclusion that the institutions under review were political with the observation that their political activities did not meet the criteria – specifically the “ancillary and incidental” criterion – of subsections 149.1(6.1) and (6.2). Once again, this reasoning appears to accept that political activities are by definition activities carried on for political purposes.⁹⁸ To be sure, if political activities, properly so-called, necessarily reveal political purposes, it follows that political activities (except where they are deemed to be charitable under subsections 149.1(6.1) and (6.2)) are inconsistent with the requirements for charitable registration, specifically the requirement for exclusively charitable activities in the case of charitable organizations and exclusively charitable purposes in the case of charitable foundations.

Even when the dictionary definition of “political” has been consulted to assist the court with the meaning of “political activities”, the resulting interpretation – “a. of or concerning the state or its government, or public affairs generally, b. of, relating to, or engaged in politics, c. belonging to or forming part of a civil administration” – maps very closely with the common law understanding of “political purposes”.⁹⁹ Again, this reinforces that political activities are activities in pursuit of political purposes.

If we stopped here, it might seem like the common law conveniently avoids the need for a statutory definition of political activities. Why expend time, energy and political capital in the development of a statutory definition if the common law enables a workable interpretation? A statutory definition may seem especially unnecessary when we consider that such a definition –

⁹⁴ See, for example, *Positive Action Against Pornography v Minister of National Revenue* [1988] 1 C.T.C. 232. In paragraph 17, Stone J. confusingly concluded that “this subsection [subsection 149.1(6.2)] is of no assistance as the appellant’s purposes and activities are not ‘ancillary and incidental’ but, rather, are primarily of a political nature”. The intention was presumably to convey that politics was front and centre rather than peripheral. But this is a rather confusing way to frame that point.

⁹⁵ *Action by Christians for the Abolition of Torture v R* [2003] 3 C.T.C. 121 at para 35 (per Décaré J.A.).

⁹⁶ *Notre Dame de Grâce Neighbourhood Assn v Minister of National Revenue* [1988] 2 C.T.C. 14 at para 13.

⁹⁷ *Human Life International in Canada v Minister of National Revenue* [1998] 3 C.T.C. 126. at para 12.

⁹⁸ *Notre Dame de Grâce Neighbourhood Assn v Minister of National Revenue* [1988] 2 C.T.C. 14 at paras 16 and 17, *Positive Action Against Pornography v Minister of National Revenue* [1988] 1 C.T.C. 232 at para 17 and *Alliance for Life v Minister of National Revenue* [1999] 3 C.T.C. 1 at para 58.

⁹⁹ *Action by Christians for the Abolition of Torture v R* [2003] 3 C.T.C. 121 at paras 60-66. To be sure, the activities qualifying as political under this understanding would essentially consist of activities carried on to achieve one or more of the *McGovern* categories of political purposes.

including the one I have advocated elsewhere¹⁰⁰ – would likely look similar to the administrative interpretation currently enforced by the CRA in any event.

But we need to probe further. If we interpret the phrase “political activities” consistently with the common law approach to characterizing activities based on the purposes being furthered, it follows that political activities cannot exist independently of political purposes. This must be the case. We cannot, on the one hand, distil an interpretation of political activities from the common law understanding of political purposes while, on the other hand, maintain that political purposes are absent even if political activities are present. A link between activities and purposes either exists or it does not. If the link exists, it follows that the permissibility of political activities under subsections 149.1(6.1) and (6.2) entails the permissibility of political purposes, at least if we approach these subsections with the logic of the common law of charity.

But so what? Does it make a practical difference whether the authorization of political activities under subsections 149.1(6.1) and (6.2) carries with it an implied authorization of political purposes? Provided we know what advocacy charities can undertake, why should we care whether the label “activity” or “purpose” is attached to it?

There are a number of reasons why this does indeed matter.

(1) Coherence

Distilling an interpretation of political activities from the common law categories of political purposes afflicts subsections 149.1(6.1) and (6.2) with strained and contradictory reasoning. Doing so results in subsections 149.1(6.1) and (6.2) drawing on the very insight – that political activities are by definition activities in support of non-charitable political purposes – that they go on to legislatively deny. A fundamental contradiction has therefore been hardwired into subsections 149.1(6.1) and (6.2) in the sense that these subsections rely upon (and thus indulge) a premise – that political activities further non-charitable political purposes – that they exist to specifically refute.¹⁰¹ In other words, the thing deemed to be the case by subsections 149.1(6.1) and (6.2) – that political activities are (within limits) charitable – contradicts a premise of these subsections – that political activities are non-charitable. Not surprisingly, this causes confusion.

The best way to suspend the ITA’s usual reliance upon the common law of charity in relation to specific activities – here, political activities – is to make a clean break. Legislative measures – like subsections 149.1(6.1) and (6.2) – that rely upon common law logic in the course of overriding the common law are neither fish nor fowl. These kinds of measures invite (and thus seemingly endorse) common law reasoning except to the extent that they do not. As we shall see, a legislative definition of “political activities” could easily avoid the resultant confusion by enabling a clean and targeted break from the common law.

It might sound academic to critique the coherence of subsections 149.1(6.1) and (6.2). Strained reasoning does not a crisis make. Indeed, some might say strained reasoning is charity law’s stock-in-trade. But coherence matters. Coherence enables explanation, which in turn enables understanding and compliance. Incoherent or unclear rules are self-defeating. One of the core

¹⁰⁰ See, for example, A. Parachin, “How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act” (2017) 65:2 Canadian Tax Journal 391-418 at 411.

¹⁰¹ The contradiction has not been lost on courts. In *Human Life International In Canada Inc v Minister of National Revenue* [1998] 3 C.T.C. 126, Strayer J.A. observed as follows in footnote 6: “Subsection 149.1(6.2) indirectly indicates that political activities are not charitable.”

goals of legislative interventions into the common law of charity under the ITA is to ensure that property donated to charity is devoted to charitable purposes. If rules are unclear or incoherent they all but ensure unwitting non-compliance and/or the devotion of charitable resources to professional advisors rather than charitable programming. Coherence is especially important to subsections 149.1(6.1) and (6.2) given that their very purpose was to bring greater coherence to the treatment of political activities.¹⁰²

(2) Legislative Intent

It was not the intention of subsections 149.1(6.1) and (6.2) to allow for political purposes. The intention was instead to clarify that exclusively charitable purposes can (within limits) be pursued through political activities.¹⁰³ Given this intention, it was self-defeating to have left political activities undefined. It was practically inevitable that in the absence of a statutory definition common law logic would flavour the interpretation of “political activities”. And for the reasons noted above it was predictable that this would unwittingly raise questions as to whether the permissibility of political activities carries with it an implied permissibility of some sort for political purposes.

(3) Unintended Consequences for the Meaning of “Charity”

Rather than clarify the charity – politics distinction, subsections 149.1(6.1) and (6.2), through their unintentional condonation of limited political purposes, destabilize it. As we have seen, the permissibility of political activities under subsections 149.1(6.1) and (6.2) arguably implies – accepting that political activities cannot exist independently of political purposes – the permissibility of political purposes.¹⁰⁴ Consider how this could impact applications for charitable status.

At common law, purposes that tend to necessitate law reform for their attainment are non-charitable political purposes even if they do not expressly call for law reform.¹⁰⁵ It makes no

¹⁰² *Infra* note 103 and related text.

¹⁰³ Subsections 149.1(6.1) and (6.2) were enacted via Government Bill C-84. On December 5, 1985, at Second Reading in the House of Commons, Mr. Geoff Scott (Parliamentary Secretary to Secretary of State of Canada), explained the measures as follows:

The amendment recognises that it is appropriate for a charity to use its resources, within defined limits, for incidental political activities *in support of its charitable goals...* I emphasise that it *has to be related to charitable purposes of that organization*. (Emphasis added.)

See http://parl.canadiana.ca/view/oop.debates_HOC3301_06/1155?r=0&s=1.

Likewise, the Department of Finance Technical Notes dated November 1985 make clear that subsections 149.1(6.1) and (6.2) were meant to legislatively establish not that political purposes may be pursued but rather that political activities may be used to pursue charitable purposes. It states at sub-clause 85 (2) that:

These amendments recognise 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*. (Emphasis added.)

See David M Sherman, Department of Finance Technical Notes, 24 ed (Toronto: Carswell, 2012) at 2045, 149.1(6.1), (6.2). Likewise, on May 29, 1985, then Minister of National Revenue, the Honourable Perrin Beatty, delivered a speech addressing the intentions behind subsections 149.1(6.1) and (6.2). The “Background Statement” (copy on file) includes the following statement of intention:

Political activities undertaken by a registered charity must be ancillary and incidental to one or more of its charitable purposes. This means that *it must be clear that they are in furtherance of a charitable purpose...* (Emphasis added.)

