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Charitable Foundations and Advocacy

Reimagining the Doctrine of Political Purposes

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By Adam Parachin

I – INTRODUCTION:

What role do we want grant making foundations to play within the charitable sector specifically and society generally? Does current law enable or frustrate that role? These are the core questions I aim to consider in this discussion paper, focussing on rules of law restricting advocacy by charities.

The first step is to identify how grant making foundations differ legally and practically from other charities. Current income tax law essentially categorizes charities based on the familiar distinction between charities that fund charitable programming, e.g., grant making foundations, and charities that directly carry out such programming. It achieves this by recognizing a distinction between charitable foundations and charitable organizations. The *Income Tax Act* statutorily defines "charitable foundations" as institutions established for exclusively charitable *purposes* (which is specifically defined to include the disbursement of funds to other registered charities) and "charitable organizations" as institutions established for exclusively charitable *activities*.[1] At the risk of oversimplifying, charitable foundations further their charitable purposes by funding other charities and charitable organizations further their charitable activities by directly supplying charitable goods and services. Therefore, in income tax law the "funding versus doing" distinction takes expression as, and corresponds with, a distinction between "charitable purposes" and "charitable activities", respectively. This distinction – that between charitable purposes and charitable activities – has been widely criticized for contributing ongoing confusion to the law of charity. That it is so central to the regulatory treatment of grant making foundations reveals a fault line in the foundation of the regulatory infrastructure within which grant making foundations operate.

This is not to suggest that the "funding versus doing" distinction altogether lacks regulatory significance. It is merely to invite critical reflection on what this distinction ultimately reveals to us about the nature of grant making foundations and the regulatory treatment of these foundations. In my view, one reason why the "funding versus doing" distinction ultimately matters from a regulatory perspective is because it is representative of the "convening role" played by grant making foundations within the charitable sector. This role is most obvious in the sense that grant making foundations are mobilizers of capital within the sector through the provision of grants. But foundations also play a convening role in the sense that they provide the context, infrastructure and platform for discussion within and about the sector. Foundations frame discussion and debate on all matters charitable. They also speak on behalf

[1] See the definitions of "charitable foundation", "charitable organization" and "charitable purposes" set out in subs. 149.1(1) of the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) [the *Income Tax Act*].

of the sector to government and the public at large. Of course, none of these convening functions are exclusive to grant making foundations, as these functions are also performed from time to time by operating charities directly carrying out charitable programming. These functions are, though, defining features of the role played by foundations as convenors, thought leaders and advocates within and on behalf of the sector.

When grant making foundations are viewed in this light, it becomes apparent that rules of law restricting advocacy by charities, though they apply with like force to all charities, have a unique impact the mission of charitable foundations. A cynical response is that this goes no further than making the banal observation that those who advocate are more impacted by rules restricting advocacy than those who do not. Obviously, if advocacy and convening along the lines alluded to above are part of what qualify charitable foundations *as charitable foundations*, then the rules of law restricting advocacy will impact charitable foundations differently (perhaps more severely) than other charities. But I think there is a bigger point at stake here. If current law works at cross purposes with the kind of advocacy that falls within the "convening role" of charitable foundations, then we might treat this as *prima facie* evidence of regulatory overreach.

Although all of these issues have been previously considered, they have taken on a renewed timeliness given the earmarked funding the Charities Directorate of the Canada Revenue Agency has received for audits of political advocacy by charities. In addition, courts in other jurisdictions have in recent years liberalized the rules relating to political advocacy by charities. In *Aid/Watch Incorporated and Commissioner of Taxation*, the High Court of Australia concluded that advocacy related to a charitable end (the relief of poverty in that case) can itself be a discrete charitable purpose.[2] Shortly thereafter, the New Zealand Supreme Court in *Re Greenpeace of New Zealand Incorporated* expressly concluded that "political and charitable purposes are not mutually exclusive in all cases".[3] More recently, the UK First-Tier Tribunal (Charity) in *Human Dignity Trust* v *The Charity Commission* reasoned that human rights based advocacy can be altogether immune to the rules restricting political advocacy.[4] All of these developments point to a need to revisit the Canadian approach to regulating political advocacy by charities.

Employing a case law and policy analysis, this paper explores the thesis that the doctrine imposes an artificial constraint on the boundaries of legal charity. Part II reveals the strange duality posed by the rules restricting political advocacy by charities. Though the charitable sector is premised on idealism, the law is selective in the extent to which that idealism can take expression in charitable works. Part III provides a primer on the legal meaning of charity. Part IV discusses the impact of the doctrine on the operations of charities. Part V reveals the superficial rationales articulated by courts in support of the doctrine. Part VI links the doctrine

[2] [2010] H.C.A. 42
[3] [2014] NZSC 105 at para 3.
[4] CA/2013/0013.

with the rise of fiscal considerations in the legal definition and regulation of charity. Part VII proposes reforms to the doctrine designed to preserve a principled distinction between charity and politics, while ridding the law of the excessive restraints it currently poses against political advocacy by charities.

II - CHARITIES AS CENTRES OF NORMATIVE THOUGHT:

Current law restricting the scope of permissible advocacy by charities reflects a curious duality. On the one hand, charities are in many senses uniquely suited for active and constructive participation in the process of law and policy reform. Owing to their frontline experience and grassroots connections charities frequently have valuable insights into the unique and varying needs of constituencies served by government programming. This combination of field experience, specialized knowledge and closeness to the community gives charities a basis for commenting meaningfully on the effectiveness of existing, or need for new, government programming.

Charities are also ready sources of normative perspectives on law and policy. Whereas the marketplace relies upon economic self-interest to unite people who otherwise lack a basis for collective action, idealism is the organizing principle behind the charitable sector. The sector brings together people who share in common a concern over, and core values surrounding, matters of collective interest. Since the basis for action in the charitable sector is entirely civic, one might say that charities are where principled conviction and community experience come together to form a vibrant and proficient source for democratic renewal and reform.

Nevertheless, charity law through the rule known as the doctrine of political purposes severely restricts the ability of charities to function as agents of reform. While charities are permitted under Canadian law to engage in a limited amount of political *activity* (excluding partisan participation in election campaigns), no institution can qualify as charitable (or continue to so qualify) if it has (or adopts) a political *purpose*. Perhaps not surprisingly this means charitable status is unavailable to any institution whose purposes entail campaigning for or against candidates for public office. Less expected is that it also disqualifies institutions whose purposes expressly or by necessary implication entail seeking changes to the laws or administrative practices of any government (foreign or domestic) or promoting points of view on controversial social issues. The doctrine goes so far as to establish that any pursuit that entails convincing people to view some problem or issue from a particular perspective is political (and thus non-charitable) in the sense that it promotes an attitude of mind.

