

Charity and Politics in Canada – A Legal Analysis

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The Pemsel Case
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1. Introduction

Under the present income tax law of Canada, corporations, trusts, and organizations that are registered charities are exempt from taxation on their income and may issue receipts to donors that will entitle them to credits against their tax otherwise payable if they are individuals and deductions in computing taxable income if they are corporations.

As these benefits depend on the status of a body as a registered charity, they will be withheld if the Minister declines to register the body or revokes its previous registration. Although there are some difficulties of interpretation, it is clear that entitlement to registration is intended to be affected by the extent that the body carries on “political activities” – a term that is referred to in three provisions of section 149.1 of the *Income Tax Act* (“*ITA*”) but is not defined in the statute.

This paper addresses the meaning of political activities for the purposes of the *ITA* and the extent to which they may legitimately affect the entitlement of a body to be, or to remain, registered as a charity.

The first four parts of the paper are intended to be descriptive of the current state of the law with attention to questions of internal logic, coherence and consistency raised by the reasoning in the most relevant Canadian decisions and in the published views of the Canada Revenue Agency. The discussion of these issues is expanded in the critique that follows, and then some consideration is given to available avenues for future development of the law governing the political activities of registered charities. The final section of the paper attempts to summarize the conclusions that can be drawn from the preceding discussion. The focus throughout is on areas where the existing jurisprudence would benefit from further clarification and may not preclude future developments. The emphasis is, for the most part, on traditional legal analysis and not on whether the present state of the law is satisfactory as a matter of social or taxation policy.¹ It is believed that much of the dissatisfaction with the

¹ As the paper is concerned only with the legal issues relating to the interaction of the principles of equity governing the political activities of charities with the interpretation of the provisions of the *ITA*, the discussion addresses the legal definition of charity only in that context. The definition and its continuing evolution are dealt with comprehensively in works such as *Waters' Law of Trusts in Canada*, 4th.ed. (Toronto: Thomson Carswell, 2012); Picarda, *The Law and Practice Relating to Charities*, 4th ed. (Haywards Heath, West Sussex: Bloomsbury Professional, 2010); Bourgeois, *The Law of Charitable and Not-For-Profit Organizations*, 4th ed. (Markham, Ont.: LexisNexis, 2012); Drache et al, *Charities Taxation, Policy and Practice*, loose-leaf (Toronto: Carswell, 2007). The extensive literature on the philosophical underpinnings and inadequacies of the legal concept of charity includes: Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto:

restraints imposed on the political activities of charities – as well as the obstacles to meaningful reforms – stems ultimately from the incoherence and confusion in the mismatch of common law² and statutory principles that the courts have attempted to apply.

Several of the unresolved questions on this topic arise from the courts' insistence that, in the absence of statutory definitions of charitable and political purposes, the meaning of these concepts must be ascertained by reference to the general law of charity applicable in other non-fiscal contexts. As one author has commented, the incorporation of the general law of charity for tax purposes contrasts with the attempts that have been made elsewhere in the *ITA* to have taxation consequences determined with the utmost certainty by an application of quasi-mathematical formulae.³ To the extent that certainty and predictability are recognized as desirable objectives of fair and efficient tax legislation, the legal definition of charity is particularly unsuitable for adoption. A result has been that much of the notorious conceptualism, formalism, and fine and often semantic distinctions that have infected judicial reasoning in charity cases for generations are now conspicuous features of Canadian taxation law.

2. Themes

There are a number of recurring themes in the discussion that follows. For the most part these concern questions that have not yet been subjected to in-depth analysis by the courts but which, if not dealt with, will continue to give rise to confusion and uncertainty. These include:

- the unresolved contradiction between accepting that the principles of equity governing charitable trusts are to be applied in interpreting the relevant provisions of the *ITA* and allowing the development of these principles to be affected by considerations relating to the fiscal benefits conferred and the statutory context.

- the confusion engendered by the inadequacy of the traditional justifications for the doctrine of political purposes in the common law of charity.

Ontario Law Reform Commission, 1996), chapters 6 and 7; Chia, Harding and O'Connell, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*" (2011), 35 *Melbourne U.L. Rev.* 353; E. B. Bromley, "Contemporary Philanthropy – Is the Legal Concept of Charity Any Longer Adequate?" in Waters, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993), chapter 4; and Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfield & Nicholson, 1979), chapter 15.

² By the "common law" and the "general law" I refer to the principles of equity governing charitable trusts. The term "common law" is therefore used in the generic sense of judge-made law.

³ Richard Bridge, *The Law of Advocacy by Charitable Organizations: The Case for Change* (Vancouver: IMPACS, 2000), page 9.

-- conceptual distinctions required by the *ITA* that have no counterparts or significance in the law governing the validity or administration of charitable trusts.

-- the anomalous nature of the general law governing political purposes as a source of the confusion surrounding the statutory distinctions between purposes and activities.

-- the difficulty of reconciling the words of the relevant provisions of the *ITA* that refer to political activities with the conceptual analysis applied in dealing with non-fiscal issues of private law affecting the validity or administration of charitable trusts.

-- the inconsistency between the juridical bases of the doctrine of political purposes and the recognition that political activities can be ancillary and incidental to the charitable purposes and activities of an organization or foundation.

-- the inadequacy of the traditional ends and means analysis to support a distinction required by the *ITA* between charitable activities and activities ancillary and incidental to charitable purposes and activities.

-- notwithstanding the statutory incorporation of a concept of political activities, the scope for judicial clarification and reform of the concept of political purposes by reference to the values affirmed in the Canadian Charter of Rights and Freedoms and other democratic and constitutional values that have received judicial recognition.⁴

3. Provisions of the *Income Tax Act*

For the purpose of the *ITA* a “registered charity” is generally a charitable organization or charitable foundation that is resident in Canada, was either created or established in Canada, has been accepted for registration by the Minister and is currently registered as a charitable foundation or organization.⁵

Relevant parts of the definitions of “charitable foundation” and “charitable organization” in section 149.1 (1) of the *ITA* are as follows:

⁴ Several of the themes are either developed or touched upon by Paul Michell in his comprehensive and thoughtful article, “The Political Purposes Doctrine in Canadian Charities Law” (1995), 12 *Philanthropist* (No. 4), 3; and also by Bromley, *op. cit.*, footnote 1 at pages 78-86.

⁵ Subsection 248 (1).

“charitable foundation” means a corporation or trust that is constituted and operated exclusively for charitable purposes, ... and that is not a charitable organization.

“charitable organization” means an organization, whether or not incorporated,

- (a) all the resources of which are devoted to charitable activities carried on by the organization itself, ...

149.1 (6.1). For the purposes of the definition of “charitable foundation” in subsection 149.1 (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 will 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 149.1 (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.⁶

4. Legal Concepts

It is well-established in Canadian income tax law that the references in the *ITA* to charitable purposes are to be interpreted in the light of the law governing the validity of charitable

⁶ In what follows I refer to ss. 149.1 (6.1) and 149.1 (6.2) as “6.1” and “6.2” and, sometimes, to the Canada Revenue Agency as “the Agency”.

trusts.⁷ The general law in this sense also bears on the concept of political purposes and the extent to which political activities are compatible with charitable objects and activities.⁸

Although there are important Canadian decisions on these questions – including three cases in the Supreme Court of Canada – the English decisions continue to be influential. It remains to be seen whether more critical views expressed in recent Australian cases will find support in this country.

For persons involved with existing charities and those seeking to obtain registration, the views of officials of the Canada Revenue Agency may have more immediate importance than the strict legalities. In the ultimate legal analysis, however, the Agency has no jurisdiction or discretion to define the purposes and activities that are to be considered as charitable or political.

Although the general law as recognized in the English and Canadian cases provides a legal framework for the interpretation of 6.1 and 6.2, some verbal elasticity is required if the provisions are to achieve their intended purpose.

(a) *Purposes and activities*

A distinction between purposes and activities of organizations and foundations is an important aspect of the treatment of charities under the *ITA*. It has been referred to in the reasons delivered in most of the recent cases although the treatment has not always been consistent. In *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*,⁹ the reasons of the majority of the Supreme Court of Canada referred to judicial opinions that blurred the distinction between purposes and activities by using the terms interchangeably as a serious source of confusion that would inevitably work to the detriment of bodies seeking to obtain, or retain, registration as charities.¹⁰ Gonthier J., delivering the reasons of the minority in the same case, was less critical:

⁷ This is an application of the rule of statutory interpretation accepted and applied in *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531(H.L.) that: “In construing Acts of Parliament, it is a general rule ... that words must be taken in their legal sense unless a contrary intention appears”: at page 580.

⁸ Any analysis of the general law in this area must build on the contributions of Professor L.A. Sheridan in a series of articles that include “Charity versus Politics” (1973), 2 *Anglo-Am L. Rev.* 47; “The Political Muddle – A Charitable View?” (1977), 19 *Mal. L. Rev.* 42; and “Charitable Causes, Political Causes and Involvement” (1980), 2 *Philanthropist* (No. 4), 5. In addition, Sheridan’s “The Chapol Family Quiz” (1977), 2 *Philanthropist* (No. 1), 14 is a penetrating as well as an entertaining exposé of the inconsistencies in the cases that predated the relevant Canadian decisions examined by Michell in his article cited in footnote 4, above.

⁹ [1999] 1 S.C.R. 10 (“*Vancouver Society*”).

¹⁰ Para 153; *per* Iacobucci J.; despite this comment, in *Action by Christians for the Abolition of Torture (ACAT) v. The Queen* (2002), 225 D.L.R. (4th) 99 (F.C.A.) (“*ACAT*”) at para 35 it was said that as the word “political” must have the same meaning whether it is attached to purposes or activities, the terms “political purposes” and “political activities” would be used interchangeably. In *Everywoman’s Health Centre v. Minister of National*

... the precise boundary between an activity and a purpose is rather protean and so one should not expect a bright line to separate them.¹¹

Charitable purposes are referred to both in the statutory definition of a charitable foundation and in 6.1 but not in the definition of a charitable organization and 6.2, which refer only to charitable activities. Political activities are referred to in 6.1 and 6.2. No reference is made to political purposes in these provisions.

Linguistically, the nature of the distinction between purposes and activities might not appear to create any particular difficulty. The purposes of an organization or foundation are those for which it was created while the “activities” of a foundation or organization refer to what it actually does. In the present context, it was said in *Vancouver Society* that purposes are “the ends to be achieved; activities are the means by which to accomplish those ends” and it was stated that the character of activities as charitable or political is to be determined by reference to the purposes they serve.¹²

The reference in *Vancouver Society* to judicial opinions that blur the distinction between purposes and activities was most probably intended to include those in decisions of the Federal Court of Appeal in cases where the Minister’s decisions to refuse, or revoke, registration of organizations were upheld on the ground that the activities, or purposes, of the body were political and not charitable. These decisions do reveal a variety of different views on the meaning and significance of the statutory distinction between political activities and purposes. The confusion, and the tendency to blur the distinction in the context of political purposes, does however predate the Canadian decisions and was embedded in the common law in England by reason of the interpretation placed by the courts on the reasoning of Lord Parker in *Bowman v. Secular Society*.¹³ According to this interpretation, trusts to procure changes in the law of a country are trusts for political – and, in consequence, non-charitable – purposes even though the ultimate objects to be achieved would otherwise be charitable.¹⁴ This, it is suggested, is a root cause of the confusion surrounding the distinction in the Canadian cases that have dealt with political activities and purposes.

Revenue, [1992] 2 F.C. 52 (F.C.A.) at para 9, it was said that the court saw no reason not to apply the principles relating to the purposes of an organization to the activities of the appellant.

¹¹ Para 121.