See also *Action by Christians for the Abolition of Torture v R* [2003] 3 C.T.C. 121 at paras 58-9.

¹⁰⁴ If a political activity cannot exist independently of a political purpose it follows that we cannot accept the charitableness of a political activity without thereby accepting the charitableness of the associated political purpose.

¹⁰⁵ See, for example, *McGovern*, *supra* note 3.

difference if the specific law reform being sought corresponds with charitable purposes. The rationale for this position is that law reform cannot be disentangled from these purposes (law reform is *the purpose*). Do subsections 149.1(6.1) and (6.2) unwittingly change this?

Under these provisions the political activity of law reform is deemed to be charitable provided the enumerated criteria are met. But if political activities – e.g., pursuing law reform – are permissible under subsections 149.1(6.1) and (6.2) notwithstanding that they imply the presence of political purposes – e.g., law reform – it becomes arguable that a political purpose should not automatically result in charitable status being denied. That is, if we cannot conceive of political activities as existing separately from political purposes, we cannot accept the charitableness of political activities without thereby accepting the charitableness of the associated political purposes. Subsections 149.1(6.1) and (6.2) therefore provide a toehold to contest the common law position that purposes necessitating law reform are automatically non-charitable in the context of the ITA.

None of this appears to have been intended. To the contrary, this is the unintended by-product of having left the phrase “political activities” undefined without fully appreciating the consequences of doing so.

(4) Redundant and/or Contradictory Requirements

Assume, as contemplated above, that the permissibility of political activities under subsections 149.1(6.1) and (6.2) implies the permissibility (within limits) of political purposes, that a political activity cannot exist independently of a political purpose. We encounter some problems when we have to reconcile this with the requirement that political activities – in order to be within the deeming rule of subs. 149.1(6.1) and (6.2) – must be “ancillary and incidental” to charitable purposes (in the case of charitable foundations) and to charitable activities (in the case of charitable organizations).¹⁰⁶

Since the “ancillary and incidental” doctrine is itself a source of some confusion, a brief explanation is warranted. It is well established that charitable status is only available to exclusively charitable institutions. The incidental doctrine serves the apparent goal of relieving against too literal an understanding of the exclusive charitableness requirement. In short, the incidental doctrine means that the exclusive charitableness requirement may be satisfied notwithstanding the presence of non-charitableness provided it – the non-charitableness – can be framed as incidental. Generally speaking, non-charitableness will qualify as “incidental” (and thus benign) if it is either (1) a consequence of pursuing charitable ends or (2) a means to charitable ends (rather than an end in itself). If non-charitableness does not fit into either of these categories, then it will not qualify as “ancillary and incidental”, meaning that charitable status is jeopardized.

The first sense of ancillary and incidental – a consequence of pursuing charitable ends – is misplaced in subs. 149.1(6.1) and (6.2). This sense of the ancillary and incidental doctrine does not focus on what charities directly do *per se* but rather on the consequences stemming from what charities directly do. For example, at issue in *Incorporated Council of Law Reporting for England and Wales v A-G*¹⁰⁷ was the charitableness of a not-for-profit institution publishing law reports. One of the objections to the charitableness of the program was that, though the

¹⁰⁶ Paras 149.1(6.1)(b) and (6.2)(b).

¹⁰⁷ [1972] Ch 73.

institution in question lacked a profit motive, the consequence of publishing law reports was to enhance the profitability of law firms. A literal application of the exclusive charitableness requirement would result in the denial of charitable status in such circumstances. Programming is arguably not exclusively charitable when one of its obvious and predictable consequences is to enhance the profitability of those consuming that programming. The court concluded, however, that the profit in these circumstances was merely “incidental to or consequential on” the institution’s charitable purpose of disseminating knowledge.¹⁰⁸

Similar reasoning could extend to politics. If, for example, there was a concern that political activity was occurring as a consequence of charitable programming, *e.g.*, university education inspires graduates to political action, such political activity could be framed as merely an incidental consequence of charitable programming. But it is very difficult to read subs. 149.1(6.1) and (6.2) consistently with this sense of ancillary and incidental. These provisions are not meant to excuse political activity inspired by (and consequential to) a charity’s programming. They only apply where the political activity is directly carried out by the charity itself. It is therefore difficult to see how a given political activity could be understood as consequential to a charity’s direct actions when those actions include the political activity.

This takes us to the second sense of ancillary and incidental – a means to charitable ends. This sense of ancillary and incidental arises where charities engage in activities that, when viewed in isolation, appear to lack the hallmarks of “charity”. An example sometimes given is that the employment practices of charities are often indistinct from those of for-profit entities.¹⁰⁹ Though charities must themselves lack a profit motive, they nonetheless use pecuniary incentives to recruit and retain employees and contractors. A literal application of the exclusive charitableness requirement would mean that the profit accruing to the employees and contractors of a charity undermine its exclusive charitableness. If *somebody* is profiting, then obviously there is absent an *exclusively* not-for-profit operation. The incidental doctrine precludes this reasoning. In the specific context of employment practices and the like, it enables the conclusion that the profit inuring to employees and contractors is purely incidental in the sense that compensating employees and contractors is merely the “means to the attainment” of charitable purposes.¹¹⁰

This sense of ancillary and incidental – a means to ends – appears to have been what was intended in the context of subs. 149.1(6.1) and (6.2).¹¹¹ But it does not function particularly well here. Consider the requirement of para 149.1(6.1)(b) that a political activity be ancillary and incidental – in the sense of being a means to ends – to a charitable *purpose*. How could a political

¹⁰⁸ *Ibid.* at 103.

¹⁰⁹ See H. Picarda, *The Law and Practice Relating to Charities*, 4th ed. (West Sussex, Bloomsbury Professional Ltd, 2010) at 339.

¹¹⁰ The “means to ends” interpretation of the incidental doctrine was adopted by a majority of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women* [1999] 1 S.C.R. 10 at paragraphs 156-8. Iacobucci J. summarized the principle as follows at para 158:

The chief proposition to be drawn from this holding is that even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfilment of another, charitable, purpose and not as an end in itself. That is, where the purpose is better construed as an activity in direct furtherance of a charitable purpose, the organization will not fail to qualify as charitable because it described the activity as a purpose.

¹¹¹ On May 29, 1985, then Minister of National Revenue, the Honourable Perrin Beatty, delivered a speech addressing the intentions behind subsections 149.1(6.1) and (6.2). The “Background Statement” (copy on file) includes the following statement of intention:

Political activities undertaken by a registered charity must be ancillary and incidental to one or more of its charitable purposes. This means that *it must be clear that they are in furtherance of a charitable purpose...*(Emphasis added.)

activity – properly so-called – ever be the means to attaining a charitable purpose? Recall that activities are characterized in the law of charity based on the ends being pursued. Para 149.1(6.1)(b) confusingly requires that an activity be a political activity (and thus by definition a means to political ends) and also ancillary and incidental to charitable purposes (which would make it a means to charitable ends and thus a charitable activity). This confusingly restricts the application of subs. 149.1(6.1) to situations in which an activity is simultaneously political *and* charitable. It is no wonder this causes confusion.

The interpretive problems are even more pronounced when we consider the requirement of para 149.1(6.2)(b) that a political activity be ancillary and incidental – again in the sense of being a means to ends – to a charitable *activity*. Taken literally, this would require that a political activity be the means to a charitable activity. How is this possible? An activity could only ever be a means to an end. An activity cannot be a means to an activity (or a means to means). Again, it is no wonder this drafting has caused confusion.

But let's accept that a political activity can indeed meet the "ancillary and incidental" requirement, in other words that a political activity can be demonstrated to be a charitable activity in the sense of being the means to charitable ends. If this is possible, it follows that the deeming rule in subsections 149.1(6.1) and (6.2) serves no practical purpose. Remember that subsections 149.1(6.1) and (6.2) deem political activities to be charitable. In principle, there is nothing offensive about such a deeming rule. But what is the point of this deeming rule if it only applies where a political activity – in order to comply with the "ancillary and incidental" requirement – must be demonstrated to be charitable? If the very thing being deemed to be the case – that political activities are charitable – must first be demonstrated to be the case to attract the deeming rule, there does not seem to be any point to the rule.