The implications of the doctrine of political purposes are in some senses radical. Under current Canadian law, charitable purposes cannot entail, either expressly or by necessary implication, political advocacy, not even in relation to those areas of law and policy dovetailing with charitable purposes. So a relief of poverty organization must have as its purpose the direct relief of poverty rather than advocating in favour of any particular anti-poverty strategy. Likewise, an educational charity must provide educational services rather than operate for the

purpose of securing any given education policy. The ability of charitable foundations to assume a role as thought leaders in controversial areas of human existence is significantly constrained.

It was not always this way. At one time, the law posed little to no restriction on the freedom of charities to pursue aims that under current law would be characterized as non-charitable political purposes. With the twentieth century came new regulatory restrictions that progressively muzzled charities in the area of political advocacy. The cases expanding the doctrine of political purposes have been widely criticized for being poorly reasoned and excessively restrictive on charities.[5] As we shall see, there is some merit to these criticisms.

III – THE LEGAL MEANING OF "CHARITY":

Eligibility for charitable status under Canadian law, including income tax law, is determined on the basis of the common law meaning of charity. The common law defines charity with reference to the preamble to a 1601 English statute variously known as the *Statute of Charitable Uses* and the *Statute of Elizabeth*.[6] This was an unlikely source for the legal meaning of charity because the preamble does not itself define charity, nor was it intended to inform attempts to define charity. The *Statute of Charitable Uses* was instead enacted to regulate what were at the time of its enactment abuses in the administration of charitable trusts. The preamble simply gave context to the statute's regulatory aims by listing – by way of example only – the sorts of purposes for which charitable trusts were being established.[7] Nevertheless courts began to consult the preamble as a reference point for determining whether putative charitable trusts were indeed established for exclusively charitable purposes. It eventually became the law that a purpose could qualify as charitable only if it was specifically listed in the preamble, analogous to a purpose specifically listed in the preamble or analogous to a purpose that had previously been found by a court to be charitable.

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[5] See, for example, N. Brooks, *Charities: The Legal Framework* (Ottawa, ON: Secretary of State, 1983); A. Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes," *Alberta Law Review* 45, no. 4 (2008), 871; L.A. Sheridan, "Charitable Causes, Political Causes and Involvement," *The Philanthropist* 2, no. 4 (1980), 5; G.F.K. Santow, "Charity in Its Political Voice: A Tinkling Cymbal or a Sounding Brass?," *Current Legal Problems* 52, no. 1 (1999), 255; Richard Bridge, "The Law of Advocacy by Charitable Organizations: The Case for Change," *The Philanthropist* 17, no. 2 (2002), 2; B. Harvie, *Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses*, January, 2002. http://www.vsi-isbc.org/eng/policy/pdf/regulation_of_advocacy.pdf; Chia, J., M. Harding, and A. O'Connell, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc. v. Federal Commissioner of Taxation*," *Melbourne University Law Review* 35, no. 2 (2011), 353; and A. Dunn, *Charity, Law and Politics: Radicals, Conservatives or Subversives* (Oxford: Hart Publishing, forthcoming March 2014).

[6] 1601 (43 Eliz. 1), c. 4.

[7] The preamble identified the following as charitable purposes:

> [T]he relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids; support, aid, and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption or prisoners or captives; and the aid or ease of any poor inhabitants covering payments of fifteens, setting out of soldiers, and other taxes.

Through the passage of time the cases dealing with the legal meaning of charity grew to form a somewhat muddled body of judicial pronouncements. To help bring better understanding to this area of law, Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* offered a fourfold classification of the purposes that had to date been characterized as charitable.[8] In what is easily the most widely quoted statement ever made in charity law, Lord Macnaghten said:[9]

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

It remains the case today that no purpose will qualify as charitable under Canadian common law unless all of its purposes meet a "public benefit" requirement and fall within one or more of these four so-called "heads' of charity.

The *Pemsel* "heads" of charity do not pose any immediately obvious conflict with political engagement. There is, for example, nothing in the phrase "relief of poverty" necessitating the conclusion that pursuing poverty relief through, say, law reform, is necessarily non-charitable. Indeed, at one time trusts with purposes whose attainment necessitated a change to law were upheld as charitable.[10] Courts of the 19th century concluded that trusts to promote temperance legislation,[11] secure the abolition of vivisection[12] and establish a new bishopric[13] were exclusively charitable. Perhaps more telling is that at one time the political involvement of charities is said to have been largely unquestioned.[14]

All of this changed in 1917 when Lord Parker of the House of Lords observed in *Bowman* v. *Secular Society* that "a trust for the attainment of political objects has *always* been held invalid".[15] While this statement was neither historically accurate nor necessary for the resolution of the case before the court, it formed the basis of the modern day restriction against political advocacy by charities. Literally all cases dealing with the non-charitableness of political advocacy either cite *Bowman* directly or cite cases following *Bowman*.

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[8] [1891] A.C. 531 (H.L.) [*Pemsel*].
[9] Ibid., 583.
[10] See Peter Luxton, *The Law of Charities* (Oxford: Oxford University Press, 2001), 225.
[11] *Farewell* v. *Farewell* [1892] O.J. No. 173 (Ont. H.C.J.).

[12] *In re Foveaux* [1895] 2 Ch. 501.
[13] *Re Villers-Wilkes* [1895] 72 L.T. 323. This purpose apparently necessitated a change to the law. The case references a legislative bill that was introduced for the purpose of constituting a bishopric for Birmingham.
[14] F. Gladstone, *Charity, Law and Social Justice* (London: Bedford Square Press, 1982), 99-100; K. 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), 16 and 127-28; and M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979), 44, 78 and 359.
[15] [1917] A.C. 406 (H.L.) at 442 (emphasis added) [*Bowman*].