¹² Para 54 *per* Gonthier J. dissenting on other grounds. In amendments to the *ITA* enacted by S.C. 2012, Ch. 19, ss. 7(1) and 7(3) an activity of disbursing funds to a qualified donee will be considered to be a charitable purpose unless it can reasonably be considered that its purpose is to support the political activities of the donee – in which case it will be a political activity.

¹³ [1917] A.C. 406 (H.L.) at page 442. Lord Parker’s much-criticized statement that “... the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift” was preceded by a finding that the objects of the changes were political.

¹⁴ See, for example, *McGovern v. Attorney-General*, [1982] Ch. 321 (Ch.D.), (“*McGovern*”) at page 340; *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 at pages 62-63.

In determining whether a trust is established for charitable purposes at common law, authorized activities and powers are generally relevant to, and only to, the extent they do or do not advance charitable purposes. As the necessary enquiry is into the ends the activities are to serve, the means and ends analysis is ingrained in the law of charity. It follows that the treatment of trusts that authorize, or require, activities directed at obtaining changes in law or in government policy as necessarily trusts for political purposes is anomalous as all such changes will necessarily be means to some other end.¹⁵ It follows also that political activities and purposes are characterized as such by reference to the means of achieving the objects of an organization rather than by the objects themselves. Logically, the means and ends analysis should characterize a trust as charitable or otherwise by reference to the nature of the objects to be accomplished by legislation or other changes in law or government policy.

In short, the interpretation that Lord Parker's reasoning in *Bowman* has received in later cases departs from the traditional ends and means analysis and creates an exception to the general rule that activities can be characterized as charitable or non-charitable by reference only to the objects they are designed or effective to achieve. The failure to recognize this in the Canadian cases has contributed to the confusion surrounding the distinction between activities and purposes that is built into section 149.1 of the *ITA* – confusion that an application of an ends and means analysis cannot dispel.

The distinction between purposes and activities is easily blurred for a number of other reasons. One is that it has been quite common for the constituting documentation of an organization to describe its objects or purposes as being to carry on certain activities. When that is done it is not surprising that judges sometimes use the terms interchangeably. Another is that the courts have accepted that, properly construed, objects described as such may be characterized as activities; yet another is a recognition of the courts and the Canada Revenue Agency that the nature and extent of an organization's activities may require them to be treated as objects or purposes in themselves. These considerations militate against a too heavy reliance on what may appear to be identified as purposes or activities in the constituting documentation of an entity.

(b) Charitable purposes

A full discussion of the common law concept of charitable purposes would be well beyond the scope of this paper. The comments that follow are intended to provide only some necessary background for the discussion of the judicial and administrative treatment of political purposes and activities under the *ITA*.

¹⁵ While the author has argued elsewhere for the application of the ends and means approach for the identification of charitable activities, it was suggested that the same approach cannot be applied to distinguish acceptable and unacceptable political activities: Cullity, "The Myth of Charitable Activities" (1990), 10 E. & T. J. 7 at pages 24-25; see, also, Brooks, *Charities: The Legal Framework* (Paper prepared for the Policy Co-ordination Directorate, Parliamentary Library, Ottawa, 1983) at pages 142-143.

The adoption of the common law definition, or description, of charitable purposes incorporates the cumulative effect of a multitude of decisions concerning, for the most part, the validity or enforcement of charitable trusts. The cases are notoriously replete with fine and unconvincing distinctions and, in the opinion of two of the most learned and prolific scholarly commentators on the subject, it was readily apparent that different decisions could be reconciled only by “an audacious straining of language”. It would be difficult to argue that this comment and the authors’ lament that “the morass of case law expands from year to year”¹⁶ are any less applicable to the present state of the Canadian law of charity.

Although the *Statute of Charitable Uses*¹⁷ has often been treated as the starting point for determining whether a purpose is charitable in law, charitable trusts and charitable corporations were afforded special treatment and privileges long before the statute’s enactment.¹⁸ Even the enumeration of charitable purposes in the preamble to the statute that provides its only enduring legal relevance or influence has been traced back to the 14th century.¹⁹

It seems that, from the time of its enactment, the preamble was referred to as containing a useful though not exhaustive²⁰ list or enumeration of charitable purposes. Its utility for this purpose continued to be recognized in the years following the important decision in *Commissioners for the Special Purposes of the Income Tax v. Pemsel*²¹ when it was, in effect, imported into Lord Macnaghten’s classification of charitable purposes in that case – a classification that in the Canadian cases has been treated as the starting point for any consideration of the modern law.

After including specific purposes of reducing poverty and advancing education and religion, the fourth head of the classification in *Pemsel* was stated to be “other purposes beneficial to the community, not falling under any of the preceding heads”.²²

The vagueness of the fourth head in the classification was underlined in subsequent cases in which it was held that, although no purposes will be charitable in law unless they benefit the public, or an important section of the public, not all purposes that do so will be charitable.

In order to identify purposes that fall within the fourth head of the *Pemsel* classification, the traditional approach of English courts was to insist that “to be charitable [purposes] must be

¹⁶ Keeton and Sheridan, *The Modern Law of Charities*, (2nd ed. Belfast: Northern Ireland Legal Quarterly, 1971) at page 24.

¹⁷ 43 Eliz.1, c. 4 (1601) (the “*Statute of Elizabeth*”).

¹⁸ Keeton and Sheridan, *op. cit.*, footnote 16 at pages 1-4.

¹⁹ *Ibid.*, page 4.

²⁰ *Ibid.*, page 22; *Vancouver Society*, at paras 34 (Gonthier J.) and 146 (Iacobucci J.).

²¹ [1891] A.C. 531 (H.L.).

²² Page 583.

shown to be for the benefit of the public, or the community, in a sense or manner within the ‘intendment of the preamble’ to the *Statute of Elizabeth*’.²³ Such statements did not, however, mean that the only purposes that will be charitable under the fourth head of *Pemsel* are those that are specifically mentioned in the preamble or identifiable by analogy to them. Purposes within the spirit and intendment of the statute would not be determined exclusively by a process of statutory interpretation applied to the preamble. They include purposes that by no stretch of the imagination could be regarded as implicit in, or analogous to, the objects listed in the preamble. The preamble did not contain an exhaustive list of charitable purposes and it has been stated repeatedly that the categories of charitable purposes are not closed and that the legal definition of charity must be permitted to evolve so as to reflect changing social needs even to the extent of recognizing new charitable purposes.²⁴

Given that charitable purposes within the spirit and intendment of the *Statute of Elizabeth* include purposes other than those in the preamble and those analogous to them, the judges forming a majority in each of the two most recent decisions of the Supreme Court of Canada have for the most part preferred to state, with acknowledged circularity, that purposes that are charitable within the fourth head of *Pemsel* must be beneficial to the public in a way the law regards as charitable. Such purposes are to be determined by examining the trend of previous decisions and drawing analogies from them.²⁵ The courts have treated the purposes enumerated in the preamble as examples.²⁶

The persuasiveness of arguments by analogy is often open to debate. To be effective they require a finding that the facts of a previous case are similar to those of the instant case in relevant respects. The reasons of the majority in *Vancouver Society* do not provide much guidance in determining relevance. Those of the minority attribute importance to principles of “altruism” – defined as “giving to third parties without receiving anything in return other

²³ *Scottish Burial Reform and Cremation Society Ltd., v. Glasgow Corporation*, [1968] A.C. 138 (H.L.), at page 154; similarly in *Gilmour v. Coats*, [1949] A.C. 426 (H.L.) at pages 442-443, Lord Simonds stated that it was settled and familiar law that the objects enumerated in the preamble “and all other objects which by analogy ‘are deemed within its spirit and intendment’ and no other objects are in law charitable”.

²⁴ *Vancouver Society*, at paras 36, 48 and 51 (Gonthier J.) and 150 (Iacobucci J.); *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*, [2007] 3 S.C.R. 217, at para 25 (“A.Y.S.A.”). Exceptionally in recent years, one of the enumerated purposes was relied on by analogy in *Vancouver Regional FreeNet Association v. Canada*, [1996] 3 F.C. 880 (F.C.A.) where the provision of free access to the digital “information highway” was held to be within the spirit and intendment of the *Statute of Elizabeth’s* reference to the repair of bridges, ports, causeways and highways.

²⁵ *Vancouver Society*, paras 176-177; *A.Y.S.A.*, para 27, citing *D’Aguiar v. Guyana Commissioner of Inland Revenue*, [1970] T.R. 31 (P.C.).

²⁶ *Vancouver Society*, paras 34-35 (Gonthier J.) and 146 (Iacobucci J.); *A.Y.S.A.*, para 25. The insistence that the preamble did not contain an exhaustive list is not inconsistent with the statements in the House of Lords cited in footnote 23 above. The references in those cases to objects within the spirit and intendment of the Statute were not confined to the enumerated purposes but included all those subsequently recognized in reasoning by analogy. The process was far removed from an exercise in interpreting the preamble as is probably indicated by Lord Simonds’ use of the verb “deemed” in the passage in *Gilmour v. Coats* cited in footnote 23 above.

than the pleasure of giving”²⁷ – and public welfare or benefit in an objectively measurable sense. These principles, it was said, “underlie the existing categories of charitable purposes and should be the touchstones guiding their further development”.²⁸

While an application of the two principles might serve to weed out purposes that should not be considered charitable, the minority did not suggest that novel purposes consistent with the principles would necessarily be placed within the fourth head of *Pemsel*. They refused to accept a *prima facie* presumption that purposes beneficial to the public will be considered to be charitable. In delivering the reasons of the minority, Gonthier J. stated:

The court should adhere to the principles of altruism and public benefit, to which I adverted above, in order to identify new charitable purposes and to ensure that existing ones continue to serve the public good. The law should reflect the realisation that although the particular purposes seen as worthy of pursuit change over time, the principles of which they are instantiations endure.

Thus in determining whether a particular purpose is charitable, the courts must look to both broad principles – altruism and public benefit – as well as the existing case law under the *Pemsel* classification. The courts should consider whether the purpose under consideration is analogous to one of the purposes enumerated in the preamble of the *Statute of Elizabeth*, or build analogy upon analogy. Yet the pursuit of analogy should not lead the courts astray. One’s eye must always be upon the broader principles I have identified, which are the Ariadne’s thread running through the *Pemsel* categories, and the individual purposes recognised as charitable under them. The court should not shy away from the recognition of new purposes which respond to pressing social needs.²⁹

In *Vancouver Society*, by a majority of four judges to three, the Supreme Court upheld the decision of the Federal Court of Appeal affirming the denial of registration of the appellant as a charitable organization. The appellant’s stated objects were as follows:

- a. to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment;
- b. to carry on political activities provided such activities are incidental and ancillary to the above purposes and provided such activities do not include direct

²⁷ *Vancouver Society*, para 37. See the discussion of altruism in Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission. 1996) pages 145-152.

²⁸ *Ibid.* In *McGovern*, Slade J. accepted counsel’s submission that it is possible to extrapolate from the enumeration of objects in the preamble to the Statute of Elizabeth a general principle that objects directed at the relief of human suffering and distress will be charitable (page 333).

²⁹ *Ibid.*, paras 50-51.

or indirect support of, or opposition to, any political party or candidate for public office;

c. to raise funds in order to carry out the above purposes by means of solicitations of funds from governments, corporations and individuals;

[d.] to provide services and to do all such things that are incidental or conducive to the attainment of the above objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.

While, in the opinion of the majority, clause (a) contained the primary object of the appellant and would qualify as charitable as being for the advancement of education, it was held that object [d] would authorize the appellant to pursue other non-charitable purposes and, in consequence, the appellant was not constituted exclusively for charitable purposes – a requirement that, although not stated in 6.2, was held to be as applicable to charitable organizations as it is to charitable foundations by virtue of the express terms of 6.1. Objects (b) and (c) were considered to be unobjectionable incidental means for the advancement of object (a).