Some courts have avoided the above conceptual challenges by approaching the "ancillary and incidental" criterion in subsections 149.1(6.1) and (6.2) as a restriction on the proportion of resources that may be devoted to political activities.¹¹² We can be assured that politics is merely a means to charitable ends rather than an end in itself when only limited resources are devoted to political activities, or so the reasoning goes.¹¹³ On this view, the phrase "ancillary and incidental" was essentially meant to guard against mission creep. It was simply a way of saying that political engagement is permissible but that it must be a *supplement to* (rather than *substitute for*) a charity's programming. While concerns over mission creep are understandable, the "substantially all" requirement in subsections 149.1(6.1) and (6.2) already provides a complete response to the concern over mission creep.¹¹⁴ If substantially all resources are being applied to charitable purposes / activities, there can be no concern that political engagement is consuming excessive resources. No further statutory mechanism to deal with this concern is necessary or desirable.

¹¹² See, for example, *Notre Dame de Grâce Neighbourhood Assn v Minister of National Revenue* [1988] 2 C.T.C. 14 at para 16.

¹¹³ Similar reasoning was entertained (albeit not with specific reference to subsections 149.1(6.1) and (6.2)) in *Re Public Trustee and Toronto Humane Society* [1987] O.J. No. 534 at paras 44-5.

¹¹⁴ As we have seen, the opening language of subsections 149.1(6.1) and (6.2) restrict the application of the deeming rule to circumstances in which "substantially all" resources are devoted to charitable purposes (in the case of charitable foundations) and charitable activities (in the case of charitable organizations).

In short, the ancillary and incidental requirement is both redundant and difficult to reconcile with the idea – invited by the failure to legislatively define political activities – that political activities are activities carried on to further political purposes.

For these (and other) reasons, it was a major policy mistake to leave the phrase “political activities” undefined.

(ii) Consequences of Non-Compliance

What happens if a charity’s political activities do not conform with the criteria of subsections 149.1(6.1) and (6.2)? This would be the case if, for example, a charity’s political activities included the direct or indirect support of, or opposition to, any political party or candidate for public office.¹¹⁵

As drafted, subsections 149.1(6.1) and (6.2) go no further than to create a deeming rule. Political activities meeting the criteria specified in these subsections are, in effect, legislatively deemed to be charitable. This can be described as a “safe harbour” – political activities meeting the legislative criteria are “safe” for charities. The implication is that political activities *not* conforming to the specified criteria simply lose the protection of the “safe harbour”. That is, subsections 149.1(6.1) and (6.2) do not express or imply that non-conforming political activities are necessarily prohibited non-charitable activities. Presumably this means we have to resort to the common law to determine the character (charitable or non-charitable) of non-conforming political activities. As we have seen, the cases have not been of one view on whether, and the extent to which, political means can be used to achieve charitable purposes.¹¹⁶

But the CRA has long since taken the administrative position that subsections 149.1(6.1) and (6.2) establish a “complete code” that exhaustively describes the only political activities permissible for charities.¹¹⁷ While certain court decisions have also flirted with this reasoning,¹¹⁸ it is impossible to reconcile with the actual text of subsections 149.1(6.1) and (6.2). But then in Budget 2012 paragraphs 188.2(e) and (f) were added to the ITA. These provisions provide that a charitable foundation or charitable organization, respectively, may have its gift receipting privileges suspended for one year where it engages in political activities not conforming to the criteria of subs. 149.1(6.1) and (6.2). By imposing a penalty for non-conforming political activities, paragraphs 188.2(e) and (f) take for granted that subsections 149.1(6.1) and (6.2) say something – that the only permissible political activities for charities are those conforming to the criteria of subsections 149.1(6.1) and (6.2) – they do not actually say. Again, this is confusing.

Taking stock, subsections 149.1(6.1) and (6.2) fall short in relation to the most basic of questions. They do not define “political activities”. Neither is it altogether clear whether these provisions merely provide a “safe harbour” or an exhaustive description of the only political activities permissible for charities.

¹¹⁵ This kind of activity is expressly excluded from the deeming rule in subsections 149.1(6.1) and (6.2) by virtue of paras 149.1(6.1)(c) and (6.2)(c).

¹¹⁶ See s. 6.1 of CPS-022. Presumably on the basis of paras. 149.1(6.1)(c) and (6.2)(c), the CRA takes the position that partisan electioneering is a categorically prohibited activity. This reflects a complete code interpretation.

¹¹⁷ This is evident in CPS-022.

¹¹⁸ *Supra* note 98.

(E) Solving the Problem

(i) New Legislative Measures

Subsections 149.1(6.1) and (6.2) attempt to codify a defensible principle – that political means can be used within limits to achieve charitable purposes. But as we have seen they are poorly drafted. What is the solution?

Elsewhere I have proposed a legislative amendment that would better clarify the amount and type of political activities charities may use to achieve their charitable purposes.¹¹⁹ In brief, subsections 149.1(6.1) and (6.2) could be repealed and replaced with two new grounds for the revocation of charitable registration under subsections 149.1(4.1). Paragraphs 149.1(4.1)(a)-(f) currently enumerate six grounds for revocation of charitable registration. New paragraphs 149.1(4.1)(g) and (h) could be added to deal with political activities. The new grounds for revocation could be:

- (g) devoting resources to a prohibited political activity; and
- (h) devoting resources to a political activity except where
 - (i) the political activity is carried on in furtherance of a charitable purpose, and
 - (ii) substantially all of the charity’s resources are otherwise devoted to charitable purposes or charitable activities.

“Prohibited political activity” could be legislatively defined to mean direct or indirect support of, or opposition to, any government, political party or candidate for public office.

“Political activity” could be legislatively defined to mean an activity, the direct and principal purpose of which, is to either secure or oppose a change on any basis to any law, domestic or foreign, or to the policy or administrative practices of any government, domestic or foreign.

(ii) Explaining the Proposal

Having provided a detailed explanation for these proposed amendments elsewhere,¹²⁰ it will suffice for present purposes to provide a summary explanation here.

The proposed definition of “prohibited political activity” reflects the widely held view that partisan electoral politics do not represent an appropriate way for charities to pursue their charitable missions. Practically no one argues the contrary position. A categorical prohibition on this sort of activity should not prove controversial.

The proposed definition of political activity is concerned with activities directed at achieving or opposing reform to law, public policy or the administrative practices of government. In practice this would mean that activities will be considered “political” – and thus permissible within limits – if they entail efforts to attain charitable purposes *through government*. The common denominator linking all activities qualifying as political under the proposed definition is that they all consist of efforts to achieve charitable purposes by changing the behaviour of government – to

¹¹⁹ A. Parachin, “How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act” (2017) 65:2 Canadian Tax Journal 391-418.

¹²⁰ *Ibid.*

persuade it to do something it is not currently doing, change what it is currently doing or refrain from doing what it is currently doing. In this regard, the proposed definition is consistent with the idea elaborated in Part 3(B) above that political activity should be permissible albeit restricted as a way of respecting the distinctiveness of charity and government.

Concerns over mission drift – that charities will become fundamentally concerned with pursuing their missions through political activity – will continue to be addressed through the requirement that “substantially all” resources must be otherwise devoted to charitable purposes or charitable activities. This means there is an inherent limit on the extent to which charitable purposes can be pursued through political activities. The “substantially all” criterion is not without challenges but these challenges can be addressed through better administrative interpretation.¹²¹

Unlike subsections 149.1(6.1) and (6.2), the proposed reform does not require that political activities be “ancillary and incidental” to charitable purposes. It instead adopts a plain language expression of the same essential point by expressly indicating that political activity is permissible only if it is carried on in furtherance of a charitable purpose. This ensures that politics cannot become an end in itself and must instead remain the means of attaining charitable purposes.

The proposed amendment improves on the status quo in the following ways.

First, the statutory definitions of “political activity” and “prohibited political activity” in the proposed amendment improve on the most significant flaw of subsections 149.1(6.1) and (6.2) – the absence of defined terms. In so doing it makes a clean break from the common law. This is the best way to legislatively improve on the common law of charity in the ITA – through self-contained and targeted legislative measures that use appropriate statutory definitions to override (or supplement) common law principles in relation to specific topics (here, political activities) in relation to which the common law is adjudged to be deficient. Legislative interventions such as subsections 149.1(6.1) and (6.2) – that confusingly blend common law logic with legislative principles do not work particularly well.

Second, the proposed amendment improves on the status quo by making abundantly clear that it establishes a complete code – an exhaustive statement of the only permissible political activities. This is the best way to legislatively clarify what political activities can and cannot be undertaken in the pursuit of charitable purposes. The status quo – drafted as a safe harbour but administered as a complete code – is hardly a model of clarity.

(iii) Anticipating Objections

I will address two anticipated objects to the proposed reform.