Building on the foundation of *Bowman*, courts in future cases elaborated on what it means to have a "political" object. The cases reveal an ongoing expansion of what qualifies as political such that the law has evolved from having little to no restriction against political advocacy to now having a robust restricting against advocacy. The list of purposes characterized as political has expanded to now include electioneering,[16] campaigning for changes to the laws or policies of a domestic or foreign government,[17] promoting a point of view[18] or attitude of mind[19], advocating in favour of one side of a controversial social issue[20] and creating a climate of opinion.[21] This list is very broad

In addition to the case law authorities, there are the administrative practices of the Charities Directorate of the Canada Revenue Agency (the "CRA"). The CRA has published a policy statement (the "Policy Statement") summarizing its administrative interpretation of the relevant case law.[22] Though the Policy Statement lacks the force of law, it is authoritative in the sense that it informs the audit practices of the CRA. Among other things, the Policy Statement elucidates an important distinction between political activities and political purposes. Though charities are prohibited from having political *purposes*, they are permitted to engage in a certain amount of political *activities*, including (1) communicating to the public that some law or policy should be changed or (if reform is being contemplated) retained and (2) encouraging the public to contact public officials urging them to either oppose or support a proposed change to law or policy.[23]

The basis for the CRA's position in this regard is subsection 149.1(6.1) and (6.2) of the *Income Tax Act*. These provisions provide that charitable foundations and charitable organizations, respectively, can devote part of their resources to "political activities" provided those activities do not include electioneering and remain "ancillary and incidental" to charitable purposes. There is absent from current law a bright line test for determining when a political activity has ceased to be ancillary and incidental to a charitable purpose. The basic issue is one of discerning when a political activity has become an end in itself such that the institution in question can no longer be considered to be established and operated for exclusively charitable purposes. One of the relevant factors is the extent of a charity's resources devoted to political activities. As a general guideline, the CRA applies a ten per cent rule, meaning no more than

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[16] Ibid., 340.
[17] Ibid., 340.
[18] *Vancouver Society of Immigrant and Visible Minority Women* v. *Canada (M.N.R.)*, [1999] 1 S.C.R. 10 at para 171 [*Vancouver Society*].
[19] *Anglo-Swedish Society* v. *Commissioners of Inland Revenue*, [1931] 47 TLR 295 [*Anglo-Swedish*] and *Toronto Volograd Committee* v. *Canada*, [1988] 3 F.C. 251 [*Toronto Volograd*].
[20] *Human Life International in Canada Inc.* v. *M.N.R.*, [1998] F.C.J. No. 365 (F.C.C) [*Human Life*]; *Re Positive Action Against Pornography and Minister of National Revenue* (1988), 49 D.L.R. (4th) 74 (F.C.A.) [*Re Positive Action*]; and *Alliance for Life v. M.N.R.,* [1999] 3 F.C. 504 (F.C.A.) [*Alliance for Life*].
[21] *Buxton and Others* v. *Public Trustee and Others* (1962), 41 T.C. 235.
[22] Canada Revenue Agency Document CPS-022, *Political Activities* (Ottawa, ON: Canada Revenue Agency, 2003) http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html#N10452.
[23] Ibid., Section 6.2.

ten per cent of a charity's resources – property, staff, volunteers, directors, *etc* – can be applied to political activities.[24] If this threshold is exceeded, an otherwise permissible political activity risks being audited by the CRA as an impermissible political purpose, the consequence of which is loss of charitable status.

In addition, the Policy Statement sets out CRA's understanding of the distinction between charitable public information campaigns and non-charitable political messaging. Public awareness campaigns, the Policy Statement notes, only qualify as charitable if stringent criteria are met. To qualify as charitable, a public awareness campaign must, among other things, be based on a "well-reasoned" position, which the Policy Statement defines as follows:[25]

> 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 Policy Statement expressly notes that providing information is not itself a charitable purpose unless it meets the formal requirements for the advancement of education. Among the requirements that educational charities must meet are the requirements that the materials presented qualify as "reasonably objective" and "well-reasoned". Education must not rely upon an "appeal to emotions" or be undertaken to "create a climate of opinion or to advocate a particular cause."[26] Again, this is an exacting standard. The distribution of empirically demonstrably "facts" enjoys the cover of charitable status but communications drawing on ideals alone risks being relegated to the political category.

While there is obviously much more that could be said about how the cases and CRA distinguish charity from politics, the description set out here will suffice for present purposes. Charity law has shifted from a position that at one time had few restrictions on political engagement to a position that strictly regulates the scope of lawfully permissible political advocacy for charities.

IV – Regulatory Impact on Charities:

The implications of the doctrine of political purposes for charities are far-reaching, if not radical. Take, for example, the non-charitableness of law reform. Obviously, this precludes charities from being established for the express purpose of securing a change to law. Less obvious, however, is that it also disqualifies institutions whose purposes merely imply the need for, and perhaps even the desirability of, law or policy reform. The breadth of the principle is illustrated by the holding in *McGovern v. Attorney-General* in which the House of Lords concluded that Nobel Peace Prize winning Amnesty International Trust was non-charitable because one of its purposes – pursuing the abolition of human torture – implicitly

[24] The percentage is adjusted upwards for small charities. The ceiling is twenty per cent for charities with annual incomes less than $50,000, fifteen per cent for charities with annual incomes between $50,000 and $100,000 and twelve per cent for charities with annual incomes between $100,000 and $200,000. Ibid. at Section 9.
[25] Canada Revenue Agency Document CPS-022, Appendix I.
[26] Ibid., Section 8.

contemplated a change to law.[27] The court reasoned that abolishing human torture would ultimately tend toward pursuing law reform. How can one truly *abolish* human torture other than making it contrary to law?[28] The same reasoning was applied by the House of Lords in *National Anti-Vivisection Society* where it was concluded (contrary to earlier authorities) that pursuing the abolishing of vivisection was not a charitable purpose.[29]

Likewise, the precedents establishing that it is political to promote a view on a controversial social issue or an attitude of mind go some distance toward removing charities from public debate. It is fair to say that charitable status is jeopardized where any of the purposes of an institution entail convincing anyone, whether that be the public at large, elected politicians or government officials, that any particular perspective or value commitment should be preferred over others. This reflects a legal ordering in which charities have come to be valued as suppliers of tangible goods and services but not as suppliers of normative ideals capable of enriching public deliberation. "Awareness organizations" and those engaging in public information campaigns have been denied charitable status in numerous cases. This includes institutions established and/or operated for the purpose of promoting a view on abortion,[30] promoting greater understanding between societies in conflict,[31] promoting the view that pornography is harmful,[32]promoting the desirability of any particular political doctrine or perspective[33] and promoting the view that peace is best secured by demilitarisation.[34] The final case referenced in this list reveals the considerable extent to which courts have sought to remove charities from public deliberation. The court took no issue with a charity promoting the view that peace is preferable to war.[35] The bar to charitableness was that the institution in question was advancing the view that disarmament was the *best* way to achieve peace. As this is a matter of considerable controversy, the promotion of this view was political rather than charitable.[36]