The judges in the minority agreed that object (a) was a charitable educational purpose but considered that it would also qualify under the fourth head of *Pemsel* as a “valid charitable purpose of assisting immigrants so that they may obtain employment or self-employment, and thus become fully integrated into national life.”³⁰ This conclusion was reached on the basis of an analogy provided by a number of decisions and rulings in Canada and other common law jurisdictions that they considered indicated a trend towards recognition of the special needs of immigrants. The other objects, including [d], were treated as directly related methods of furthering the purpose within the fourth head.

The judges forming the majority were unable to discern the trend on which the minority’s analogy was based and disagreed with the conclusion that the objects of the appellant could qualify as charitable under the fourth head of *Pemsel*.³¹ There was, however, no disagreement that the legal concept of charitable purposes must continue to evolve as social conditions and values change.

The same approach was followed in *A.Y.S.A.* in which the court was asked to move beyond older English decisions that held that the promotion of “mere sport” was not charitable and to find that the promotion of amateur sports involving the pursuit of physical fitness should be considered to fall within the fourth head of *Pemsel*. It was held that the trend of the cases

³⁰ *Ibid.*, para 99.

³¹ The minority did not purport to find support for their conclusion in the objects set out in the preamble, or in the spirit and intendment of the *Statute of Elizabeth*, and Iacobucci J., for the majority, stated that the objects enumerated in the preamble were of no assistance.

would permit sport to be charitable if it was ancillary to another charitable purpose such as education but not otherwise.³² It is notable that, in the discussions of the possible application of the fourth head in *Pemsel*, no reliance was placed on the spirit and intendment of the *Statute of Elizabeth*.

In two decisions in Ontario it has been held that, in view of the definition of charity in the *Charities Accounting Act (Ontario)*³³ – a definition that is in its terms essentially the same as the *Pemsel* classification – the *Statute of Elizabeth* is no longer to be regarded as influencing the development of the legal concept of charity. In the first of such cases, *Re Laidlaw Foundation*,³⁴ a divisional court concluded that the English cases under the fourth head of Lord Macnaghten’s classification have no application in Ontario. In *Re Levy Estate*³⁵ the Court of Appeal accepted the proposition that the preamble to the *Statute of Elizabeth* “no longer defines charitable trusts in this province” and declined to follow its earlier decision³⁶ that a trust is not charitable unless it falls within the spirit and intendment of the statute and, it seems, impliedly repudiated the authority of decisions under the fourth head of *Pemsel*.

The finding in *Laidlaw*, but not that in *Levy*, was considered in *Vancouver Society* and *A.Y.S.A.* where *Laidlaw* was explained and distinguished as based on the provisions of the *Charities Accounting Act*. In *A.Y.S.A.*, Rothstein J. referred to the decision of the divisional court as “anomalous” in that it endorsed only part of the common law definition of charity by denying precedential authority to decisions under the fourth head of *Pemsel* that treat public benefit by itself as insufficient.³⁷

By itself, the finding in *Levy* that in order to be charitable there is no requirement for purposes to be within the spirit and intendment of the *Statute of Elizabeth* might not create any significant conflict with the reasoning in *Vancouver Society* and *A.Y.S.A.* given the approach of the majority in each of those cases. It is the conclusion drawn in *Laidlaw* that decisions under the fourth head of *Pemsel* are not authoritative in Ontario that distinguishes the present state of the provincial law from the federal law considered and applied in *Vancouver Society* and *A.Y.S.A.*.

Although the provisions of the *ITA* and considerations of tax policy were clearly recognized in these decisions of the Supreme Court of Canada as relevant to the analysis of the common law concept of charity, the thrust of the reasoning appears to leave little room for a conclusion that the law to be applied in interpreting references to charitable purposes in the *ITA* differs from that for purposes of property and civil rights in Ontario. The inference

³² *A.Y.S.A.*, para 40.

³³ R.S.O. 1990, c.C-10, s.7.

³⁴ (1984), 48 O.R. (2d) 549 (Div. Ct.).

³⁵ (1989), 33 E.T.R. 1 (Ont. C.A.).

³⁶ *Ibid.*, para 9; *Re Eacrett*, [1949] O.R. 1 (C.A.).

³⁷ *A.Y.S.A.*, paras 37-38.

appears irresistible that income tax considerations and the fiscal privileges conferred on registered charities are considered to be as relevant to issues involving the validity of testamentary and *inter vivos* trusts and other matters of provincial and territorial charity law as they are to the interpretation of the *ITA*. The justification for this is less than self-evident even if there appears to have been no suggestion that the quantitative restrictions on political activities in 6.1 and 6.2 apply also to the provincial laws governing charities.

(c) *Charitable activities*

As previously mentioned, in *Vancouver Society*³⁸ Iacobucci J. referred to the existence of previous judicial opinions that blurred the distinction between purposes and activities. As, in the past, English law does not appear to have attributed any significance to a separate concept of charitable activities, English decisions have no direct relevance on this question. The *ITA*, however, refers to charitable activities and political activities, and in both *Vancouver Society* and *A.Y.S.A.*³⁹ the courts emphasized that the former cannot be defined in the abstract but only in terms of the purposes they serve. In delivering the reasons of the majority in *Vancouver Society*, Iacobucci J. stated:

... the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself that determines whether or not it is of a charitable nature.⁴⁰

Similarly, in the reasons of the minority, Gonthier J. stated:

A critical difference between purposes and activities is that purposes may be defined in the abstract as being either charitable or not, but the same cannot be said about activities. That is, one may determine whether an activity is charitable only by reference to previously identified charitable purpose(s) the activity is supposed to advance. The question then becomes one of determining whether the activity has the effect of furthering the purpose or not.⁴¹

In the view of the court it followed that, despite the absence of any reference to charitable purposes in the *ITA*'s definition of a charitable organization, the activities of an organization could only be characterized as charitable or non-charitable after it was determined that it was, or was not, established exclusively for charitable purposes.

³⁸ [1999] 1 S.C.R. 10.

³⁹ [2007] 3 S.C.R. 217.

⁴⁰ *Vancouver Society*, para 152.

⁴¹ *Ibid.*, para 53.

(d) *Political purposes*

Much of the Canadian law on political purposes is derived from the reasoning of Lord Parker of Waddington in *Bowman v. Secular Society*.⁴² *Bowman* has been accepted in both Canadian and English courts as authority for the proposition that political purposes are not charitable and cannot qualify as such on the ground that they are educational or as falling within the category of purposes beneficial to the community that have been held to be within the fourth head in *Pemsel*. It has also been understood to stand for the proposition that a trust with an object, or main object,⁴³ to change the law through legislation or otherwise will be a trust for political purposes. Trusts, organizations, and corporations will not be constituted for exclusively charitable purposes if their purposes or objects are to be characterized as political in this sense.⁴⁴

The rationale for the treatment of political purposes in *Bowman* was stated to be that “the court has no means of judging whether a proposed change in the law will or will not be for the public benefit”.⁴⁵ Subsequent cases have treated that statement as not referring only to an inability of the court to determine public benefit as a matter of fact but as extending to an institutional or constitutional incapacity of the court. Thus, in *McGovern*, after referring to *Bowman* and to passages in *National Anti-Vivisection Society v. Inland Revenue Commissioners*,⁴⁶ Slade J. stated:

⁴² [1917] A.C. 406 (H.L.). In *Farewell v. Farewell*, [1892] 22 O.R. 573 (Ch. D.), a decision of Chancellor Boyd in which the validity of a trust was in issue, a purpose of supporting a change in the law was held to be charitable. The reasoning of the court is quite inconsistent with the recent cases that follow *Bowman* but it has to all intents and purposes been ignored. Similarly, in *Lewis v. Doerle* (1898), 25 O.A.R. 206 (C.A.) it was held that a devise of land on trust to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights was charitable and, as such, was void pursuant to the provisions of mortmain legislation then in force.

⁴³ The reconciliation of references to the “main” or “primary” objects of a trust with the requirement that to be charitable its objects must be exclusively so is considered below.

⁴⁴ The weak support for the reasoning in *Bowman* in the earlier authorities has been noted by a number of commentators including Parachin “Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes” (2008), 45:4 Alberta L. Rev. 871 at pages 876-880; and Brooks, *op. cit.*, footnote 15, pages 135 – 139.

⁴⁵ *Bowman*, page 442. The view that purposes will not be charitable at common law if they seek or require changes in the law has been “pretty thoroughly rejected” in the United States: *Scott and Ascher on Trusts* 5th ed. (New York: Aspen Publishers, 2009) Vol. 6 at page 2579; *Restatement of the Law Third, Trusts*, para 28, page 23; and the rationale for it has been severely criticized by several learned commentators: see, for example, Sheridan, “Charity versus Politics”, footnote 8 above, at pages 57-58; Parachin, *op. cit.*, footnote 44 at pages 882-884; Chia et al, *op. cit.*, footnote 1 at page 363; Bromley, *op. cit.*, footnote 1 at pages 78-83. For the view that, in order to be coherent, the doctrine of political purposes must incorporate a normative element relating, for example, to the minimum conditions of human dignity, see Drassinower, “The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis” in Phillips, Chapman and Stevens (eds.) *Between State and Market – Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queens University Press, 2001), page 290.

⁴⁶ [1948] A.C. 31 (H.L.).

From the passages from the speeches of Lord Parker, Lord Wright and Lord Simonds which I have read I extract the principle that the court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.⁴⁷

Later in his reasons, Slade J. summarized the effect of the English decisions on the classification of political purposes:

(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the *Statute of Elizabeth*, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in *Bowman's* case can never be regarded as being for the public benefit in a manner which the law regards as charitable. (2) Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (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.

This categorisation is not intended to be an exhaustive one, ...⁴⁸

In a number of decisions of the Federal Court of Appeal the concept of political purposes has been expanded significantly beyond the examples provided in *McGovern*.

⁴⁷ *McGovern*, pages 336-337.

⁴⁸ *Ibid*, page 340. The passage quoted from *McGovern* was cited with approval in *Positive Action Against Pornography v. Minister of National Revenue*, [1988] 2 F.C. 340 (F.C.A.) (“*Positive Action Against Pornography*”); *Human Life International in Canada v. Minister of National Revenue*, [1998] 3 F.C. 202 (F.C.A.) (“*Human Life International*”); *Alliance for Life v. Minister of National Revenue*, [1999] 3 F.C. 504 (F.C.A.) (“*Alliance for Life*”) and *ACAT*. While the summary of the English law on the nature of political purposes in Picarda, *op. cit.*, footnote 1 at pages 248-249, probably does not extend beyond that in the Canadian jurisprudence, the preceding valuable discussion at pages 225-248 reviews the inconsistencies in the treatment of several other possible extensions of the concept.

In *Toronto Volgograd Committee v. Minister of National Revenue*,⁴⁹ the objects were generally to recreate a link between residents of Toronto and Volgograd and to promote understanding among them of issues they have in common including the risk of nuclear war and to help them to find peaceful ways of living together. The Minister's decision to refuse registration was upheld by a majority of the court on the ground that the purposes and activities of the appellant were political. Although the court was unanimous in the ultimate decision, there was a division of opinion in the Federal Court of Appeal on the question whether purposes of an organization were relevant to its status as a charitable organization within the meaning of the *ITA*. The question was left open by the majority as counsel conceded that both purposes and activities should be considered. Marceau J., with whom Mahoney J. expressly disagreed, favoured a view that, *semble*, only the activities of the organization were relevant. This question was put to rest in *Vancouver Society* by the finding that the purposes of a charitable organization must be exclusively charitable.