The first objection is that the proposed reform would (more or less) codify the CRA’s current administrative interpretation of political activity in Policy Document CPS-022. On this view, the proposed reform is much ado about nothing in the sense that it would not radically change the status quo. But this criticism misses the point. Even accepting that practical outcomes might not be radically different under the proposed reform, the reform would nonetheless rid us of the intellectual gymnastics that subsections 149.1(6.1) and (6.2) currently require. In so doing, it would remedy the incoherence that currently plagues the status quo. It would facilitate compliance by bringing principled rationality to the law in this area.

¹²¹ *Ibid.* at 410-11.

The second objection is that the proposed reform enumerates the scope of permissible political activity in the context of a legislative provision specifying the grounds for revocation of charitable status. Doing so, it might be argued, introduces the risk that political activities will be viewed suspiciously by CRA auditors and courts not as a natural fulfilment of charitable mission but rather as a departure therefrom potentially serious enough to warrant revocation of charitable status. Political activities might therefore be approached not as something charities should be doing but rather as something that jeopardizes charitable status.

There is admittedly some merit to this concern. That said, if political activity is going to be permitted albeit within limits, as I believe should be the case, there is no escaping the need for (1) an exhaustive statement of the only permissible political activities and (2) clearly enumerated consequences for exceeding the limits. Since revocation of charitable registration should only be used as a penalty of last resort for serious or sustained violations, the proposed reform leaves open the possibility of intermediate sanctions for first-time or non-serious violations.

The Administrative: CRA’s Administrative Treatment of the Charity – Politics Distinction

(A) General

Having dealt with the judicial and legislative treatment of the charity – politics distinction, we now turn to the CRA’s administrative treatment of this distinction in CRA Policy Statement CPS-022.¹²² My comments here are confined to the guidance on “public awareness” set out in s. 7.1 of CPS-022.¹²³ In short, the CRA’s commentary on “public awareness” is an instance of well-intentioned, albeit misguided, regulatory overreach through which best communication practices are expressed as minimum regulatory requirements.

(B) Why focus on the issue of public awareness?

Before dissecting the CRA’s guidance on public awareness, it is worth explaining why I am focused here on this specific issue.

(i) Importance of Public Awareness

There is a premium on “getting the rules right” in relation to public awareness. This is not to deny the importance – indeed the fundamental importance – of providing coherent and clear regulatory guidance in relation to electioneering and campaigning for reform to law and policy. But not all of these have the same impact on the day-to-day operations of charities. Charities can readily choose to stay far clear of electioneering. Likewise, charities can either avoid campaigning for law and policy reform or selectively engage in such campaigning on a strategic and rule compliant basis. We can debate whether charitable status should be contingent upon charities removing themselves from such advocacy but it is at least possible for charities to so remove themselves.

¹²² Available at: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html>

¹²³ For additional commentary on how to improve the CRA’s administrative interpretation of the “substantially criterion” in subsections 149.1(6.1) and (6.2), see A. Parachin, “How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act” (2017) 65:2 Canadian Tax Journal 391 at 410-11.

Public awareness is altogether different. Public awareness is unavoidable. It is implicated in practically everything that charities do. Literally all programming and all communications by charities entail some form of public awareness. Whereas advocacy for law and policy reform by a charity can be episodic, that is not true, at least not as readily true, in relation to public awareness. The latter is non-episodic and unexceptional in that it is thoroughly integrated into all charitable programming

Messaging of some sort is implicated in practically everything that charities do. Even though charities are not always openly engaged in public awareness campaigns, messaging is going to be present in their fundraising, choice of target population and design of charitable programming. Even such seemingly benign charitable trusts as scholarship funds communicate potentially controversial value judgments about the sorts of criteria that should be used to identify meritorious scholarship candidates (*e.g.*, gender, religion, financial need, geographic residence, disadvantaged ancestry, military service, *etc.*), the sorts of athletic and academic pursuits worthy of financial support and so on. Likewise, relief of poverty charities communicate ideas about the basic standards of living below which no one would be left behind.

Given the pervasiveness of public awareness, there is tremendous potential here for the CRA to have a severe and negative impact upon charities if an excessively restrictive conception of public awareness is enforced.

(ii) Regulatory Overreach?

The commentary on public awareness in CPS-022 was probably meant to be enabling in the sense of clarifying that, in the view of the CRA, charities are free to promote awareness of various issues related to their charitable mission without thereby attracting the doctrine of political purposes. But CPS-022 goes further than merely clarifying this as a statement of principle. As we shall see, CPS-022 contemplates criteria to which public awareness must conform in order to be charitable. The implication is that public awareness will be “political” (or at least non-charitable) if these criteria are not satisfied. This is problematic in at least two ways.

First, as a matter of technical interpretation, there is a mismatch between the construction of “political” in s. 6 of CPS-022 and the construction of charitable public awareness in s. 7.1. That is, it is possible for the communications of a charity to fail the criteria for charitable public awareness enumerated in s. 7.1 of CPS-022 without necessarily thereby meeting the criteria of “political” in s. 6. But if public awareness is not political, on what basis is it assumed to be non-charitable? CPS-022 does not explain this assumption, nor cite supporting authorities.

Second, s. 7.1 of CPS-022 effectively regulates the tone and content of the public communications of charities. That would be fine if these were relevant to the charity – politics distinction. But the criteria enumerated in s. 7.1 of CPS-022 go well beyond what the cases establish about the charity – politics distinction. The commentary on public awareness in CPS-022 conflates three issues – (1) What is political? (2) What is educational? (3) What is informational? – that are properly kept distinct. CPS-022 reflects the idea that public awareness must be *both* apolitical and educational in the sense of meeting certain of the criteria for the “advancement of education”.

The idea that it is political to promote a point of view, promote an attitude of mind or cultivate a climate of opinion appears to have significantly influenced the CRA’s administrative position on the charitableness of public awareness.¹²⁴ There is language in some of the authorities that – if

¹²⁴ See s. 7.1 of CPS-022.

taken out of context – could support this interpretation. However, in the Appendix to this paper, I document the relevant authorities, concluding that none of them clearly resolve that this type of conduct is political absent an explicit goal to secure a change to law of government policy.

It is true that merely promoting a point of view is not educational in the charity law sense (see the Appendix). However, it has never been established that all charities, regardless of whether they are organized for the advancement of education or some other charitable purpose, must meet the formal criteria for the advancement of education. But this is what s. 7.1 of CPS-022 effectively achieves.

(iii) Evolving Common Law

The single most important common law development since CPS-022 was first released in 2003 directly relates to the charitableness of public awareness. In *Aid/Watch Incorporated v Commissioner of Taxation*¹²⁵ (discussed in the Appendix below) the High Court of Australia concluded that generating public debate in relation to recognized charitable purposes is itself a discrete charitable purpose. This development is going to have to be dealt with when it comes time to update CPS-022. In *News to You Canada v. Minister of National Revenue*,¹²⁶ the Federal Court of Appeal declined to follow *Aid/Watch*. However, for the reasons noted in the Appendix, *News to You* does not resolve that *Aid/Watch* is irrelevant in Canada.

(C) CRA's Guidance on Public Awareness in CPS-022

The CRA does not formally define “public awareness” in CPS-022. It is evident, though, that the CRA understands public awareness as consisting of giving “useful information to the public to enable them to make decisions about the work a charity does or an issue related to that work.”¹²⁷ This construction of public awareness is enormously broad, potentially encompassing a significant amount of a charity’s communications.

In the view of the CRA, public awareness will be charitable provided the following criteria are met:

- 1) The information imparted through public awareness campaigns must be “well-reasoned”, as that term is defined by the CRA. This includes the requirement that public awareness be based on “factual information”,¹²⁸
- 2) Public awareness must not be the purpose for which a charity is operating. Since public awareness must be “connected and subordinate” to charitable purposes, it must, in the view of the CRA, be the means to the attainment of charitable ends;¹²⁹
- 3) Public awareness can have “some emotional content” but cannot be “primarily emotive”;¹³⁰ and

¹²⁵ (2010) 241 CLR 539 (“*Aid/Watch*”).

¹²⁶ 2011 FCA 192 (“*News to You*”) at paragraphs 28 and 29.

¹²⁷ Section 7.1 of CPS-022.

¹²⁸ Section 7.1 of CPS-022.

¹²⁹ Section 7.1 of CPS-022.

¹³⁰ Section 7.1 of CPS-022.