Perhaps one of the most significant impacts of the doctrine of political purposes is one that cannot be directly observed, namely, self-censorship by charities. The cases suggest that neutrality and objectivity are hallmarks of legal charity. It has been held, for example, that

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[27] [1982] 1 Ch. 321 at 337 [*McGovern*].
[28] This reasoning has been followed in Canada in *Action by Christians for the Abolition of Torture* v. *Canada* (2002), 225 D.L.R. (4th) 99.
[29] *National Anti-Vivisection Society* v. *I.R.C.*, [1948] A.C. 31 [*Anti-Vivisection*].
[30] See *Human Life* and *Alliance for Life.*
[31] See *Anglo-Swedish* and *Toronto Volograd*.
[32] See *Re Positive Action*.
[33] See *Re Loney* (1953), 61 Man. R. 214 (Q.B.); *Re Hopkinson*, [1949] 1 All E.R. 346; *Bonar Law Memorial Trust* v. *I.R.C.* (1933) 49 T.L.R. 220; *Re Knight* [1937] O.R. 462 (H.C.J.); and *Re Bushnell* [1975] 1 W.L.R. 1596. For a general discussion of these cases and others on point, see 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), 51-54 and Brooks, *Charities*, 149.
[34] *Southwood & Another* v. *Her Majesty's Attorney General* 2000 WL 877698.
[35] Ibid.
[36] See the judgement of Chadwick L.J. at ibid., para 29.

charitableness will be absent where there is no attempt to "educate the public so that they [can] choose for themselves, starting with neutral information, to support or oppose" any particular position.[37] So while courts have recognized that it can be charitable to educate people "from a particular political or moral perspective", they have concluded that charitableness is spent once the goal becomes promoting a political or moral perspective.[38] The distinction is so fine and difficult to draw in practice that it weighs heavily in favour of charities either altogether removing themselves from public debate or restricting public communications to highly temperate remarks. This kind of chilling effect may well represent the single biggest impact of the doctrine on charities.

Perhaps of particular concern is that the doctrine of political purposes creates something of an unequal playing field. Although the doctrine is facially neutral in the sense that it applies with like force to all charities, it has the effect of marginalizing certain perspectives while privileging others. For example, the non-charitableness of law and policy reform privileges supporters of the status quo over those calling orthodoxy into question. Since the latter can only achieve their mission by campaigning for change, they are the ones who disproportionately bear the brunt of the doctrine of political purposes. Supporters of the status quo typically need not engage in advocacy and therefore generally need not contend with the doctrine of political purposes. Likewise, the principle that charitable education must be "well-reasoned" and cannot rely upon an "appeal to emotions" (see Part II above) prejudices certain perspectives. Whether any particular content, be it educational curriculum or information relayed through a public campaign, incites emotions will often turn on whether the underlying message affirms or opposes established norms. Institutions questioning orthodoxy will presumably be more likely to fail this requirement because their message will be more likely to attract strong emotional responses. Further, the well-reasoned requirement goes some distance in restricting charitable education and information campaigns to empirically demonstrable statements.[39] Perspectives drawing on ideals not readily amenable to empirical demonstration, *e.g.,* "social justice", will struggle to meet this requirement and thus stand a greater chance of being characterized as political.

Certain of the indicia employed to distinguish charity from politics also seem to run at cross purposes with how voluntary associations are formed. Consider the idea (discussed in Part II above) that charitable education can be distinguished from political propaganda based on whether relevant counterarguments are identified and addressed. At some level, this is a sensible basis on which to distinguish genuine attempts to inform from attempts to indoctrinate. However, there is also another sense in which it runs contrary to how voluntary associations form and attract audiences. One commentator rhetorically asks whether a "group

[37] *Re Bushnell* [1975] Ch. 1605 (Ch. D.).
[38] See, for example, *Challenge Team v. Canada* [2000] F.C.J. No. 433 (F.C.A.); and *Vancouver Society*, 168, 169 and 171.
[39] This is implicit in the requirement for a well-reasoned position based on factual information.

against impaired driving [would] have to give the 'other side' of impaired driving".[40] For better or for worse, value neutrality is not what inspires people to form, participate and contribute to charities. So while it is true that polemical information campaigns might properly fail to qualify as educational, over-emphasizing value neutrality as a hallmark of charity runs the risk of entrenching into law a sterile understanding of charity.

In short, the doctrine of political purposes has a profound impact on charities. The idealism forming the basis for collective action in the charitable sector is prohibited by the doctrine from taking full expression in the activities of charities. The question addressed in the next part is why courts have interpreted charity in this manner. The reasons offered by courts are surprisingly shallow.

V – Stated Rationales for the Doctrine of Political Purposes:

The jurisprudence is notable for the superficial rationales courts have articulated in support of the doctrine of political purposes. As these rationales have been thoroughly discussed and critiqued elsewhere,[41] it will suffice for present purposes to identify the core claim recurring in the jurisprudence. Most of the cases rest on the idea that the doctrine of political purposes is a necessary concession to the institutional limits of the judiciary. The reasoning is as follows: Given that public benefit is a prerequisite for charitable status, a finding by a court that a given purpose qualifies as charitable at law is neither value neutral nor agnostic. To the contrary, it is at some level an affirmation that the purposes being pursued are desirable, that they confer a recognizable benefit on some segment of society qualifying as "a public". Much of the jurisprudence is concerned with articulating reasons why it would be inappropriate for courts to find public benefit in, and thus affirm, political purposes.