In *Positive Action Against Pornography*,⁵⁰ the appellant was denied registration as a charitable organization on the ground, *inter alia*, that its "primary purposes or activities" were political. The Federal Court of Appeal found that the appellant's objects and activities were intended to be supportive of influencing and lobbying legislators, changing the law, and generally changing public attitudes and beliefs toward pornography.

The decision in *Positive Action Against Pornography* was followed in *Human Life International* in which it was held that activities primarily designed to sway public opinion on important social issues are political and not charitable.⁵¹ The court concluded that, as a substantial part of the activities of the appellant were being devoted to political purposes, all of the resources of the organization were not devoted to charitable activities.⁵²

The more recent decision of the Federal Court of Appeal in *Alliance for Life*⁵³ is particularly important in that the court had the benefit of, and considered, counsel's written submissions on the effect of the reasons of the Supreme Court of Canada in *Vancouver Society* which had been handed down after the hearing.

⁴⁹ [1988] 1 C.T.C. 365 (F.C.A.). This decision was followed, and arguably extended, in *Canada UNI Association v. Minister of National Revenue*, [1992] F.C.J. No. 1130 (F.C.A.), where the objects of the appellant included informing Canadians of the unique social cultural and linguistic nature of Canada and enhancing tolerance of linguistic and cultural differences through knowledge and understanding. These were held to be political purposes and, accordingly, neither educational nor within the fourth head of the *Pemsel* classification.

⁵⁰ Above, footnote 48.

⁵¹ In *ACAT*, the Court accepted that this was an additional category of political purposes to those listed in *McGovern*: para 38. It was also accepted as correct in *Alliance for Life* where it was said that the rationale for the proposition in *Human Life International* was consistent with the reasoning in *Bowman*: para 50.

⁵² The decision in *ACAT* was to the same effect, the Court holding also that an exercise of moral pressure on governments is by itself a political purpose or activity (para 53).

⁵³ Above, footnote 48.

In *Alliance for Life*, the Federal Court of Appeal upheld the revocation of the appellant's registration on the ground that its activities in support of its pro-life purposes were political activities that were not ancillary and incidental to its charitable activities. The court held that the "true mission" of the appellant in pursuing the activities was to advocate "strongly held convictions on important social and moral issues in a one-sided manner to the virtual exclusion of any equally strong opposing convictions" and not to further the organization's charitable purposes.⁵⁴ It followed that the organization did not satisfy the requirement that it be devoting all of its resources to charitable activities and that the exception to this requirement in 6.2 did not apply.

(e) *Political activities*⁵⁵

Following the logic and the reasoning applied by the Supreme Court of Canada to charitable activities, it should follow that, for the purpose of 6.1 and 6.2, political activities are to be defined as those designed to achieve political purposes and that the latter, like charitable purposes, are to be identified in accordance with the general law as referred to above. This is implicit in the application of the reasoning in cases on political purposes, such as *Bowman* and *McGovern*, and in the Canadian cases dealing with charitable organizations and political activities. If a particular purpose, such as one of changing the law, is to be characterized as political, conduct designed, or effective, to further such purpose must be a political activity.

As already indicated, the relevance of an organization's purposes was the subject of a difference of opinion among the judges in *Toronto Volgograd* where in the view of the majority the purposes and activities were political and, therefore, not charitable. The essential connection between political purposes and political activities is consistent with the approach of the Federal Court of Appeal in *Positive Action Against Pornography, Human Life*

⁵⁴ The broad categories of political purposes and activities accepted in *Human Life International* and *Alliance for Life* are consistent with the view of Chesterman, *op. cit.*, footnote 1 at page 183: that "Promoting a Specific Objective or Attitude of Mind Relating to a Broad Social Issue of a Controversial Character" will be a political purpose. However, it seems to be at least implicit in *McGovern* that Slade J. was prepared to accept that a purpose of influencing members of the public to accept a particular point of view on controversial issues would not be considered political unless there was an attempt to exert pressure on legislators or government (page 346). In Santow, "Charity in its Political Voice – a tinkling cymbal or a sounding brass?" (1999), *Aust. Bar Review* 225, the author commented: "The distinction made by Slade L.J. is a fine one. For a trust to create public sentiment for a change of that sort, when it depends for effectiveness ultimately on that in turn producing pressure on government for remedial legislation is hardly to be distinguished from direct lobbying of government to the same end.": page 236. The validity of the distinction was rejected by Carl Juneau in "DEFINING CHARITABLE LIMITS – Advocacy, Education and Political Activities", *Fit to be Tithed II*, Osgoode Hall, Toronto, November 26, 1998.

⁵⁵ The undefined references to political activities were inserted into the statute in 1986. For many years previously the *ITA* had distinguished between charitable purposes and charitable activities, again without any attempt at definition of either term. While the definitions of charitable organizations and charitable foundations to which the distinction is relevant were not enacted until 1950, and registration was not introduced until 1966-67, the Act had already divided charities into those that performed charitable activities and those constituted exclusively for charitable purposes.

International and Alliance for Life. In each of these cases, the examples of political purposes provided in *McGovern* were relied on in support of the conclusion that the appellant's activities were political.

Although, for the most part, the reasoning in the cases supports what is essentially a means and ends analysis to the identification of political activities, there is still, I believe, much force in the view of the majority of the Federal Court of Appeal in *Scarborough Community Legal Services v. Minister of National Revenue*⁵⁶ that an application of this analysis is inadequate to distinguish political activities from charitable activities, as it is accepted that political activities may be intended and effective to advance charitable as well as political purposes. A purpose of obtaining legislation to advance objects within the fourth head of *Pemsel* would be an obvious example.

Once again, much of the analytical confusion surrounding political purposes and political activities, and the distinction between the latter and charitable activities, arises from the courts' attempts to fit political activities within the traditional ends and means analysis. If, as was asserted in *Vancouver Society*, activities are essentially means to an end, any "purpose" of changing the law will necessarily be a means to some other end. It follows that the traditional analysis in terms of means and ends does not help to distinguish political purposes and political activities, or to explain why political purposes are *per se* non-charitable. In short, political activities designed to obtain changes in the law or government policy are an exception to the general rule that the legal characterization of an activity is not determined by the type or nature of the activity but only by reference to the purpose it is intended to serve.⁵⁷

The concept of ancillary and incidental purposes and activities was relied on in *McGovern* and *Vancouver Society* to distinguish non-charitable political purposes and activities from charitable purposes and activities but is arguably inadequate for this purpose.

(f) Ancillary and incidental purposes and activities

The general proposition that a charitable foundation and a charitable organization must have exclusively charitable purposes must be qualified by a recognition that non-charitable – including political – purposes and activities that are considered to be incidental and ancillary to the achievement of the otherwise charitable purposes or activities of an entity will not deprive it of its exclusively charitable character.⁵⁸

⁵⁶ [1985] 2 F.C. 555 at para 15.

⁵⁷ *Cf.*, the definition of "politics" provided in Ontario Law Reform Commission *op. cit.*, footnote 27: "In a liberal democracy, politics is the process of a society's collaborative effort to make law, to come to some agreement or understanding on a particular determination of the good": page 152.

⁵⁸ In *Vancouver Society*, it was held that political activities (included in the stated purposes of the appellant) were unobjectionable as they were expressly limited to those ancillary and incidental to other objects that were charitable: paras 108-109 and 191-192.

Although statements referring to “ancillary” and “incidental” purposes and activities of bodies asserted to be charities are numerous, the meaning given to incidental and ancillary purposes and activities has not been entirely uniform. One of the questions on which the case law in Commonwealth jurisdictions might be thought to provide different answers is whether the terms are interchangeable and, in particular, whether the concept of an “ancillary” activity or purpose adds anything that would not be considered as incidental. Despite the words of clause (b) of 6.1 and 6.2, the question seems essentially one of semantics in the ultimate analysis rather than one of substance.

The OED definitions of “ancillary” are helpful as a starting point. The term is defined as meaning “subservient” as well as “subordinate,” and “subservient” is defined as serving as a means to a further end or purpose, with “subordinate” as an alternative meaning. As it is accepted in the Canadian cases that “incidental” means subservient in its first sense, this suggests that, if guidance can be obtained from the ordinary meaning of the words, the meaning to be attributed to “ancillary” is either the same as “incidental” or refers to a purpose or activity that is subordinate to a body’s other purposes or activities.

In some of the authorities, references are made to ancillary “or” incidental purposes or activities – an expression that is ambiguous in that it could be intended either to indicate different concepts separated disjunctively or the same concept described interchangeably.

Other authorities, as well as the provisions of 6.1 and 6.2, refer to ancillary “and” incidental purposes which, if intended to be linked conjunctively, would indicate different requirements, each of which must be satisfied.⁵⁹

The most authoritative view in Canada treats purposes and activities as “incidental” to the advancement of the charitable objects of a foundation or organization if they are means to the achievement of such objects and not purposes of the body.⁶⁰ This was clearly indicated by Ritchie J. in *Guaranty Trust Company of Canada v. Minister of National Revenue*⁶¹ when quoting from the judgment of Denning L.J. in a case in which the question was whether an association was “instituted for the purposes of science, literature or fine arts exclusively”:

⁵⁹ The Canada Revenue Agency appears to accept the conjunctive construction: Policy Statement CPS O-22 (definition of ancillary and incidental purposes).

⁶⁰ Non-charitable purposes and activities have also been described as incidental to the charitable objects of an institution or organization where they were subordinate consequences of pursuing such objects: e.g., *Royal College of Surgeons of England v. National Provincial Bank Ltd.*, [1952] A.C. 631 (H.L.) at page 659; *McGovern* at page 340; Cullity, “Charities – The Incidental Question” (1967), 6 *Melbourne U.L. Rev.* 35 at page 51. The Ontario Law Reform Commission (*op. cit.* footnote 27) would confine the notion of “incidental” purposes and activities to byproducts of “ancillary” activities (defined as the means of achieving charitable purposes): at page 300. In the Commission’s opinion permissible political activities and purposes should be restricted to those that were ancillary “or” incidental within the meanings they attributed to the terms: at page 156.

⁶¹ [1967] 1 S.C.R. 133 at page 143.

It is not sufficient that the society should be instituted “mainly” or “primarily” or “chiefly” for the purposes of science, literature or the fine arts. It must be instituted “exclusively” for those purposes. The only qualification – which, indeed, is not really a qualification at all – is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, *merely a means to the fulfilment of those purposes*, do not deprive a society of the exemption. Once, however, the other purposes cease to be merely incidental but become collateral, that is, cease to be a means to an end, but become an end in themselves, that is, become additional purposes of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption.

The same approach is evident in the reasons of the majority in *Vancouver Society*.⁶² While the interpretation of the concept of incidental purposes and activities in the reasons of Gonthier J. does not appear to be inconsistent with that of the majority, the learned judge emphasized that, in determining whether an organization’s activities are in furtherance of its charitable purposes, there must be “a coherent relationship” between the activity and the purpose.⁶³ The court, he said, must evaluate the nature of activities by reference to the degree of relationship with the charitable purposes they purport to support.⁶⁴

The ends and means analysis to the interpretation of incidental purposes was accepted in *McGovern*, where Slade J. stated:

First, if any one of the main objects of the trusts declared by the trust deed is to be regarded as “political” in the relevant sense, then, ... the trusts of the trust deed cannot qualify as being charitable. Secondly, however, if all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have the incidental power to employ political means for their furtherance will not deprive them of their charitable status.⁶⁵

An approach that might be thought to attribute a separate meaning to the concept of “ancillary” objects and activities accepts that political purposes can be ancillary to an

⁶² See paras 192-193. The ends and means approach to the characterization of activities as charitable or otherwise was rejected by the majority of the Federal Court of Appeal in *Scarborough Community Legal Services v. Minister of National Revenue*, at paras 15-16 in favour of a distinction between primary and subservient activities.

⁶³ *Vancouver Society*, para 62.