- 4) Public awareness must not entail any of the following:¹³¹
- a) an explicit call to political action;
 - b) an explicit communication to the public that the law / policy of any domestic or foreign government be changed (or that any proposed revisions thereto be rejected); or
 - c) an explicit intention to incite pressure on elected representatives or public officials to retain, oppose or change the law, policy or decision of any domestic or foreign government.

(D) Evaluating the CRA Guidance on Public Awareness in CPS-022

The criteria for charitable public awareness reflected in CPS-022 are excessively restrictive. Two of the criteria are especially problematic: (1) well-reasoned and (2) non-emotive.

(i) Well-Reasoned Criterion

According to s. 7.1 of CPS-22, public awareness must be “well-reasoned” in order to be charitable. The well-reasoned criterion is intuitively appealing. No one argues that public awareness should be deliberately misleading or poorly reasoned. However, CPS-022 effectively transforms a “best practices” standard into a minimum regulatory requirement.

“Well-reasoned” is defined in CPS-022 as follows:¹³²

A position based on factual information that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present/address serious arguments and relevant facts to the contrary.

The reference to counter-arguments has a basis, although not a strong one, in established law. As discussed below in the Appendix, the Federal Court of Appeal in *Alliance for Life v Minister of National Revenue*¹³³ identified (as one of several factors) a failure to address opposing positions in coming to the conclusion that the institution under review in that case had a political rather than a charitable purpose.¹³⁴ However, concerns over objectivity in the reported cases have usually been expressed in the context of determining whether an applicant for charitable status is organized and operated for the purpose of advancing education.¹³⁵ Here, courts have reasoned that, although education need not be value neutral, it cannot be so thoroughly value laden that it is better described as indoctrination than education.¹³⁶

CPS-022 effectively extends this reasoning across all categories of legal charity. In the context of public awareness this means that awareness campaigns must conform to the standards expected

¹³¹ Sections 7.1 and 6.2 of CPS-022.

¹³² CPS-022 Appendix I.

¹³³ [1999] 3 FC 504 (“*Alliance for Life*”).

¹³⁴ *Ibid* at paragraph 57.

¹³⁵ See, for example, *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504, *Human Life International in Canada v Minister of National Revenue* [1992] 202, *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 and *Southwood v A.G.* [2000] EWCA Civ J0315-3.

¹³⁶ For example, in *Challenge Team v Canada* [2000] F.C.J. No. 433, Sharlow J. reasoned at 1 that “educating people from a particular political or moral perspective may be educational in the charitable sense” but that the line is crossed when the evident aim is “solely to promote a particular point of view”.

of formal education in order to qualify as charitable. This seems to go beyond what the cases establish.

Also problematic is the absolute requirement for “factual information”. Taken literally, this requirement confines public awareness to empirically demonstrable facts. Information based on non-factual sources, *e.g.*, conceptions of justice or morality, automatically fails the requirement for factual information and by extension fails to qualify as charitable under CPS-022. There is, though, no authority for the proposition that charities should be confined in their public messaging to empirically demonstrable facts. This is inconsistent with (most obviously) the charitableness of religion, where matters of faith take centre stage. In addition, it sets a higher standard for charitable public awareness than courts have established for even the advancement of formal education. It is well-established that the latter can be based on moral knowledge.¹³⁷ It is not obvious that public awareness should be held to even the same standards as education much less higher standards.

(ii) Non-Emotive Criterion

Section 7.1 of CPS-022 states that public awareness may “have some emotional content” but cannot be “primarily emotive”. The apparent goal of the CRA is to distinguish reason from rant. An assumption is being made that highly emotive materials are likely to be heavily one-sided. There is some suggestion in *Alliance for Life v Minister of National Revenue*¹³⁸ (see the Appendix) that heavily one-sided materials are at risk of being characterized as political. However, there are no authorities concretely establishing that emotive materials, even highly emotive materials, are for that reason alone one-sided and thus political (or otherwise non-charitable). “Emotiveness” is not a variable that the Canadian authorities have identified as being intrinsically important to the charity – politics distinction.

And so a criticism of CPS-022 is that, by treating emotiveness as though it is intrinsically important, the policy statement goes beyond what the cases have said about the charity – politics distinction. This raises the possibility of “false-positive” results, *i.e.*, materials might be falsely characterized by the CRA as political simply because they are emotive. Imposing an across the board requirement that materials not be “primarily emotive” assumes too much about the intrinsic importance of emotiveness.

Deferring to the degree of emotiveness is also problematic in the sense that assessments of what is excessively emotive are likely to be highly subjective. Further, testing for emotiveness does not foster a level playing field. Novel / niche perspectives are presumably more likely to attract emotional responses. Equating politics with emotiveness will therefore disproportionately weed out these kinds of perspectives. By extension the weight attached by the CRA to emotiveness has the potential to work at cross purposes with the pluralism often associated with the charitable sector.

(E) Solution

CPS-022 is not wrong in its ambition to clarify that charities may foster public awareness about a charity’s work, or issues related to that work, without attracting the doctrine of political purposes.

¹³⁷ See, for example, paragraph 170 of *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 S.C.R. 10.

¹³⁸ [1999] 3 FC 504.

The mistake is in thinking that it is necessary to both (1) define political and (2) define charitable public awareness. It is adequate for the CRA to simply set out an interpretation (consistent with the cases) of what is political. All communications that fall outside of the definition of political are by definition outside of the regulatory restrictions on political activities. Offering any further criteria to delimit charitable public awareness means we are no longer policing the charity – politics distinction but rather dictating the minimum standards to which the communications must conform. A revised CPS-022 should have a more restricted focus.

Conclusion

The doctrine of political purposes ultimately rests on a defensible idea – that charity and politics are distinct. But the doctrine has proven challenging for courts, legislators and the CRA. Courts have indulged shallow reasoning to explain the common law distinction between charitable and political purposes. As we have seen, this reasoning is unpersuasive and incapable of sustaining the doctrine of political purposes. Likewise, legislators have struggled to seamlessly mesh ITA legislative provisions in relation to political activities with common law principles. Subsections 149.1(6.1) and (6.2) are an ill-conceived mishmash of legislative and common law principles. The CRA too has struggled to administer this area of law without regulatory overreach.

Notably, none of these problems are the product of any single failure. They are instead the result of many small failures, e.g., the failure of courts to explain the characteristics of charity that render it distinct from politics, the failure of legislators to fully appreciate the problem they were trying to solve through subsections 149.1(6.1) and (6.2) and the failure of the CRA to anticipate that the guidance on public awareness in CPS-022 goes well beyond administering the charity – politics distinction and teeters on establishing standards for public speech by charities.

Nonetheless the doctrine of political purposes is worth preserving. To that end, I have suggested three solutions to the above problems with a view to preserving the idea that charity and politics are distinct while ridding this area of law / administration of its excesses. First, courts should abandon the shallow rationales currently used to justify the doctrine of political purposes, opting to instead explain the charity – politics distinction as a mechanism restricting the ability of charities to pursue their charitable missions through government. Second, Parliament should repeal subsections 149.1(6.1) and (6.2) and replace them with alternative legislative measures (which would include statutory definitions of “political activity” and “prohibited political activity”). Third, the CRA should revise or withdraw the guidance on public awareness in CPS-022.

Appendix – Case Summaries

The Canadian common law authorities lend very little support to the blunt proposition that public awareness (or “thought leadership”) is political. Certain cases contain language that – if taken out of context – could be read as establishing that the definition of political necessarily extends to promoting a point of view, promoting an attitude of mind or cultivating a climate of opinion. However, there is an alternative explanation for these cases. As discussed below, almost all of these cases deal with situations where there was an explicit aim to secure a change to law / policy. The Canadian cases coming closest to establishing that promoting a point of view is political are *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*¹³⁹ and *Alliance for Life v Minister of National Revenue*.¹⁴⁰ However, for the reasons given below, neither of these cases actually go that far.

The leading decision upon which the Canadian decisions are based is *McGovern v Attorney General*.¹⁴¹ Slade J. reasoned that trusts for political purposes include trusts of which a “direct and principal purpose” entails any of the following:¹⁴²

- (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.

It was subsequently clarified in *Re Koeppler’s Will Trusts* that political purposes are not confined to seeking changes to law but also include opposing proposed changes to the law.¹⁴³ Presumably the same principle applies to opposing recommended changes to policy or decisions of governmental authorities. The feature that all of these political purposes share in common is that they all involve explicit attempts to influence government either through elections or law / policy reform. They do not extend the definition of political any further.

(A) Canadian Authorities

Here, in brief, are the principles emerging from the Canadian authorities (presented in chronological order).

¹³⁹ [1999] 1 S.C.R. 10.

¹⁴⁰ [1999] 3 FC 504.