One particularly anemic line of reasoning posits that the law would stultify itself – contradict or cause itself to appear illogical – if it were to recognize public benefit in law reform.[42] The essential idea is that law reform could only be of public benefit if the law were imperfect to begin with. Since the law should not recognize its own imperfection, charity law cases, so the reasoning goes, should be decided from the premise that the law is perfect as it is. On this view, law reform initiatives are necessarily non-charitable because their goal is to take the law from a state of perfection to something that could only be inferior. With respect, this shallow reasoning is hardly even worth critically dissecting as no serious student of the law is very likely to the accept premise that the law is perfect. Perfection is at most an aspiration of the law but

[40] Webb, *Cinderella's Slippers*, 42 citing Paul Tuns, "When is a charity considered to be dealing in 'propaganda'? Human Life International was stripped of its charitable tax status for being too 'political'. Who's Next?" *Globe and Mail*, Feb. 1, 1999, final edition.
[41] See, for example, Parachin, "Distinguishing Charity and Politics".
[42] See, for example, *Anti-Vivisection Society*, 62 and 50; and *McGovern*, 333-37.

not an achieved characteristic. Ironically, one of the leading cases dealing with the doctrine of political purposes openly commented on the imperfection of the doctrine itself.[43]

Other cases emphasize the need for courts to maintain an appearance of neutrality in matters of controversy. Justice Slade reasoned in *McGovern* that finding public benefit in political purposes would be problematic because it would "usurp the functions of the legislature", [44] result in the court "prejudicing its reputation for political impartiality",[45] and "be a matter more for political than for legal judgment".[46] Other authorities have reasoned similarly with the common theme being that judges ought to refrain from ruling on the public benefit of advocacy as a way of preserving the institutional legitimacy of courts.[47]

If nothing else, this reasoning helps put into context decisions like *McGovern* in which the court declined to find public benefit in the advocacy work of the Nobel Peace Prize winning Amnesty International Trust. It is not as if the court concluded that Amnesty lacked public benefit. The court simply declined to make a determination one way or the other as a way of preserving its impartiality. Non-charitableness was not a positive finding but rather the practical effect of no conclusion having been drawn as to the presence or absence of public benefit requirement. Likewise, in *Human Life* and *Positive Action Against Pornography* the court did not conclude that the pro-life and anti-pornography perspectives lacked public benefit. Instead, the court altogether declined to address the matter as a way of upholding the institutional neutrality of courts.

There are two notable fallacies evident in this approach.

The first fallacy lies in the assumption that neutrality is necessarily preserved through a failure to rule one way or the other on the public benefit of political purposes. Just as granting charitable status is not a value neutral exercise, neither is withholding it. The neutrality courts purport to be preserving by making no finding on the issue of public benefit is compromised by the fact that this does not bring the cases to a neutral conclusion. Cases dealing with charitable status only have two possible outcomes – charitable or non-charitable. "Maybe but maybe not" is not one of the possible outcomes. So when a court declines to make any finding on the issue of public benefit, the default result is that the particular institution before the court will fail to qualify as charitable. Even though the court is not specifically finding that the institution is non-charitable on the basis that it lacks public benefit, the ultimate effect is the same. In both instances the institution in question faces the stigma of having lost its legal battle for

[43] See *Human Life*, para 19.
[44] *McGovern,* 337.
[45] Ibid., 337.
[46] Ibid., 339.
[47] See also *Alliance for Life*; *Bowman*, 442; *Anti-Vivisection*, 62; *Human Life*, paras 12 and 14; *Jackson* v. *Phillips* (1867), 96 Mass. 539, para 59; and Ontario Law Reform Commission Report on the Law of Charities (Toronto: Ontario Law Reform Commission, 1997), 219-20.

charitable status. As this is not a neutral outcome, it does not preserve the neutrality of the judiciary in the way that courts assume.

Further, a failure to rule on the issue of public benefit is tantamount to a finding that public benefit may or may not be present. That is, courts are accepting that the purposes before them are of such a nature that reasonable people might agree to disagree on the issue of benefit without either side contradicting any inviolable principle of law or justice. There are certainly contentious issues in relation to which this reasoning is apt.[48] However, what about cases like *McGovern* and *Action by Christians for the Abolition of Torture* v. *Canada* dealing with the abolition of human torture? The court's failure to rule on public benefit implies that human torture may have a place in a democratic society committed to just law. This is not altogether value neutral.

The second fallacy lies in the assumption that a grant of charitable status necessarily entails the court's condonation of the *specific* law reform or the *specific* point of view being advocated. One might say that a distinction exists between the desirability inhering in the particular *purposes* being pursued and the desirability inhering in the *pursuit* of those purposes. Charitable status could be granted on the strength of the conclusion that it is of public benefit for there to be public debate over matters relating to the legally recognized categories of charity. Benefit need not necessarily be found in the particular point of view being advanced by any given institution in such debates. This, incidentally, is how the law tends to find benefit in religion without aligning itself with any particular religion. The law accepts that there is benefit in religious inquiry without necessarily endorsing all the individual beliefs of any given religion.[49] There is no reason why the same approach could not be taken in connection with political purposes.[50]

At the end of the day the cases have struggled to adequately account for why the law distinguishes charity from politics in the manner that it does. The various explanations offered by courts tend to raise more questions than they answer. Whatever good reasons might exist for distinguishing charity from politics those reasons do not find concrete expression in the authorities.

VI –Role of Income Tax Considerations:

How then do we account for the doctrine of political purposes? After years of having little to no restriction on the political advocacy activities of charities, why did the law assume an increasingly restrictive approach? A cynical view is that the doctrine manifests an emergent disrespect for freedom of expression, particularly by governments seeking to minimize public

[48] For example, the CRA discusses in the Policy Statement a hypothetical charity advocating a view in a municipal debate over whether pedestrian safety would be best achieved through a marked pedestrian crosswalk or a traffic light.

[49] In *Gilmour* v. *Coats* [1949] AC 426 (H.L.) it was expressly held by Lord Reid at 459 that a "religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true".

[50] The High Court of Australia adopted similar reasoning in *Aid/Watch*, 44-45.

criticism. Consistent with this view, the income tax amendments facilitating CRA's enforcement of the doctrine of political purposes enacted as part of the 2012 federal budget have been characterized as a political response to criticism of the federal government's environmental policy from within the charitable sector.[51] One could, however, legitimately question whether the doctrine of political purposes is best viewed in this light. The doctrine does not forbid any person from holding or expressing any point of view. That is, any institution denied charitable status on the ground that it has a political purpose remains free to reorganize and operate as a non-charitable not-for-profit institution. The doctrine of political purposes is not therefore focussed on the limits of free expression so much as on the limits of charitableness.