⁶⁴ *Ibid.*, para 58.

⁶⁵ *McGovern*, page 343. Although the passage quoted refers to “incidental powers” and a distinction between powers and objects would reinforce an argument based on means and ends, courts have not confined the concept of acceptable incidental activities to those described in a body’s constitutive documents as powers rather than objects. *Vancouver Society* is an example.

organization's charitable objects only if they are subordinate to a charity's main or primary objects. This approach has found favour in Australian cases in which, for example, it has been stated:⁶⁶

One should look to see whether the object to promote political change is so persuasive and predominant as to disqualify the trust from being a charitable trust. ... there is a real distinction between the situation where, a or the, principal or dominant object(s) of the trust are political as opposed to that where the political purpose is merely ancillary or subsidiary to, or the, principal or dominant charitable object(s).

The approach which appears to attribute to ancillary purposes and activities a meaning different from those that are incidental to the achievement of charitable objects does not appear to have been endorsed in Canada. No reference was made to a separate category of ancillary purposes and activities in the majority's reasons in *Vancouver Society* and, while in some passages in his dissenting reasons Gonthier J. referred to the primary⁶⁷ purposes of an organization, the learned judge stated elsewhere in his reasons that it was clear that a charitable organization could not pursue political purposes at all.⁶⁸ As Gonthier J. did not distinguish between incidental and ancillary purposes or activities, it seems most likely that the references to such purposes and activities in different parts of his reasons were most likely intended to treat the terms as interchangeable.⁶⁹

If the above interpretation of the reasoning in *Vancouver Society* is correct, the authoritative approach to the meanings of "ancillary" and "incidental" is essentially one that involves a distinction between ends and means. This, as *Guaranty Trust* recognizes, may require one to determine whether a means to a charitable end has become a collateral end in itself.

The precise nature of the intellectual exercise required to determine whether this has occurred has not been explored extensively in the Canadian cases. In *Vancouver Society*, Gonthier J. referred to the question:

The point at which the pursuit of ancillary activities expands into an "end in itself" is a nice question, and has been the subject of considerable debate. As the

⁶⁶ *Attorney-General for NSW v. The NSW Henry George Foundation* 2002 NSWSC 1128, paras 47- 49.

⁶⁷ See, e.g., paras 40 and 63.

⁶⁸ Para 60.

⁶⁹ In para 61 the learned judge spoke of an ancillary activity expanding into an end in itself by becoming an "impermissible collateral purpose" a statement that seems to hark back to the views expressed in *Guaranty Trust* and espoused by the majority in *Vancouver Society*; see, however, para 107 where it is said that the "rule that a charity cannot be established for political purposes does not mean that the charity cannot engage in political activities in furtherance of those purposes." The context and the sentence that followed may indicate that the reference to "those purposes" should have been to the charitable purposes of the body. Alternatively, the reference may simply reflect that political activities are, or should be, defined in terms of political purposes.

question is necessarily contextual, the courts have been reluctant to establish bright lines in this area, and have preferred a case-by-case approach: see *Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2d) 236 (H.C.), at p. 254.⁷⁰

The citation of the *Toronto Humane Society* case, however, is interesting and, probably, significant. It was submitted in that case that the support given by the Society to a non-charitable body (“CAPS”) with political objects had “reached a stage where it is a primary activity of the Society and that this is objectionable in a charitable institution”. The submission was rejected by the court which, at paras 44-45, approved a proportionality test:

Regard should be had to all activities of the Society, and a decision reached as to the proportion of such efforts which has been absorbed by CAPS (or any other political pursuit). Consideration should be given not only to expenditure of money but to use of premises, personnel and other resources. ...

Viewing the matter thus I am not prepared to say that the involvement of the Society in CAPS has reached the point where the intervention of the Court is required

If CAPS, either alone or in conjunction with any other activities of a political nature, becomes in fact top priority in the efforts of the Society, it will invite the intervention of the Court....

On this approach we can put on one side the semantic question relating to the meaning of “ancillary” and “incidental” as, even on the ends and means analysis accepted in *Vancouver Society*, the result is essentially the same as in the Australian cases: one can only determine whether a means has expanded into an end in itself, or should be considered to be a means to some end – stated or unstated – other than a body’s charitable purposes, by looking to the prominence it will have, or has acquired, in the work of the body. To be acceptable, political activities must in this sense be subordinate to its (main or primary) charitable objects and activities.⁷¹ Only then, it seems, will there be the degree of relationship between the activities and charitable purposes that Gonthier J. required.

Accordingly, as the general law in Canada now stands, it appears that political activities which, although asserted, or effective, to be means of achieving charitable ends, may have such prominence in the work, or intended work, of a body to justify a decision that they

⁷⁰ Para 61.

⁷¹ Cf., *Commissioners of Inland Revenue v. Yorkshire Agriculture Society*, [1928] 1 K.B. 611 (C.A.) at page 632. In *ACAT* the Federal Court of Appeal upheld the Minister’s decision to revoke the registration of the appellant on the ground that its primary activities were attempts to put pressure on governments by, among other things, sending letters and postcards to politicians urging them to take action to enforce international recognition of human rights. The activities were not mentioned in the appellant’s incorporating documents and the court concluded that they had become ends in themselves.

should be considered as collateral ends in themselves. Such a conclusion will be drawn if they are not subordinate to its charitable objects.⁷² The requirement of subordination avoids the difficulty that an analysis exclusively in terms of means and ends cannot explain why in some cases political activities that advance charitable purposes will be acceptable ancillary and incidental activities to the advancement of charitable purposes while in other cases they will detract from charitable status.⁷³

The requirement of subordination also resolves, or at least explains, the apparent paradox created by statements in cases like *McGovern* that suggest that an entity can have exclusively charitable purposes even though some of its purposes are considered to be political and therefore not charitable. An organization that conducts acceptable incidental and ancillary political activities for the ultimate purpose of benefiting its charitable objects will be pursuing both charitable and political purposes. In determining whether such a body is established or constituted for exclusively charitable purposes, the subordinate political purposes are, in effect, to be ignored.

Very little attention has been given to the meaning of ancillary and incidental activities in the decisions of the Federal Court of Appeal. As already mentioned, the activities of the appellant in *Alliance for Life* were held not to satisfy the requirement. The court's reasoning on the issue is contained in the following passage:

Nor does it seem to me that these activities were “ancillary and incidental” to the appellant’s charitable activities, principally that of educating Canadians “on human development, human experimentation, reproductive technologies, adoption, abortion chastity, euthanasia and similar issues affecting human life”. As Iacobucci J. stated in *Vancouver Society*,.. “‘educating’ people about a particular point of view in a manner that might aptly be described as persuasion or indoctrination” is not “education” in the charitable sense. The statements alluded to above suggest, if anything, that despite the objects stated in the appellant's constituting document its true mission is more likely that of advocating strongly

⁷² In *Positive Action Against Pornography* Stone J. held that 6.2 was of no assistance to the appellant as its purposes and activities were not ancillary and incidental to its charitable activities “but, rather, are primarily of a political nature and therefore non-charitable”: at page 355.

⁷³ The difficulty referred to in the text is avoided by the reformulation of the definition of ancillary and incidental activities in the policy statement as referred to below. There is, however, no doubt that even this restatement does not remedy the uncertainty attached to attempts to apply the concepts of ancillary and incidental purposes and activities. As Chia et al commented: “A qualitative test allowing ‘ancillary’ or ‘incidental’ political activity creates an intolerable degree of uncertainty when the consequences imperil the very existence and financial viability of the organisation. This uncertainty is also compounded by ignorance of the permissible scope of political activity. The result is a ‘chilling effect which deters organisations from engaging in any political activity or from applying for charitable status, and which also distorts the preferences of donors and the structure of organisations”: *op. cit.*, footnote 1 at page 364 - 365. As will be discussed below, the uncertainty is further compounded by the incorporation of the concepts in 6.1 and 6.2.

held convictions on important social and moral issues in a one-sided manner to the virtual exclusion of any equally strong opposing convictions.⁷⁴

The above statement was made in the context of the appellant's argument that the impugned activities were ancillary and incidental to its educational purposes. The question whether they were ancillary or incidental to its purposes under the fourth head of *Pemsel* was not addressed.

The correct interpretation of the passage from the decision is not, perhaps, entirely clear. On one interpretation, having found that the activities of the appellant were political and not educational because they were presented in a one-sided manner, and having accepted that ancillary and incidental political activities may involve the advocacy of a particular point of view on controversial matters,⁷⁵ the court held that the one-sidedness of the appellant's activities that prevented them from being educational charitable activities also prevented them from being ancillary and incidental to such charitable educational activities. On this view, acceptable political activities for the purposes of 6.2 will not include one-sided advocacy of a particular point of view, a statement that is hard to reconcile with the court's earlier recognition that ancillary political activities may involve strongly advocating a particular point of view on controversial matters.

Alternatively, as the final sentence in the passage quoted suggests, the basis for the court's finding may have been that the appellant's political activities – which were necessarily means of achieving certain ends – had undergone a metamorphosis and become a collateral end in themselves. No explicit finding of predominance was made but is presumably implicit in the reference to the appellant's "true mission."

One difficulty with the analysis in each set of reasons in *Vancouver Society* is that they do not appear to provide a principled test for distinguishing activities that are charitable from those that are ancillary and incidental to an organization's charitable purposes. The test provided for identifying charitable activities is not clearly distinguishable from that which would characterize its activities as ancillary and incidental. In each case, the test is framed in similar language by reference to activities that are means to – and in furtherance of – charitable ends.⁷⁶ Political activities could fall within either category unless there is a special rule that, while permitting them to be ancillary and incidental to charitable purposes,

⁷⁴ Para 69.

⁷⁵ Para 52 (quoted below in text at footnote 110).

⁷⁶ Although semantic hair-splitting has been notorious in the development of charity law, to accept as a crucial distinction that activities that "further" charitable purposes are charitable activities while those that are a means of achieving charitable purposes may be ancillary and incidental but are not charitable activities would obviously be ridiculous. Compare the test for identifying charitable activities in para 53 of the minority reasons with para 121 which contemplates that activities may be in furtherance of charitable purposes but still be non-charitable.

excludes them from the category of charitable activities irrespective of the fact that they may directly further charitable purposes of an organization. Such a rule may be required for the purposes of giving effect to the legislative intention reflected in 6.1 and 6.2, but it is doubtful that it could be justified by reference to the reasons in *Vancouver Society*. On this question, the general law applicable to charitable trusts is not likely to be of assistance as it did not require, or attribute significance to, a distinction between charitable activities and activities ancillary and incidental to charitable purposes.

5. Interpretation of 6.1 and 6.2

While, in their form, 6.1 and 6.2 may appear to be intended to enlarge the definitions of charitable organizations and foundations, there is evident as well a legislative intention to limit the extent to which a charitable organization or foundation can devote its resources to political activities. Although this was accepted in *Vancouver Society* and in *Alliance For Life*, neither the Supreme Court of Canada nor the Federal Court of Appeal found it necessary or appropriate to reconcile the language of the statutory provisions with the analysis of the general law and the test for identifying charitable activities that they found to be applicable for purposes of the *ITA*. It is clear that, if the legislative intention is to be effected, some otherwise apparently compelling or reasonable implications of the analysis must be rejected.

The difficulty in reconciling the language of 6.1 and 6.2 with the general law revolves around the question whether activities that are ancillary and incidental to charitable activities or purposes of an organization or foundation are to be characterized as charitable activities. As has been indicated above, the analysis in *Vancouver Society* provides no clear distinction between the two concepts.