¹⁴¹ [1982] Ch 321.

¹⁴² *Ibid.* at 340.

¹⁴³ [1984] Ch 243 at 260.

Farewell v Farewell¹⁴⁴

Farewell dealt with a testamentary trust established for the purpose of promoting the adoption of temperance legislation. The trust was upheld as charitable notwithstanding its overt law reform purpose. Chancellor Boyd reasoned that a court could find public benefit in this kind of trust without necessarily having to conclude that the particular law reform being sought was itself beneficial. Since the trust contemplated lawful means of pursuing the proposed law reform, there was no barrier to characterizing the trust as charitable.

Lewis v Doerle¹⁴⁵

Lewis v Doerle considered the charitableness of a testamentary trust established for the express purpose “to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights”. MacLennan J.A. concluded (without stating reasons) that the trust was charitable at law. Ironically, this had the effect of voiding the trust under mortmain legislation in effect at that time. While the terms of the trust did not elaborate on whether the purpose was to be furthered through political means, the stated purpose unavoidably entailed advocacy.

Scarborough Community Legal Services v Minister of National Revenue¹⁴⁶

Scarborough Community dealt with the charitableness of a community legal clinic. The clinic was denied charitable status because it was operating for the purpose of securing changes to law / policy. Marceau J. cited, by way of example, the clinic’s participation in a rally at Queen’s Park, its advocacy for by-law reform, etc. It was held that “an undertaking aimed specifically and directly at influencing the policy-making process may always be said to be political”.¹⁴⁷ The case establishes nothing outside of the narrow context of law / policy reform.

Positive Action against Pornography v Minister of National Revenue¹⁴⁸

Positive Action concluded against the charitableness of a society producing and disseminating materials with an anti-pornography orientation. Stone J. concluded that the materials lacked the kind of sustained and structured curriculum necessary for charitable education.¹⁴⁹ Stone J. instead characterized the society as political. Importantly, this characterization was specifically linked with the determination that the society had a mandate to effect reform to law / policy.¹⁵⁰ Stone J. therefore concluded that the society was political within the classification of political purposes articulated in *McGovern v Attorney General*, specifically the characterization of law / policy reform as political.¹⁵¹ This understanding of *Positive Action* is consistent with Strayer J.A.’s description of the case in *Human Life International v M.N.R.*¹⁵² *Positive Action* does not establish

¹⁴⁴ [1892] O.J. No. 173 (“*Farewell*”).

¹⁴⁵ (1898) 25 OAR 206.

¹⁴⁶ (1985), 17 DLR (4th) 308 (“*Scarborough Community*”).

¹⁴⁷ *Ibid.* at para 13 (per Marceau J.).

¹⁴⁸ [1988] 2 FC 340 (“*Positive Action*”).

¹⁴⁹ *Ibid.* at paragraph 9.

¹⁵⁰ See, for example, *ibid.* at paragraph 14.

¹⁵¹ *Ibid.* at paragraph 15.

¹⁵² [1998] 3 FC 202. See paragraph 12 where Strayer J.A. clearly attributed the holding in *Positive Action* to the presence of a law reform mandate.

that promoting a point of view – outside of specifically attempting to effect reform to law and/or policy – is political.

Re Public Trustee and Toronto Humane Society¹⁵³

In *Toronto Humane Society*, the Public Trustee of Ontario objected to the efforts of a charity, the Toronto Humane Society, to change the law. The Public Trustee took the position that pressing for legislative change was political and thus impermissible for a charity. Anderson J. reasoned that the Toronto Humane Society could devote some of its resources to attempts to change the law without thereby automatically ceasing to be charitable. Charitable status is compromised when efforts to change the law consume an excessive proportion of a charity's resources (defined broadly). It was concluded that that line had not yet been crossed in this case. Preferring a case-by-case approach, Anderson J. declined to quantify the amount of resources a charity can expend on this kind of activity without thereby vitiating its charitableness. Outside of clarifying that law reform can at some indeterminate point become a political purpose the case does not speak to the meaning of "political".

Toronto Volgograd Committee v Minister of National Revenue¹⁵⁴

The applicant for charitable status in *Toronto Volgograd* organized international exchanges between residents of Canada and Volgograd. The specific goal was to enhance understanding between the people of Canada and the people of Volgograd. Stone J. held that this was neither charitable for the advancement of education nor for other purposes of public benefit under the fourth head of charity. The experiential learning fostered through the exchanges was held to lack the formality and structure required for charitable education.

The judgment contains language that – taken out of context – could be interpreted as establishing that it is political to shape public opinion. Stone J. cited three English cases – *Anglo-Swedish Society v CIR*,¹⁵⁵ *Buxton v Public Trustee*¹⁵⁶ and *In re Strakosch Decd; Temperley v Attorney General*¹⁵⁷ – for the proposition that "purpose or activities aimed at creating a particular climate of opinion and as promoting an attitude of mind" are not charitable.¹⁵⁸ Each of these cases contain excerpts consistent with this proposition.

Anglo-Swedish Society dealt with a trust to promote a "closer and more sympathetic understanding between the English and Swedish peoples". The trust created exchange opportunities for Swedish journalists to visit the UK. Concluding against the charitableness of the trust, Rowlatt J. reasoned as follows:¹⁵⁹

There may be many trusts to influence general opinion the results of which influence may be very good, but where the immediate trust is only to influence general opinion in favour of some theory or view or aspiration, or what it may be, I cannot myself see that the statute of Elizabeth is looking to that sort of thing at all.

¹⁵³ [1987] O.J. No. 534 ("*Toronto Humane Society*").

¹⁵⁴ [1988] 3 FC 251 ("*Toronto Volgograd*").

¹⁵⁵ (1931), 16 T.C. 34 (K.B.) ("*Anglo-Swedish*").

¹⁵⁶ (1962), 41 T.C. 235 (Ch.D.) ("*Buxton*").

¹⁵⁷ [1949] 1 Ch. 529 (C.A.) ("*Strakosch*").

¹⁵⁸ *Toronto Volgograd*, *supra*, note 108 at paragraph 12.

¹⁵⁹ *Anglo-Swedish*, *supra* note 109 at p. 38 (emphasis added).

Buxton v. Public Trustee dealt with whether “the improvement of international relations and intercourse” was charitable. A variety of means were identified for achieving this charitable purpose, including sponsoring international exchanges and educating public opinion. Importantly, the objects specifically contemplated “assisting any persons by paying their expenses in connection with their standing for election for Parliament or other public Assemblies.” Concluding against the charitableness of these objects, Plowman J. reasoned as follows:¹⁶⁰

The only element of education which might be said to be comprehended in those objects appears to me to be education for a political cause, by the creation of a climate of opinion and that is not, in my judgment, education of a kind which is charitable. As Mr. Stamp said, it is really no more than propaganda.

In re Strakosch dealt with a similar mission to improve relations between ethnic groups. The objects under review in this case included strengthening “the bonds of unity between the Union of South Africa and the Mother Country” and “the appeasement of racial feeling between the Dutch and English speaking sections of the South African community”. Concluding against the charitableness of these objects, Lord Greene reasoned as follows:¹⁶¹

The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political.

The commonality across these cases (including *Toronto Volgograd*) is that they all deal with international relations between nation states. The attitude of mind being promoted in each of the cases related directly to the issue of how two nation states should relate to one another. Even though no specific law reform was sought, the trusts were overtly concerned with altering governmental action in the area of international relations. These were trusts deliberately designed to shape foreign policy through experiential exchanges. The exchanges were essentially the means to a foreign policy end.¹⁶² These cases do not speak to the charitableness of public awareness outside of the context to shape government policy.¹⁶³

NDG Neighbourhood Association v Revenue Canada, Taxation Department¹⁶⁴

NDG Neighbourhood does not address what qualifies as political outside of law and policy reform. The case dealt with the charitableness of an activist neighbourhood association. The association was directly involved in law and policy reform.¹⁶⁵ The association argued that its advocacy was charitable because the law and policy reforms it sought were intended to improve the lives of

¹⁶⁰ *Buxton*, *supra* note 110 at p. 242 (emphasis added).

¹⁶¹ *Strakosch*, *supra* note 111 at p. 538.

¹⁶² See, for example, *Canada UNI Association v MNR* [1992] FCA at para 5 where Marceau J.A. characterizes the *Toronto Volgograd* charity as operating to “reduce world tensions and the threat of nuclear holocaust.”