But this only redirects us back to asking what it is about charity that has inspired jurists to distinguish it from politics. Interestingly, the cases do very little to establish an intrinsic incompatibility between charity and advocacy. One might even say that the cases are incoherent to the extent that they accept the inherent charitableness of religious proselytization but nevertheless characterize as political the advancement of views on controversial social issues. Is there anything more controversial than religious dogma? However, criticizing the cases for failing to consistently distinguish charity from politics according to some substantive metric might very well miss the point. It is at least possible that the doctrine of political purposes is not a response to some perceived incompatibility between charity and politics so much as it is a response to an assumed incongruity between charitable *status* and politics. That is, courts may well have developed the doctrine of political purposes from the vantage of an instrumental view of charity under which the principal concern is less whether any given purpose has the true character of a charitable purpose and more whether it should enjoy the benefits, primarily the income tax benefits, that follow from a grant of charitable status.[52] On this understanding, the doctrine of political purposes can be attributed to a mostly undisclosed, perhaps even subconsciously held, view of charitable status as a policy instrument for determining eligibility for a state subsidy in the form of income tax concessions. Such an approach conflates the question "is this charitable?" with the question "should this institution be state subsidized through tax concessions?". The denial of charitable status to institutions with political purposes can perhaps then be thought of as at some level reflecting the determination that certain forms of advocacy, regardless of whether they are truly charitable, should not be state subsidized through income tax concessions and should thus be denied charitable status.

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[51] See, for example, the following story: Shawn McCarthy, "Minister Defends Tory Environment Plan, Dials back Criticism of Charities," *The Globe and Mail*, May 7, 2012 http://www.theglobeandmail.com/news/politics/ottawa-notebook/minister-defends-tory-environment-plan-dials-back-criticism-of-charities/article4105318/.

[52] See, for example, S. Swann, "Justifying the Ban on Politics in Charity" in A. Dunn, ed., *The Voluntary Sector, the State and the Law* (Portland, ME: Hart Publishing, 2000), 161; A. Dunn, "Charity Law as a Political Option for the Poor" in C. Mitchell and S. Moody, eds., *Foundations of Charity* (Portland, ME: Hart Publishing, 2000), 75; P. Luxton, "Charitable Status and Political Purpose," *N.L.J. Annual Charities Rev.* 24, (1995), 28; C.E.F. Rickett, "Charity and Politics," *N.Z.U.L. Rev.* 10, no. 169 (1982), 176; and U.K., H.C., "Charities: A Framework for the Future" Cm 694 (1989) at ch. 2.

Admittedly, this interpretation of the cases is provocative in the sense that it locates the true rationale for the doctrine of political purposes not in the text but rather the subtext of the cases, the reasoning of which tends to avoid linking the doctrine with subsidy considerations. Some will object to this thesis on the ground that the reasons for judgment articulated by courts ought to be taken seriously as just that – the reasons for which legal conclusions are reached – rather than dismissed as mere window dressing. Nonetheless, the thesis that tax subsidy considerations might be playing a buried role in the jurisprudence does not strain credulity. The formal reasoning of charity cases generally, and the cases distinguishing charity from politics specifically, often seems artificial, suggesting that additional undisclosed considerations might also be playing a role. Notably, the doctrine of political purposes is a 20th century phenomenon that closely paralleled the growth and development of the modern income tax regime. With the arrival of income tax came new technical and policy considerations that could perhaps be viewed as justifying new restrictions on political engagement. Charity law became infused with a fiscal dimension owing to the income tax concessions that charities have enjoyed since effectively the outset of income tax. It became possible to view grants of charitable status as something posing a tangible public cost. Unlike before the advent of income tax, a rule restricting political advocacy by charities now made sense as a tool for more efficiently targeting the state subsidy inherent in charitable status,[53] protecting taxpayers from indirectly financially supporting special interest lobbying[54] and preserving scarce income tax revenues.[55]

Lending credence to this thesis is the fact that judges, though they tend to studiously avoid expressly attributing their interpretations of charity to fiscal considerations, have from time to time candidly acknowledged the role of such considerations. In one of the leading Canadian cases, the Federal Court of Appeal tellingly framed the doctrine of political purposes not as achieving a denial of charitableness *per se* but rather a "denial of tax exemption to those wishing to advocate certain opinions."[56] Even the Supreme Court of Canada in its recent most recent case dealing with the legal meaning of charity expressly connected its decision to withhold charitable status to the anticipated cost to the *fisc*.[57] Though this decision did not deal specifically with the doctrine of political purposes, it bears out the thesis that fiscal cost benefit analysis plays a role in the judicial interpretation of charity.

There is at least a case then for viewing the doctrine of political purposes as at some level representing a shift in thinking further to which charitable status has come to be viewed and understood by courts and regulators principally as an instrument for awarding a state subsidy.

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[53] It has been argued, for example, that it would be an inefficient use of public resources to allow charities greater latitude for political engagement. See Swann, "Justifying the Ban." 166-67.

[54] U.K., H.C., "Charities: A Framework For the Future", para. 2.41.

[55] As far back as *Pemsel*, it was recognized by Lord Halsbury at 551 that "every [tax] exemption throws an additional burden on the rest of the community."

[56] Human life at para 18.

[57] *Amateur Youth Soccer Association* v. *Canada Revenue Agency*, [2007] S.C.J. No. 42.

One concern is that this paradigm shift has brought to the case law a form of cost benefit analysis for which courts are poorly suited and under which applications for charitable status tend to be adjudicated from the vantage of whether granting charitable status is worth what it costs. This kind of cost benefit analysis favours applicants for charitable status supplying concrete goods and services, especially in instances where the demand for those goods and services might otherwise fall upon government. The economic benefits conferred by such institutions are observable and measurable. In contrast, asking whether a grant of charitable status to an advocacy organization will be worth what it will cost the public treasury is more of an imponderable. This is why fiscal considerations will tend to militate against the recognition of advocacy as charitable: The case for subsidizing advocacy is simply more difficult to make out, especially where the views being advocated challenge orthodoxy. What we are witnessing then with the doctrine of political purposes is arguably an increasingly economic driven paradigm of "charity" under which charities have come to be valued not for the normative ideals they can bring to public discourse but rather for the resources they can spare governments through the supply of goods and services.

VII - Reform:

So far I have suggested that the doctrine of political purposes reflects a shifting legal terrain in which restrictions on advocacy previously unknown to charity law have now become entrenched into current law. I have connected the rise of the doctrine to fiscal considerations lacking any discernable relevance to the true meaning of charity. The question I consider in this part is whether the doctrine of political purposes should be altogether abolished or salvaged in a modified form. I argue in favour of the latter. The ultimate premise of the doctrine – that there exists a principled distinction between charity and politics – is sound. It is just that the doctrine of political purposes is excessively broad in its current form. So in this part of the chapter I return to first principles with a view to refining and refocusing the doctrine more consistently with a principled way to understand the distinction between charity and politics.