It is well-established that ancillary and incidental activities will not prevent a foundation or organization from having exclusively charitable purposes, and it must surely follow that such activities should *prima facie* be characterized as charitable. If that were not the case, an organization would not be devoting all of its resources to charitable activities, and a foundation would not be operated exclusively for charitable purposes, if it carried on any activities – political or otherwise – that are ancillary and incidental to its charitable activities or purposes. Apart from anything else this would be inconsistent with the reasoning in *Guaranty Trust* in which a finding that “all or substantially all of its resources were devoted to charitable activities carried on or to be carried on by it” was made after an enquiry directed entirely at whether five out of seven objects of the organization were incidental to its two charitable purposes.

The problem is that if all ancillary and incidental activities are to be considered to be charitable activities for the purposes of 6.1 and 6.2, the evident legislative intention to restrict the resources devoted to ancillary and incidental political activities would not be implemented and the provisions would have no effect.

It seems, therefore, that in order to give effect to the legislative intention, 6.1 and 6.2 must be interpreted so as to treat political activities as an exception to a general rule that activities ancillary and incidental to a body's charitable activities will be considered to be charitable activities.⁷⁷

Obviously, this conclusion does not fit happily with the approach of the Supreme Court to the concept of charitable activities. If the character of charitable activities as such is to be determined by reference to the purposes they are designed to serve, political activities that are ancillary and incidental to a charity's objects should fall within the concept of charitable activities.⁷⁸

Although the logic of the analysis of charitable activities might seem to apply as much to political activities ancillary and incidental to charitable activities as it does to charitable activities generally, the reasoning of the majority and the minority in *Vancouver Society* stopped short of applying it to the references to political and charitable activities in 6.1 and 6.2. Indeed, at para 60, of the minority reasons, Gonthier J. stated that where 6.1 or 6.2 will apply, the *ITA* "deems" political activities to be charitable activities and this suggests that ancillary and incidental political activities would not otherwise be charitable activities for the purpose of 6.2.

The unanimous finding in *Vancouver Society* that the appellant's authorized ancillary and incidental political activities did not disentitle it to registration cannot be understood to imply that such activities were considered to be charitable activities. Despite the absence of a finding that the quantitative limits in 6.2 were satisfied, the conclusion that the political activities were unobjectionable must, it seems, be understood as subject to the qualification that the limits must be observed and an implicit finding that they were not being exceeded. It is not clear that this was in dispute.

⁷⁷ Similarly, to give any meaning to the stipulation in 6.1 that a corporation or trust will be considered to be constituted exclusively for charitable purposes to the extent that it devotes part of its resources to political activities that are ancillary and incidental to its charitable purposes, it is necessary to ignore, or recognize an exception to, the general rule in *Guaranty Trust* that ancillary and incidental non-charitable activities do not prevent a body from being constituted for exclusively charitable purposes. The application of this general rule to political activities was accepted in the passage from *McGovern* quoted above at footnote 65 but found to be inapplicable on the ground that the political purposes of Amnesty International were not incidental means of furthering its charitable objects. The general rule was applied by the Charity Commission for England and Wales in the Application for Registration of English PEN (July 21, 2008) in which *McGovern* was distinguished.

⁷⁸ In *Vancouver Society* at para 101 Gonthier J. described authorized activities of the appellant as charitable activities as they were "directly related to and in furtherance of" its charitable purposes. He did not refer to them as ancillary and incidental to the charitable purposes but neither did he indicate how they could be distinguished from ancillary and incidental activities.

Once again, in order to achieve the purposes of 6.1 and 6.2, the conclusion that political activities ancillary and incidental to charitable purposes or activities would not disqualify a body as a charity under the general law must be read as subject to the provisions of the *ITA*.

Although in the respects I have mentioned, the provisions of the *ITA* do not permit an interpretation consistent in all respects with the general law, the jurisprudence relating to acceptable ancillary and incidental activities of charities under that law should determine whether activities that are to be characterized as political satisfy the requirement of being ancillary and incidental to a foundation's or organization's charitable purposes or activities for the purposes of 6.1 and 6.2.

6. The Views of the Canada Revenue Agency

The position of the Canada Revenue Agency in its Policy Statement on Political Activities is generally, but I believe not entirely, consistent with that taken in the most recent Canadian case law.⁷⁹ The rule that a charity cannot be established for political purposes and the classification of such purposes in *McGovern* are generally accepted.⁸⁰ The implications of the statutory prohibition on activities that indirectly support or oppose political parties or candidates for public office are explored at some length.

In one important respect, the definition of political activities in the policy statement seems narrower than that supported by the case law. While it is perhaps not clear that the list of such activities provided was intended to be exhaustive, it appears to be more consistent with the examples provided in *McGovern* than with the extension to activities “designed essentially to sway public opinion on controversial social issues” that was endorsed in *Human Life International* and seemingly accepted in *Alliance For Life*.

In addition, those included as political activities appear to require some degree of public communication by the charity or other public involvement. This is not required explicitly in the decisions of the Federal Court of Appeal. For example, the policy statement indicates that, subject to certain conditions, a charity will be engaging in charitable (and not political) activities if, in a “well-reasoned” presentation, it contacts a politician or public official and explicitly advocates that a law, a policy, or a decision of governmental authorities be

⁷⁹ Policy Statement CPS-022: Political Activities (effective September 2, 2003). The comments in this section refer to only a small part of the quite elaborate provisions of the policy statement. They reflect the present author's interpretation of the relevant provisions and this may, or may not, be shared by officials of the Agency. To the extent that the views of the Agency may diverge from the reasoning in decisions of the Federal Court of Appeal, the Agency appears generally to have adopted a more liberal approach. Note the contrast between what seems to be the prevailing judicial philosophy of the Federal Court and the contextual comments in section 2 of the policy statement together with those in a release of March 15, 2013 that the provisions of the *ITA* are not intended to restrict the valuable contributions of charities to public policy. The evolution of the Agency's policies is described in Juneau, *op. cit.*, at pages 1-7, 1-8 and 1-15.

⁸⁰ Some retreat from the position in *McGovern* is indicated in the Agency's Guidance Statement CG-001 (May 17, 2010): *Upholding Human Rights and Charitable Registration*.

retained, opposed, or changed.⁸¹ Moreover, the contents of the representations may be released to the public in their entirety without this becoming a political activity. In the view of the Agency, a well-reasoned position is one:

... 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.⁸²

The policy statement generally deals with the requirement that advocacy be well-reasoned in the context of its discussion of charitable activities. Read literally, it might be inferred that, while advocacy that does not satisfy the requirement will not be charitable, such advocacy might still be political for the purposes of 6.1 and 6.2. If that was intended, the policy statement is silent on the existence of any standards governing political advocacy other than, presumably, a requirement that the cause advocated, or the case presented, is not frivolous or obviously groundless. Alternatively, it may have been intended that the requirement of well-reasoned advocacy was to apply to political activities as well as charitable activities.

Public advocacy of changes in the law or in government policy will be considered to be political activities except, it appears, that advocacy of the retention of an existing law, policy, or decision will not be political – and may be charitable – unless it is being reconsidered by government. The indication that opposition to changes in the law may be political if the law is under reconsideration is not stated to apply to well-reasoned presentations made to politicians or officials as described above.

Other activities that are presumed to be political are those that call for public political action or are intended to incite or organize the public to put pressure on an elected representative or public official to retain, oppose, or change a law, policy, or decision of a government authority.

Public awareness campaigns that aim to provide the public with useful knowledge to enable them to make decisions about issues related to a charity's work will be considered to be charitable activities if they are connected and subordinate to the charity's purpose, well-reasoned and not, to the knowledge or reasonably imputed knowledge of the charity, false, inaccurate, or misleading.

Public awareness campaigns are permitted to have some emotional content as long as the charity does not use primarily emotive material. It is perhaps not clear whether an excess of emotive material will cause the activity to be characterized as a political, or a prohibited,

⁸¹ The Agency had previously endorsed this view in Information Circular 87-1 (February 25, 1987); Juneau, *op. cit.*, page 1-7. It is discussed further in releases of March 12 and March 15, 2013.

⁸² Policy Statement CPS-022. While it is easy to understand the desire to confine the favourable treatment given to registered charities in the *ITA* to advocacy that makes a serious contribution to public discussion and debate, it seems inevitable that there will be a degree of subjectivity in deciding whether advocacy is well-reasoned.

activity. While the former may be more consistent with the distinctions drawn between prohibited, charitable, and political activities in the policy statement, the latter seems to be a more literal interpretation of the comment on emotive material in the policy statement.

Although a definition is provided, references to ancillary and incidental purposes are otherwise conspicuously absent from the policy statement and are replaced with a requirement that acceptable political purposes and activities must be “connected” and “subordinate” to charitable purposes and activities.⁸³

7. Approach of the Charity Commission for England and Wales

In a release of March 2008,⁸⁴ the Charity Commission of England and Wales endorsed an approach that is more benevolent than the prevailing view in Canada. The Commission drew essentially the same distinction between political purposes and political activities as in the policy statement of the Canada Revenue Agency. It recognized that a charity cannot have a political purpose and that political activities are permissible only if they further or support one of the traditional heads of charitable purposes. Most notable from a Canadian perspective is that no quantitative limits are imposed except that it is stated that political activity cannot be the only means by which a charity pursues its charitable objects or the reason for its existence.

Notably, there are no references to political activity that is “ancillary” or “incidental” to charitable purposes. The Commission noted in its Foreword that the omission did not reflect a departure from the existing law governing political activities. It was thought that by using other language, assistance could be provided to charities that had difficulty understanding the terms “dominant” and “ancillary.”

Political purposes are defined in the release as:

... any purpose directed at furthering the interests of any political party, or securing, or opposing⁸⁵ a change in law or in the policy or decisions of central government, local-authorities or other public bodies, whether in this country or abroad.⁸⁶

⁸³ The policy statement defines “ancillary” as meaning “connected” and “incidental” as “subordinate” “to make these concepts more easily understandable”. While obviously imprecise, this definition does at least avoid the confusion inherent in attempts to apply an ends and means analysis to political activities and purposes.

⁸⁴ Charity Commission, *Speaking out: Guidance on Campaigning and Political Activity by Charities* (March, 2008).

⁸⁵ The Commission distinguishes purposes that oppose changes in existing laws from those directed at ensuring their observance. The latter, but not the former, may be treated as charitable purposes. This is consistent with the statement of Slade J. in *McGovern* that trusts connected with the enforcement of the existing law of England may well qualify as charitable: at page 346. Acceptance of the same distinction appears to be implicit in the registration of Canadian organizations established for the prevention of cruelty to animals.

⁸⁶ Page 8.

Political activity was defined as:

... aimed at securing, or opposing, any change in the law or in the policy decisions of central government, local-authorities or other public bodies, whether in this country or abroad.⁸⁷

It will be noted that, although it is said that a charity cannot have a political purpose, political activities are, in effect and as appears to be the case in Canada, defined as those intended to achieve political purposes. There is no definition of charitable activities, but it is stated that:

[p]olitical activity including campaigning for a change in the law, is an entirely legitimate activity and can be an effective means of supporting a charitable purpose. However, ... it is not a charitable purpose to campaign for changes in the law whether in the UK or overseas.⁸⁸

In the view of the Commission:

Whilst there is no limit on the extent to which charities can engage in campaigning in furtherance of their charitable purposes, political activity can only be a means of supporting or contributing to the achievement of those purposes, although it may be a significant contribution. Hence, political activity cannot be the only way in which a charity pursues its charitable purposes.⁸⁹

It appears then that the Commission endorses a means to an end analysis without quantification limits or a requirement that political activities be subordinate to charitable activities. The only restrictions that distinguish legitimate and illegitimate political activities are that the former cannot be the only means of pursuing charitable purposes or the reason for a charity's existence. It appears that only then will they be treated as ends rather than means to a charitable end.