¹⁶³ See also *Southwood v A.G.* [2000] EWCA Civ J0315-3. *Southwood* dealt with whether an educational curriculum was charitable. The curriculum was structured around the view that international peace is best secured through demilitarisation. The curriculum was not found to be charitable. Excerpts from the judgment could be read as signifying that promoting a point of view is political. For example, in paragraph 29, Chadwick L.J. observed that “[t]he court is in no position to determine that promotion of the one view rather than the other is for the public benefit.” Likewise, in paragraph 30, Chadwick L.J. reasoned that “[i]t 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 recognized as charitable.” However, Chadwick L.J. specifically linked the denial of charitable status to the finding (see paragraphs 16 and 24) that the “aim” was to secure a change to the foreign policy of the United Kingdom.

¹⁶⁴ [1988] 3 FC D-39 (“*NDG Neighbourhood*”).

¹⁶⁵ *Ibid.* at paragraph 15.

those in poverty. Concluding against the charitableness of the association, MacGuigan J. was evidently of the view that the involvement in law and policy reform was so extensive that it made no difference whether the ends sought related to the relief of poverty.

Canada UNI Association v Minister of National Revenue¹⁶⁶

Canada UNI dealt with an association similar to the one before the court in *Toronto Volgograd*. The association sought to promote national unity by creating personal exchange opportunities within Canada, especially as between Anglophones and Francophones. Marceau J.A. characterized the association as political, reasoning that it was “virtually indistinguishable” from the association in *Toronto Volgograd*.¹⁶⁷ To understand the case it is important to situate it within its socio-political context. The association was promoting national unity during the very time that national unity was being pursued through constitutional reforms, e.g., the Meech Lake Accord and the Charlottetown Accord. In that context, the association could be understood as having a law / policy mandate. The case does not speak to what qualifies as political outside of this context.

Human Life International in Canada v. Minister of National Revenue¹⁶⁸

Human Life dealt with a pro-life organization promoting the pro-life perspective. Strayer J.A. concluded that the organization was political rather than charitable. If taken out of context, excerpts from the judgement could be read as supplementing the *McGovern* classification of political purposes with an additional political purpose – promoting a point of view on a controversial issue.¹⁶⁹ For example, Strayer J.A. reasoned as follows:¹⁷⁰

I believe that the jurisprudence generally supports the proposition that activities primarily designed to sway public opinion on social issues are not charitable activities.

* * *

...this kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community.

However, the case does not go very far in establishing that public awareness is political. Strayer J.A. treated *Positive Action* as the governing authority, although he seemed to acknowledge that *Positive Action* was restricted to the context of institutions with law reform mandates. That he treated *Positive Action* as the governing authority reveals that he viewed the organization before the court in *Human Life* as also having a law / policy reform mandate. To be sure, the judgement emphasizes the extent to which the organization in *Human Life* was directly involved in trying to effect law and policy reform.¹⁷¹

¹⁶⁶ [1992] FCA (“*Canada UNI*”).

¹⁶⁷ *Ibid.* at paragraph 5.

¹⁶⁸ [1998] 3 FC 202 (“*Human Life*”).

¹⁶⁹ This appears to be how Déary J.A. understood *Human Life* in paragraph 38 of *Actions by Christians for the Abolition of Torture v. Minister of National Revenue* 2002 FCA 499.

¹⁷⁰ *Human Life*, *supra* note 122 at paragraph 12.

¹⁷¹ See, for example, *ibid.* at paragraph 3.

Read in context, *Human Life* is similar to the other authorities in that it confines the meaning of political to initiatives directed at somehow altering the state of current law / policy. Even if *Human Life* is read as signalling the non-charitableness of public awareness, it goes no further than establishing that public awareness on social issues (such as abortion) lacking any discernable link to the four heads of charity is non-charitable. This establishes nothing about public awareness in relation to one or more of the heads of charity.

Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue¹⁷²

In *Vancouver Society*, Justice Iacobucci reasoned as follows:¹⁷³

[S]o long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, 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 the advancement of education.

While this could be read as implying that promoting a particular point of view is necessarily political, that may be reading too much into Justice Iacobucci’s intended meaning. From the context, it is apparent that Justice Iacobucci was solely concerned with the advancement of education. His comments were directed at identifying the outer limits of what qualifies as “education” rather than the outer limits of “charity” generally. His point was not that public awareness is political but rather that indoctrination is not educational.¹⁷⁴

Alliance for Life v Minister of National Revenue¹⁷⁵

Of the current Canadian authorities, *Alliance for Life* lends the most support for the idea that promoting a point of view – absent a law or policy reform mandate – is political. The institution before the court in *Alliance for Life* did not appear to be operating for the specific purpose of directly shaping law or public policy. Instead, the institution was primarily concerned with swaying views on the issue of abortion in favour of the pro-life perspective. This was done through the distribution of materials with a pro-life orientation. Stone J.A. concluded against the charitableness of the institution. For a variety of reasons, Stone J.A. concluded that the institution was not organized for the advancement of education. The concerns identified included the finding that the materials lacked structure, merely provided an opportunity for self-study and lacked the rigour required for charitable education (i.e., they were heavily one-sided in the presentation of the issue).¹⁷⁶

Stone J.A. then went on to characterize the institution as political. He reasoned that “despite 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”.¹⁷⁷ The

¹⁷² [1999] 1 S.C.R. 10 (“*Vancouver Society*”).

¹⁷³ *Ibid.* at paragraph 169.

¹⁷⁴ Justice Iacobucci went on to clarify in paragraph 169 that “persuasion or indoctrination” are not educational in the charitable sense.

¹⁷⁵ [1999] 3 FC 504 (“*Alliance for Life*”).

¹⁷⁶ *Ibid.* at paragraphs 44-46.

¹⁷⁷ *Ibid.* at paragraph 57.

determination that the institution was political drew on some of the same reasons underlying the determination that the institution was not educational. Stone J.A. made a point of emphasizing that the charity's materials were prepared "in a one-sided manner to the virtual exclusion of any equally strong opposing convictions".¹⁷⁸ In addition, Stone J.A. remarked that "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."¹⁷⁹

In other words, the problem in *Alliance for Life* was not that the institution promoted public debate. To the contrary, the problem was that its materials were too one-sided to foster meaningful debate. This reasoning does not foreclose the possibility that a charity may operate to promote a point of view provided it does so without the same degree of manifest bias. If anything, this reasoning accepts as its premise that fostering public debate through public awareness can be apolitical.

Action by Christians for the Abolition of Torture (ACAT) v MNR¹⁸⁰

Action by Christians confines the meaning of political to the context of attempts to directly influence governments. The institution in question sought the abolition of torture. In addition, it engaged in activism relating to the death penalty, excision, antipersonnel mines, the jailing of children together with adults and police brutality.¹⁸¹ It pursued its mission through such activities as sending letters to / pressuring governments (domestic and foreign).¹⁸² Décarý J.A. concluded that the institution was political and thus non-charitable.

Importantly, Décarý J.A.'s reasoning supports the conclusion that the charity law meaning of "political" is confined to the context of attempts to influence governments. By implication, this excludes advocacy unrelated to attempts to sway government. Décarý J.A. reasoned that the cases dealing with the distinction between charity and politics are primarily concerned with attempts to alter the law:¹⁸³

The courts have so far been concerned primarily with political purposes in cases where the purpose sought was socially or politically controversial and necessarily required changes of a statutory nature in regard to which the courts did not wish to intervene because it would force them to take a position and thereby compromise their impartiality.

Drawing on the *Canadian Oxford Dictionary* definition of political, he went on to define political as meaning "of or concerning the state or government".¹⁸⁴ Based on this conception of "political", Décarý J.A. concluded as follows:

...the words "political purposes" or "political activities", in their ordinary meaning, cover much more than initiatives leading to legislative changes. In my opinion, they cover any attempt to

¹⁷⁸ *Ibid.* at paragraph 57.

¹⁷⁹ *Ibid.* at paragraph 56.

¹⁸⁰ 2002 FCA 499 ("*Action by Christians*").

¹⁸¹ *Ibid.* at paragraphs 26 and 27.

¹⁸² *Ibid.* at paragraph 52.

¹⁸³ *Ibid.* at paragraph 39 (emphasis added).

¹⁸⁴ *Ibid.* at paragraphs 62-63.

sway a government or a member of the government, or, where there is a democracy, a member of the parliament in such areas as these organizations or individuals are politically in a position to take action in response to the pressures to which they are subjected.¹⁸⁵

* * *

It is...the very identify of the interlocutor that one is seeking to influence, which gives the activity its political character, independently of the cause in question and its value...¹⁸⁶

This approach to the charity versus politics distinction supports the conclusion that public awareness campaigns are not political simply because they shape public opinion.