A useful first step is to identify quintessential instances of non-charitable political advocacy and to reflect on why they should not qualify as charitable. If we can identify a characteristic shared in common by truly non-charitable political purposes, then we will have at least identified a referent for refining the doctrine of political purposes. In my anecdotal experience, most people tend to agree with the suggestion that institutions established specifically for the purposes of electioneering and/or lobbying represent archetypical instances of non-charitable political institutions. The relevant feature that electioneering and lobbying share in common is that they both entail a call on government to respond in some way to a social, economic, environmental or like problem. In some instances this will entail a call for interventionist governmental measures in the form of new or revised regulations. In others it will entail efforts to secure governmental deregulation so as to make room for what are perceived to be superior non-governmental solutions. Even though these militate in opposite policy directions, they are both equally concerned at the end of the day with the proper role and function of government.

Therein arguably lies the incongruity with charitableness. Even if the goal ultimately being pursued through electioneering or lobbying dovetails with a lawful charitable purpose, *e.g.,* the relief of poverty, the immediate focus of the activity is not the attainment of that purpose but rather securing a governmental response perceived as conducive to the attainment of that purpose.

Why should this make any difference? One reason might be that electioneering and lobbying are too remotely connected to the attainment of anything qualifying as charitable. Even accepting that electing a particular government or enacting a particular law reform will achieve greater poverty relief, these activities only indirectly contribute to that goal. The most proximate cause is governmental action and not the actions contributing to the government action. Electioneering and lobbying do not therefore meet the requirement that the direct effect of activities must be the attainment of charitable goals.

A less technical, and perhaps more normatively appealing, answer is that government and charity, though they might at times pursue similar goals, are ultimately distinct from one another. If true, there is a basis for concluding that a purpose qualifying as charitable at law might not remain charitable when pursued through the means of government, and by extension through actions directed at determining who forms the government through electioneering or shaping the outputs of government (*e.g.,* law and regulation) through lobbying. On this view, charity is not simply concerned with the attainment of ends qualifying as charitable. It is concerned with attaining those ends privately, meaning other than via government or law. The charitableness of an endeavour could therefore be said to be spent when an end capable of qualifying as charitable, *e.g.*, poverty relief, if pursued other than through government is instead pursued through government or law.

The suggestion that there exists such a stark distinction between charity and government might prove controversial. This was not always the case. At one time the distinctiveness of charity and government would have been taken to be obvious. Back when charities were effectively the sole suppliers of goods and services tending toward the attainment of charitable ends, there was no basis for even considering whether charitable ends remained charitable when pursued through government. Since governments were not generally pursuing the same goals as charities, the issue was moot. This remains true today in respect of some charitable purposes, such as the advancement of religion, where a clear distinction continues to exist between charity and state. However, in other areas, such as poverty relief, health and education, a blending of the ends pursued by charity and government has occurred. Further blurring the boundaries between charity and government is the propensity of government to increasingly rely upon charities to deliver government funded programming.[58] Given the

[58] See J. Warburton and D. Morris, "Charities and the Contract Culture" *The Conveyancer*, (1991), 419; M. Chesterman, "Foundations of Charity Law in the New Welfare State" in C. Mitchell and S. r. Moody (eds), *Foundations of Charity* (Portland, ME: Hart Publishing, 2000), 249; and A. Dunn, "Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process" *Modern Law Review* 71, no. 247 (2008).

increased entanglement of charities and governments, it has become necessary to re-examine the distinctiveness of the two.

There are admittedly certain respects in which current thinking about legal charity accepts a close similarity of charity and government. At a high level of generalisation charity and government are both concerned with attaining the common good. It is in this very general sense that Matthew Harding observes that "government and charity – at least charity in the legal sense – are in the same business."[59] But, as Harding observes, charity and government continue to share some territory in common even when we transition from the general to the more specific. For example, certain purposes recognized as charitable at law seem to be overtly governmental in nature. It has been established that donations to government for the purpose of paying down the national debt qualify as charitable at law.[60] Likewise, trusts to build roads and bridges qualify as charitable at law, notwithstanding that this activity can only be carried by or under the control of government.[61] Further, trusts for the relief of taxes, which effectively means trusts providing revenue streams for governments for governmental programming that would otherwise have to be raised through government revenue tools, have been recognized as charitable.[62] One could indeed say that the immediate purpose of such trusts is not to achieve governmental ends *per se* but rather to reduce the burden of tax associated with governmental ends. Nonetheless, there is clearly some sort of overlap between charity and government being contemplated in these authorities.

The theoretical thinking behind the preferred income tax treatment of charitable donations also draws to some extent upon an assumed similarity of charity and government. One line of reasoning posits that charitable donations should not be taxed because they do not qualify as "income" in the first place.[63] A premise of this reasoning is the idea that charitable donations achieve the essential aims of income tax, including the redistribution of wealth through the production of collective goods and services that would go underfunded without an income tax.[64] Obviously, this reasoning only holds true if it is accepted that charitable goods and services bear a resemblance of some sort to government supplied goods and services.

Another line of reasoning maintains that the preferred income tax treatment of charitable donations can be justified as an indirect state subsidy for charities. A state subsidy for charities is said to be warranted because of a failure of government to directly supply the goods and services supplied by charities and a corresponding failure of the market to supply charities with

[59] M. Harding, "Distinguishing Government from Charity in Australian Law," *Sydney Law Review* 31 (2009), 559 at 559-60.
[60] Newland v. A.G. (1809), 36 E.R. 262.
[61] This was noted in *Central Bayside (HCA)* (2006) 228 CLR 168 at 224 per Callinan J.
[62] See, for example, *Attorney-General v. Bushby* [1857]53 ER 373.
[63] W. Andrews, "Personal Deductions in an Ideal Income Tax," *Harvard Law Review* 86, (1972), 309.
[64] Ibid., 346.

the optimal level of funding.[65] The state could directly subsidize charities through direct transfers but an indirect subsidy delivered through donation tax incentives is said to be preferable for a variety of reasons. One idea is that donation incentives better allocate the costs of charitable programming to taxpayers who value that programming than would a system of direct state provision.[66] Another idea is that donation incentives foster a form of direct democracy whereby taxpayers are permitted to vote (through charitable donations) how public funds are allocated.[67] Still yet another idea is that donation incentives offer efficiency advantages over direct state grants because they attract more donations than they cost in terms of foregone tax revenue.[68]

This reasoning quite clearly draws upon an assumed similarity of charitable and governmental purposes. The government failure thesis casts the very existence of the charitable sector as a consequence of government failing to supply the full range of public goods that would be supplied by an ideal government. On this view there would not even be a need for the charitable sector if the government was providing the optimal level of public goods and services. Likewise, the idea that donation incentives foster a form of direct democracy implicitly analogizes between charitable goods and services and the kinds of governmental goods and services that form the basis for democratic votes. Even the idea that donation incentives are a more efficient model of program delivery than direct state provision takes for granted that charitable goods and services could be directly supplied by government.