The release states that emotive and controversial material can be used in political activities as long as it is factually accurate and has a "well-founded evidence base". This statement, and the absence of any requirement that charitable advocacy must disclose arguments and facts that conflict with its position – together with the absence of any quantitative limits on political activities – contrasts with the more restrictive approach in 6.1 and 6.2 and that adopted administratively in Canada. The approach of the Charity Commission is far more

⁸⁷ Page 7.

⁸⁸ Page 14.

⁸⁹ Page 9. While the passages quoted in the text preserve the ends and means analysis inherent in the traditional concepts of incidental and ancillary activities or purposes, it will be noted that there would appear to be no requirement that political activities be subordinate to charitable activities of the body.

liberal than the definition and treatment of political activities endorsed by the Federal Court of Appeal in cases such as *Human Life International*.⁹⁰

8. Contrasting Australian developments

The continued reliance on the *Bowman* principle, the failure to attribute relevance to the values inherent in the Canadian democratic constitutional structure – including the Charter – and the primacy attributed to tax policy in the Canadian cases are in marked contrast with the approach of the majority judges in the decision of the High Court of Australia in *Aid/Watch Inc. v. Federal Commissioner of Taxation*.⁹¹

In earlier Australian cases, courts had expressed dissatisfaction with the law on political purposes. In particular, it was questioned, in one case, whether distinctions should not be drawn between purposes contrary to existing law, those intended to change it consistently with the way the law was “tending”, and those intended to maintain it.⁹² In the same case, it was said that the controversial nature of material to be disseminated was an unreliable indicator of whether such a purpose should be characterized as political.⁹³

In another Australian case, the court concluded that the law was tending in the direction of accepting that judges can determine whether a political purpose is for the public benefit:

... to take an obvious example, if Australia has ratified an international treaty but it has not yet become part of domestic law, urging that the country go further may well be able to be judged by a court as being for the public benefit.⁹⁴

Aid/Watch concerned an appeal from a decision of the Commissioner to revoke a prior “endorsement” of the appellant as a “charitable institution” within the meaning of a number of taxing statutes. The decision had been reversed by an administrative appeals tribunal but subsequently upheld in the Federal Court. By a majority of five judges to two, the High Court allowed a further appeal and restored the decision of the administrative tribunal.

The appellant was an organization whose objects were to monitor, research, campaign, and undertake activities on the environmental impact of Australian and multinational aid and investment programs, projects, and policies. It was common ground in the Federal Court that

⁹⁰ Legal and regulatory obstacles confronted by charities wishing to pursue political objects in England are discussed by Alison Dunn in *Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process* (2008), 71 M.L.R. 247.

⁹¹ (2010), 85 A.L.J.R. 154 (HCA) (“*Aid/Watch*”). Although described by Chia et al, *op. cit*, footnote 1, as a landmark in the debate about the relationship between charity and politics, the learned authors are critical of the “curiously oblique” connection between the constitutional acceptance of the public benefit of political debate and the actual decision of the court: at pages 368 and 385.

⁹² *Public Trustee v. Attorney-General for NSW* (1997), 42 NSWLR 600 (S.C.) at page 602.

⁹³ At page 620.

⁹⁴ *Attorney-General for NSW v. The NSW Henry George Foundation* 2002 NSWSC 1128 at para 48.

the appellant was concerned with “promoting the effectiveness of Australian and multinational aid provided in foreign countries by means which included investment programs, projects and policies”. For this purpose, through media releases and public events designed to influence relevant agencies, it campaigned for changes to the ways in which aid was delivered and aid programs administered. In the view of the Federal Court, the immediate and prevailing aim of the appellant was “to influence government” and this, as a matter of the law of charitable trusts, invalidated any claim to charitable status for the purpose of the taxing statutes.

In rejecting this conclusion, the majority of the High Court declined to follow the *Bowman* reasoning or to accept the proposition that the law must not stultify itself by admitting that it is less than perfect, and it held that the purposes and activities of the appellant were not disqualified as contrary to the established system for government in Australia and the general public welfare.

The majority went further and stated, as a general principle, that:

... in Australia there is no general doctrine which excludes from charitable purposes “political objects” and has the scope indicated in England in *McGovern v. Attorney-General*.⁹⁵

The basis for these conclusions was that under the Australian constitutional structure,

... [c]ommunication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is “an indispensable incident” of that constitutional system.... the constitution informs the development of the common law.⁹⁶

It followed, in the view of the majority, that, once the political purposes doctrine was rejected, there was no obstacle to a finding that the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty was itself a purpose beneficial to the community within the fourth head in *Pemsel*.⁹⁷

⁹⁵ Para 48.

⁹⁶ Para 44. Compare *Reference re Alberta Statutes*, [1938] S.C.R. 100 at page 133 *per* Duff C.J.: “The [British North America Act] contemplates a parliament working under the influence of public opinion and public discussion. ... this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions”. *Cf.*, *Reynolds v. Times Newspapers Ltd.*, [1998] 3 W.L.R. 862 (C.A.) at page 909.

⁹⁷ *Aid/Watch* was distinguished in *News To You Canada v. Canada (Minister of National Revenue)*, [2011] F.C.J. No. 848 (F.C.A.) on the grounds that the law in Australia differs from that in Canada and that the High Court was able to relate the purposes in *Aid/Watch* to the relief of poverty.

The value of the contributions of charities to public policy debate is recognized in the introductory comments to the policy statement of the Canada Revenue Agency but no significance is attributed to it in the decisions of the Federal Court of Appeal.

The decision in *Aid/Watch* is also notable for the High Court's endorsement of the following approach to the construction of taxing statutes that have indicated an intention to incorporate common law concepts:

Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication of the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time. Further, where, as here, a general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute, which has adopted the general law as a criterion of liability in the field of operation of that statute.

Accordingly the use of the term "charitable" in the phrase "charitable institution" [in the legislation] is to be understood by reference to its source in the general law as it is developed in Australia from time to time.⁹⁸

This is consistent with the position in England but is in marked contrast with the prevailing view in Canada.

9. Critique

(a) *The law of charity: federal law or provincial law?*

The application of the common law definition of charity as a guide to the interpretation of the *ITA* makes it necessary to consider how changes in the common law concept of charitable purposes are to be accommodated. As it has also been accepted in the Canadian cases under the *ITA* that the common law definition has developed and will continue to develop to reflect changes in social conditions and public policy, it might seem to follow that such developments may affect the meaning to be attributed to the words of the statute. On the present state of the authorities, it appears more likely that the reverse will be the case: that considerations of federal tax policy that are considered relevant to the interpretation of the statutory provisions will be allowed to influence the development of the common law.

In *Vancouver Society*, the four judges forming a majority of the Supreme Court of Canada described the law of charity as a "moving subject" but, in view of possible fiscal

⁹⁸ Paras 23-24.

consequences of adopting a new and expanded definition of charity, they believed that this task was more appropriately left to the legislature, rather than to the courts, to entertain.⁹⁹

The majority did not address the question whether amendments to the *ITA*, or considerations of federal tax policy, could constitutionally and appropriately alter the common law definition of charity in cases within provincial jurisdiction. Nor did they consider the apparent contradiction between their purported application of the common law definition and their recognition that fiscal benefits conferred on registered charities were relevant in their discussion of charitable purposes and activities.¹⁰⁰

By way of contrast, the three judges in the minority were of the opinion that, by incorporating the common law definition of charity into the *ITA*,

... [Parliament] has implicitly accepted that the courts have a continuing role to rationalize and update that definition to keep it in tune with social and economic developments.¹⁰¹

Consistently with this position, Gonthier J., for the minority judges, refused to exclude the possibility of a significant judicial revision of the concept of charitable purposes in an appropriate case.

In addition, the minority judges were at least prepared to accept that the federal law of charity was not necessarily coincident or consistent with the law applied in cases of provincial jurisdiction “due to judicial decisions and provincial statutory incursions into the common law”.¹⁰²

The possibility that the words just quoted may have opened the door for a future decision that recognizes that the “common law” applied for the purposes of the *ITA* – influenced as it may be by considerations of fiscal policy – is not necessarily the same as the common law applicable in cases of property and civil rights in the provinces, is difficult to reconcile with the comments of Rothstein J. in delivering the reasons of the eight judges who formed the majority of the Supreme Court in *A.Y.S.A. Amateur Youth Soccer Association*. In noting that the “anomalous” decision in *Laidlaw* was based upon the provisions of the provincial *Charity Accounting Act*, the learned judge appears to have implied that the common law in force in

⁹⁹ Para 201. The Ontario Law Reform Commission, *op. cit.*, footnote 26, at page 145, expressed a contrary opinion and this was also the view of Bromley in “Answering the Broadbent Question: The Case for a Common Law Definition of Charity” (2000), 19 E.T.P.J. 21.

¹⁰⁰ Contrast the approach accepted in the United States as described in the *Restatement of the Law Third, Trusts*, para 28, page 10: “Trust-law definitions of charity are not limited by those used in federal, state or local tax-law; nor are tax-law definitions necessarily limited to charitable purposes recognized by the trust-law.”

¹⁰¹ Para 28.

¹⁰² *Ibid.*

Ontario was necessarily the same as that applicable for purposes of the federal Act.¹⁰³ Although this probably represents the present law in the common law provinces and territories of Canada, the contradiction inherent in the courts' insistence that the common law definition applies, but can be affected by the federal statutory context, remains unresolved.¹⁰⁴

The privileges afforded to charitable trusts under the common law are quite distinct from those conferred on registered charities under the *ITA*. Charitable trusts are not subject to the rules relating to certainty of beneficiaries, they are not subject to rules relating to perpetual duration or, with some exceptions, remoteness of vesting, they may be enforced by an Attorney General of a province or a delegate under provincial legislation, and the courts have special powers and responsibilities with respect to their enforcement and administration that include, but are not limited to, the *cy pres* jurisdiction. There is no obvious reason of principle or policy why the development of charity law in non-fiscal cases within provincial jurisdiction should be limited or affected by decisions under the *ITA*, which – like the cases in the Federal Court of Appeal on political purposes and activities – reflect considerations of tax policy.¹⁰⁵

It is not intended to place undue emphasis on the practical significance of the effect that decisions under the *ITA* may have on the development of the law of charity in non-fiscal contexts. The taxation benefits conferred under the Act are likely to be of far more importance to most philanthropically motivated persons than the privileges conferred on charitable trusts at common law. Most charitable foundations and organizations in Canada are incorporated and, as such, are not affected by questions of validity. It is still a fact that donors and particularly testators have attempted to make gifts for purposes beneficial to the public since time immemorial. There is no necessary link between the principles that should govern their ability to do this and the conditions legislatures attach to the provision of fiscal benefits from time to time.

¹⁰³ At paras 37-38. Contrast the position in the United States where the provisions of the Internal Revenue Code have been interpreted as requiring, in effect, a distinction to be drawn between common law and fiscal concepts of charity. Notwithstanding the rejection of the *Bowman* principle as part of the common law, the tax exempt status of organizations operated exclusively for charitable purposes has been withheld from those whose primary objects can only be attained by enacting or defeating legislation; see, for example, *The Fund for the Study of Economic Growth and Tax Reform v. Internal Revenue Service*, 131 F. 3d 755 (D.C. Cir. 1998).

¹⁰⁴ In *Travel Just v. Canada* 2006 FCA 343 at para 16, Evans J.A. found “considerable” force in the view that the interpretation of the *ITA* was a matter of public law so that the private law of Quebec was irrelevant.

¹⁰⁵ In each of *Vancouver Society* and *A.Y.S.A.*, the court was concerned to ensure that its analysis and decision would not affect other provisions of the *ITA*. There seems no reasonable basis for permitting such considerations – any more than the quantitative limits in 6.1 and 6.2 – to influence the common law concept of charity for non-fiscal purposes; see Parachin, *Legal Privilege as a Defining Characteristic of Charity* (2009), 48 Can. Bus. L.J. 36, for an elaborate and persuasive critique of the Supreme Court's deference to income tax considerations in *A.Y.S.A.*.