(B) Recent Foreign Judicial Decisions

Three recent foreign decisions bode potentially significant consequences: (1) *The Human Dignity Trust v The Charity Commission* (which was already addressed above in Part II) (2) *Aid/Watch Incorporated v Commissioner of Taxation*¹⁸⁷ and (3) *Re Greenpeace*.¹⁸⁸ All three decisions reveal an emerging consensus that the doctrine of political purposes should be liberalized.

Aid/Watch Incorporated v Commissioner of Taxation

Aid/Watch contemplates that generating public debate (within limits) can qualify as charitable. The organization in *Aid/Watch* monitored and published reports on the effectiveness of the foreign aid program of the Australian government. This was its main purpose. The aim of the reports was to promote the effectiveness of foreign aid. To that end, the reports were critical of the government's foreign aid program. The organization had a transparent goal of altering government practices in the area of foreign aid.

Predictably, the Commissioner of Taxation took the position that *Aid/Watch* was operating for a non-charitable political purpose. A majority of the High Court of Australia concluded otherwise. The majority concluded as follows:

[T]he generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*.¹⁸⁹

* * *

[I]n Australia there is no general doctrine which excludes from charitable purposes "political objects" and has the scope indicated in England by *McGovern v Attorney-General*.¹⁹⁰

The majority declined to comment on whether it was likewise charitable to encourage "public debate respecting activities of government which lie *beyond the first three heads* (or the balance

¹⁸⁵ *Ibid.* at paragraph 66.

¹⁸⁶ *Ibid.* at paragraph 67.

¹⁸⁷ (2010) 241 CLR 539 ("*Aid/Watch*").

¹⁸⁸ [2014] NZSC 105 ("*Re Greenpeace*").

¹⁸⁹ *Ibid.* at paragraph 47.

¹⁹⁰ *Ibid.* at paragraph 48.

of the fourth head) identified in *Pemsel*¹⁹¹. The implication of this reasoning is that encouraging debate respecting governmental actions dovetailing with established charitable purposes (not just the relief of poverty) is charitable in Australia.

In coming to this conclusion, the majority noted that *Bowman v Secular Society*, the leading English authority spawning the doctrine of political purposes, had never unambiguously been adopted in Australia.¹⁹² It was noted that with specific reference to subsections 149.1(6.1) and (6.2) of the ITA that Canada, unlike Australia, has legislatively adopted the idea that charity is distinguishable from politics.¹⁹³ The majority was critical of *Bowman* for basing its finding that law reform is non-charitable on authorities not supporting that principle.¹⁹⁴ Further, the majority concluded that *Bowman* is inconsistent with constitutional law values in Australia. Specifically, it was held that agitation for legislative and political changes are central values to the system of law in Australia.¹⁹⁵ The benefit inhering in reform causes is not the benefit inhering in the discrete law reforms being proposed but rather in the democratic process of agitating for change.¹⁹⁶

In *News to You Canada v. Minister of National Revenue*,¹⁹⁷ the Federal Court of Appeal declined to follow *Aid/Watch*. *News to You* does not, though, resolve that *Aid/Watch* is irrelevant in Canada.

First, in *News to You*, Mainville J.A. emphasized that *Aid/Watch* only lends support for the charitableness of a certain kind of public debate – specifically, debate relating to established categories of charitable purposes.¹⁹⁸ Since the applicant for charitable status in *News to You* sought to promote debate essentially in relation to all public affairs, Justice Mainville reasoned that *Aid/Watch*, even if followed, provided no assistance to the applicant.¹⁹⁹

Second, from the context, it is apparent that Mainville J.A. in *News to You* was only rejecting the blunt proposition from paragraph 48 of *Aid/Watch* that “there is no general doctrine which excludes from charitable purposes ‘political objects’”. His point was that subsections 149.1(6.1) and (6.2) of the ITA, given that they contemplate a distinction between charity and politics, preclude this aspect of the holding in *Aid/Watch* from being adopted into Canadian law. This leaves open the possibility that the reasoning of *Aid/Watch* might nonetheless inform how the distinction between charity and politics is drawn in Canada.

Re Greenpeace

Re Greenpeace is a decision from a final court of appeal revealing a shift in judicial attitudes towards a less restrictive doctrine of political purposes. In *Re Greenpeace*, an appeal was brought to the Supreme Court of New Zealand on whether there should continue to be a “free-standing

¹⁹¹ *Ibid.* at paragraph 48 (emphasis added).

¹⁹² *Ibid.* at paragraph 40.

¹⁹³ *Ibid.* at paragraph 26.

¹⁹⁴ *Ibid.* at paragraph 30.

¹⁹⁵ *Ibid.* at paragraph 45.

¹⁹⁶ *Ibid.* at paragraph 45.

¹⁹⁷ 2011 FCA 192 (“*News to You*”) at paragraphs 28 and 29.

¹⁹⁸ *Ibid.* at paragraph 29.

¹⁹⁹ The applicant for charitable status in *News to You* was established to provide unbiased news and public affairs programming with a view to encouraging a “well-informed general public for the benefit of society”.

prohibition on political purposes”.²⁰⁰ That question might be thought to be irrelevant in Canada due to subsections 149.1(6.1) and (6.2) of the ITA. However, subsection 5(3) of the New Zealand *Charities Act* contains an analogous rule. It specifies that non-charitable purposes, including advocacy, do not preclude an institution from qualifying as charitable provided they are ancillary.

A majority of the Supreme Court of New Zealand concluded that “political and charitable purposes are not mutually exclusive in all cases”.²⁰¹ The majority judgment contains some strong language condemning the doctrine of political purposes. For example:

...a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable.²⁰²

* * *

We do not think that the development of a standalone doctrine of exclusion of political purposes, a development comparatively recent and based on surprisingly little authority...has been necessary or beneficial.²⁰³

* * *

...an absolute rule that promotion of legislation is never charitable is hard to justify.²⁰⁴

* * *

It is difficult to construct any adequate or principled theory to support blanket exclusion.²⁰⁵

* * *

A conclusion that a purpose is “political” or “advocacy” obscures proper focus on whether a purpose is charitable within the sense used by law.²⁰⁶

In addition, the majority judgment identified a number of reasons why the doctrine of political purposes should be liberalized. This include the observation that advocacy often inheres in charitable purposes,²⁰⁷ including human rights advocacy,²⁰⁸ environmental protection²⁰⁹ and law reform commissions,²¹⁰ the doctrine of political purposes rests on a weak precedential history,²¹¹ that decisions such as *Aid/Watch* reveal evolving judicial attitudes,²¹² that the charity – politics

²⁰⁰ *Re Greenpeace*, *supra* note 112 at paragraph 9.

²⁰¹ *Ibid.* at paragraph 3.

²⁰² *Ibid.* at paragraph 3.

²⁰³ *Ibid.* at paragraph 59.

²⁰⁴ *Ibid.* at paragraph 63.

²⁰⁵ *Ibid.* at paragraph 69.

²⁰⁶ *Ibid.* at paragraph 69.

²⁰⁷ *Ibid.* at paragraph 64.

²⁰⁸ *Ibid.* at paragraph 71.

²⁰⁹ *Ibid.* at paragraph 71.

²¹⁰ *Ibid.* at paragraph 62.

²¹¹ *Ibid.* at paragraph 59.

²¹² *Ibid.* at paragraph 67.

distinction works at cross purposes with modern participatory processes in political, administrative and judicial decision making,²¹³ and that the doctrine “obscures” the focus of charity decisions.²¹⁴

The majority judgment was, however, unclear on what specific reforms to the status quo it was putting forward. At certain points the majority judgment seemed to reinforce the traditional notion that courts should remain neutral as to the presence or absence of public benefit in the context of political purposes.²¹⁵ The majority judgment acknowledged that “promotion” can be charitable but was rather unclear on when this will be the case.²¹⁶

[W]e consider that the promotion itself, if a standalone object not merely ancillary, must itself be an object of public benefit...[S]uch public benefit or utility may *sometimes* be found in advocacy or other expressive conduct. *But such finding depends on the wider context (including the context of public participation in processes and human rights values), which requires closer consideration than has been brought to bear in the present case.*

Re Greenpeace is nonetheless notable for revealing an emerging openness on the part of courts to embrace a liberalized doctrine of political purposes, whatever exactly that might look like.

²¹³ *Ibid.* at paragraph 63.

²¹⁴ *Ibid.* at paragraph 69.

²¹⁵ *Ibid.* at paragraphs 73, 101 and 102.

²¹⁶ *Ibid.* at paragraph 103.



The Pemsel Case

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