And yet I nonetheless maintain that charity law should be developed on the footing that charity is separate and apart from government. Those authorities characterizing purposes with an overt governmental orientation as charitable purposes represent the exception rather than the rule. Alongside these authorities exist other authorities establishing that donations to governmental departments for their general purposes and also trusts for the purpose of carrying out governmental policy are not charitable.[69] In addition, while it is true that a blurring of government and charity has in some senses occurred through time, this does not compel us

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[65] See, for example, Mark Hall and John Colombo, "The Donative Theory of the Charitable Tax Exemption," *Ohio State Law Journal* 52, (1991), 1423-25; N.J. Crimm, "An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation," *Florida Law Review* 50, no. 3(1998), 419-462; and A. Ben-Ner and B. Gui, "The Theory of Nonprofit Organizations Revisited," in H.K. Anheier & A. Ben-Ner, eds., *The Study of Nonprofit Enterprise: Theories and Approaches* (New York, NY: Plenum Publishers, 2003), 3.

[66] M. Gergen, "The Case for a Charitable Contributions Deductions," *Virginia Law Review* 74, (1988), 1399-1406.

[67] S. Levmore, "Taxes as Ballots," *University of Chicago Law Review* 65, (1998), 387.

[68] See, for example, W. Vickrey, "One Economist's View of Philanthropy," in F.G. Dickinson, ed., *Philanthropy and Public Policy* (New York, NY: National Bureau of Economic Research, 1962), 31; M. Feldstein, "The Income Tax and Charitable Contributions," *National Tax Journal* 28, (1975), 81; Gergen, "Charitable Contributions Deductions," 1404; P. Wiedenbeck, "Charitable Contributions: A Policy Perspective," *Missouri Law Review* 50, no. 1 (1985), 85-140; J.D. Colombo, "The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption," *Wake Forest Law Review* 36, (2001), 683; and D. Duff, "Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform," *Osgoode Hall Law Journal* 42, no. 47 (2004), 59-61.

[69] See Harding, "Distinguishing Government," 561-63.

to deny that charity remains distinct from government. There is a simple reason why charitable trusts can remain charitable even when established and/or funded by government. It is well-established that neither the motive nor the identity of the contributor to (or settlor of) a charitable trust is in any way relevant to whether the trust qualifies as charitable at law. The focus is always on what is being achieved rather than the source of funding or the motive behind the funding. So if all else remains equal, it simply does not matter to the charitableness of a putative charitable trust whether the settlor of or contributor to the trust is or is not government. That is, charitable ends remain charitable even when subsidized by the state. This is not to say that governmental involvement is incapable of vitiating the charitableness of a trust. The U.K. Charity Commission observes that charitable trusts must be independent from government.[70] In the view of the 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 best explanation for this is that charities are not government and cannot be operated or established as an arm of government.

One way to summarize the preceding is to say that governments cannot "do government" through charities. The only exception is if the goal of government in supporting charity is to "do charity". Of course, this is not really an exception to the rule since it merely reveals that governments are just like everybody else in the sense that they are able to support (though neither direct nor control) the work of charities. The doctrine of political purposes can be understood as simply applying this principle in reverse. When courts say that electioneering and lobbying for law and regulatory reform are non-charitable they might simply mean the following: Just like 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. The doctrine of political purposes is therefore perhaps misnamed as it is arguably less concerned with the non-charitableness of politics than it is with the non-charitableness of government.

If I have correctly identified a theoretically defensible rationale for the doctrine of political purposes, then we have a principled basis for concluding that the doctrine of political purposes as currently applied in Canadian law is excessive. For the reasons noted, the distinction between charity and government grounds a case for continuing to characterize electioneering and lobbying as non-charitable political pursuits. The same point does not obviously follow in relation to other pursuits characterized as political under current law. For example, the fact that charity and government are distinguishable neither compels nor supports the conclusion that a public information campaign or the promotion of an attitude of mind or point of view on a controversial social issue cannot be charitable. These pursuits are not directly concerned with preserving an existing or securing a new governmental response to some social ill. True, the

[70] Charity Commission for England and Wales, *RR7 – The Independence of Charities from the State* (February 2001).

cultivation of certain values or perspectives might tend to influence the demands that people make of government. However, since this is also true of, say, education and religion, it cannot in and of itself supply a basis for concluding against the charitableness of public information campaigns. Further, the potential for public information campaigns to impact voting behaviour is more an incidental consequence than an express goal of such campaigns.

Even purposes the ultimate fulfilment of which might strictly speaking entail law reform – *e.g.,* the *abolition* of human torture or vivisection as in *McGovern* and *National Anti-Vivisection*, respectively – need not automatically disqualify an institution from charitable status, at least not where the institution understands and approaches its mission not as one of securing law or regulatory reform through electioneering, lobbying or expressly inciting the public to engage in lobbying but rather as one of participating in public debate. That is, supplying the public with reasons, be they empirical, moral, practical or controversial in nature, to favour one side of a contentious issue should not necessarily be equated with campaigning in favour a particular candidate for public office or directly pressing the government to legislate consistently with one side of a contentious issue. The fact that current law treats all of these as political in the non-charitable sense suggests that the doctrine of political purposes has through time evolved so as to impose a far more robust restraint on advocacy than what a principled understanding of the distinction between charity and politics might be said to support.

VIII - Conclusion:

Charity law has shifted from initially have little to no restriction on political advocacy to now having what might be fairly described as a vigorous rule distinguishing charity from politics. The current state of the law is vulnerable to numerous criticisms. The law characterizes as political an excessively broad range of pursuits. Further, the case law authorities have never articulated a persuasive rationale for the doctrine. Arguably, the doctrine reflects an increased tendency for courts and policymakers to approach legal charity as more of a fiscal concept than an intelligible and coherent ideal. This has resulted in charities being valued more for the goods and services they supply than for the normative ideals they espouse. None of which is meant to altogether repudiate the doctrine of political purposes. The distinctiveness of charity and government grounds a case for some form of rule against political purposes, just not the rule as constituted under current Canadian law.