(b) *The significance of Vancouver Society*

The decision in *Vancouver Society* is important for its acceptance that charitable activities derive their characterization as such from the charitable objects they are designed and effective to serve. Equally important is the strong affirmation that political activities that are ancillary or incidental to the charitable objects of a trust, foundation, or organization will not prevent it from being established for exclusively charitable purposes.¹⁰⁶ The analysis of the court is also notable for its expanded approach to the meaning of educational purposes. The actual decision, however, was based on a finding of the majority that an expressed purpose of “doing all such things as are incidental or conducive to the above stated [charitable] objects” was sufficient to prevent the organization from being established for exclusively charitable purposes.

Iacobucci J. stated (at para 193):

... while doing things that are “incidental” to the attainment of charitable purposes might safely be treated as a means of fulfilment of the purposes, the same cannot be said of doing things that are merely “conducive” to those ends. To say that an action is “conducive” to a result implies only that the action leads or contributes to the result, not that it is carried on only in pursuit thereof. In other words, one purpose may be conducive to another while still remaining an end in itself, not merely a means to the fulfilment of the second purpose.

Gonthier J. described this reasoning – which he pointed out depended on the improper inclusion of two words in the statement of the organization’s purposes – as unconvincing, and he mentioned that no objection to the existence of a similar clause in *Guaranty Trust* had been taken.¹⁰⁷ The reasons of the majority in *Vancouver Society* do not refer to a number of other decisions in which “conducive” clauses have been considered for the purpose of determining whether a corporation or trust was established for exclusively charitable objects.¹⁰⁸ Such clauses have been commonly included in the objects clauses of corporations for many years, and the powers they purport to confer are, for example, included in the “ancillary and incidental” powers of non-share capital corporations governed by the *Corporations Act*¹⁰⁹ of Ontario unless expressly excluded.

¹⁰⁶ Writing in 1983, Professor Brooks was not prepared to go further than to say that it was an open question whether charitable organizations, as defined in the *ITA*, could engage in an “ancillary amount” of political activities: *op. cit.*, footnote 15 at page 143.

¹⁰⁷ Similarly, in *Incorporated Council of Law Reporting for England v. Wales v. Attorney-General*, [1972] Ch. 73 (C.A.) the inclusion of an object virtually identical to that in *Vancouver Society* was not considered to detract from the Council’s exclusively charitable purposes.

¹⁰⁸ Earlier cases were collected and discussed in Cullity, *op. cit.*, footnote 60 at pages 44-50.

¹⁰⁹ R.S.O. 1990, c. C-38, ss. 23 and 133(1).

The conclusion that the clause in the statement of charitable purposes was sufficient to deprive the organization of its status as a charity should be of no importance to other charities whose drafters scrupulously refrain from using the word “conducive” and refer instead to “incidental to”, “advancement of”, “furtherance of”, or, perhaps “promotion” or “achievement” of charitable purposes. The decision is, however, unfortunate to the extent that it continues the tradition of allowing hair-splitting and largely semantic distinctions to affect the charitable status of a trust or other entity, a tradition that has bedeviled the law of charity for at least 200 years.

Given the lessons to be learned from the decisions of the Federal Court of Appeal and *Vancouver Society*, the risk that, in the future, charitable status will be denied to trusts, corporations, or other entities on the ground that they have political purposes or will be devoting their resources to political activities will very likely depend more on specific activities actually carried out or expressly contemplated than on the words of general objects clauses contained in the constitutive documents of the entity.

It is implicit in the reasoning of both the majority and the minority judges in *Vancouver Society* that activities designed to obtain changes in the law or in governmental policies can be ancillary and incidental political activities for the purposes of 6.1 and 6.2. This was recognized in *Alliance for Life* in the following passage:

It seems to me that political activities may well be “ancillary and incidental” despite the fact they involve the advocacy of a particular point of view on controversial social issues. This surely must depend on the scope of the organization’s objectives and the activities undertaken in pursuit thereof. It may well be that a charitable organization would want to adopt a relatively strong and controversial posture in order to effectively advance its charitable objectives even to the extent, if necessary, of advocating a change of law, policy or of administrative decisions, without incurring the risk of losing its status as a registered charity. The key consideration initially must be whether the activities actually engaged in, though apparently controversial, remain “ancillary and incidental” to the charitable activities.¹¹⁰

As the ultimate decision in that case indicates, it does not follow that the characterization of purposes as political or otherwise is now without practical significance. If activities are to be characterized not as political but as charitable, the quantitative limits in 6.1 and 6.2 will be irrelevant. If they are characterized as political, they must be ancillary and incidental to charitable purposes if an ability to take advantage of 6.1 or 6.2 is to exist. It follows that, notwithstanding the guidance now provided by the Canada Revenue Agency, the possible characterization of activities as political, or not, will continue to be a live issue in the future.

¹¹⁰ Para 52.

(c) Political versus educational purposes and activities

In most of the recent Canadian cases discussed in this article, the focus has been on advocacy of particular causes that the Canada Revenue Agency has characterized as non-charitable political purposes or activities. Typically, the appellants have sought to have their activities characterized as a means for the achievement of educational purposes and, therefore, incidental to a charitable purpose under the second head of the *Pemsel* classification.

In *Human Life International*, the Minister asserted that it was clear from the consideration of the purposes and material provided by the appellant that its purpose was “to promote its views on the abortion issue and other controversial social issues”. The Minister concluded that, as the appellant espoused a specific cause and sought to sway the public to its way of thinking, it would not qualify as charitable under the head of advancing education.

Noting that the appellant had not pressed the argument that its activities were for the advancement of education, Strayer J. described it as without merit:

It is well-established in the jurisprudence of this Court that, to be an activity for the advancement of education, it must be directed towards the formal training of the mind or the improvement of a useful branch of human knowledge. The appellant has not demonstrated that its activities meet either of these requirements. The distribution of literature and holding conferences is not carried out in any structured way so as to amount to formal training. Moreover, its literature appears to be predominantly of a tendentious or polemical character that one would not normally associate with the formal training of the mind. Nor has the appellant demonstrated how its activities would amount to the improvement of a useful branch of human knowledge. It has not demonstrated significant research or the systematic development of a body of human knowledge. The impression one gets from the material is that it is primarily concerned with the dissemination of a set of opinions on various social issues and the appellant has not convincingly demonstrated anything to the contrary.¹¹¹

In support of this narrow approach to the concept of education, the court cited its earlier decisions¹¹² in which the requirement of either a formal training of the mind or the improvement of a useful branch of human knowledge was accepted.

In *Vancouver Society*, the concept of education endorsed in the decisions of the Federal Court of Appeal was rejected as unduly restrictive. Iacobucci J. referred to the evolution of contemporary attitudes towards education and endorsed what he described as an incremental

¹¹¹ Para 10.

¹¹² *Positive Action Against Pornography*, at page 348 and *Briarpatch Inc., v. The Queen*, [1996] 2 CTC 94 (F.C.A.) at page 97.

change to the common law of the kind that the Supreme Court of Canada had accepted in the past. He stated:

There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills for providing information towards a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view. ... As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of special benefit to the community, or advancing a common good. In the case of education, the good advanced is knowledge or training. Thus, so long as information 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.¹¹³

The learned judge insisted that implicit in the notion of an educational activity was a “legitimate targeted attempt to educate others”. An opportunity for members of an organization to educate themselves would not be sufficient.

While Gonthier J. was not convinced that support for an expanded concept of education was not latent in the existing English case law, he agreed with the definition of education provided by the majority.

Applying this analysis, the court in *Vancouver Society* held that the following purpose, which Iacobucci J. described as the primary purpose of the society, was charitable:

... to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment.

As I have indicated, the Supreme Court was also unanimous in finding that the charitable status of the body was not destroyed by a further purpose of carrying on political activities that were incidental and ancillary to its primary educational purpose. The decision to dismiss

¹¹³ Paras 168-169. Despite the expansion of the concept of educational purposes in *Vancouver Society*, activities have subsequently been found to fall outside the concept on the ground that they were not sufficiently structured: *News To You Canada v. Canada*, [2011] F.C.J. No. 848 (F.C.A.); that they merely provided persons with an opportunity to educate themselves: *Hostelling International Canada – Ontario East Region v. M.N.R.* 2008 FCA 396; and that they promoted a particular point of view: *Challenge Team v. Canada (Revenue)*, [2000] F.C.J. No. 433 (F.C.A.)). The principles stated by Iacobucci J. were applied in *Fuaran Foundation v. Canada* 2004 FCA 181 (F.C.A.) (“*Fuaran Foundation*”) in which it was argued unsuccessfully that the appellant’s activities in organizing retreats should be considered to fall within the advancement of religion.

the appeal turned entirely on the majority's view that activities conducive to the attainment of the charitable objects did not require such activities to be only a means of achieving them.

Despite the ultimate decision in *Vancouver Society*, the expanded concept of education adopted by the court is of obvious importance. More particularly, as there is a rebuttable presumption of public benefit in relation to purposes within the first three heads of the *Pemsel* classification, it may assist bodies to qualify for charitable status in the face of objections that public benefit must be susceptible of proof and judicial determination.

The analysis of education does not, however, eradicate the problem that resulted in a denial of charitable status in each of the decisions of the Federal Court of Appeal that I have mentioned. The definition of education approved in *Vancouver Society* expressly excluded the dissemination of information or training materials "solely to promote a particular point of view or political orientation".¹¹⁴ Consistently with this exception, Iacobucci J. was prepared to distinguish the decision in *Positive Action Against Pornography* on the basis that the material being disseminated in that case exhibited a strong anti-pornography bias.¹¹⁵

(d) *Advocacy*¹¹⁶

The word "advocacy" can refer to attempts to persuade others to support or accept a particular point of view, to take some action, or to conduct themselves in a particular manner. More broadly, it can extend to an advocate's communication of support for such a point of view, action or conduct without a necessary element of persuasion. On either view, advocacy is *per se* one-sided. The second meaning has been endorsed by the Canada Revenue Agency and related to the description of political activities in the policy statement. These include:

... [explicitly communicating] to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed or changed.¹¹⁷

The policy statement does not otherwise address the concept of advocacy explicitly, but the evident intention is to recognize both that political activities for the purposes of 6.1 and 6.2

¹¹⁴ This aspect of the reasoning of the majority – and the judicial conservatism reflected in the incremental approach to changes in the common law – is criticized by D.B. Lewis in "A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education" (1999-2000), 25 *Queens Law J.* 679.

¹¹⁵ Para 164.

¹¹⁶ See Bridge, *op. cit.* footnote 3, for a comprehensive and penetrating discussion of the problems created by the treatment of advocacy in the present law in the administration of charitable organizations and the constraints it imposes on effective public policy debate.

¹¹⁷ CPS-O22, para 6.2. "Advocacy" is defined in CPS-O22, Appendix I as "... demonstrated support for a cause or particular point of view. Advocacy is not necessarily a political activity but it sometimes can be."

may involve advocacy and that advocacy of political purposes will be a political activity. There is, however, no reason of principle why advocacy is otherwise incompatible with charitable activities, and this is consistent with the Agency's discussion of representations made to politicians and government officials advocating changes in the law. As indicated above, and subject to certain exceptions, such representations are considered to be charitable activities.¹¹⁸

Advocacy designed to obtain public support for a charity's charitable objects and activities supporting an end to racial discrimination,¹¹⁹ or for the relief of poverty, among persons who are elderly, homeless, disabled, or victims of human rights abuses,¹²⁰ would be further examples where it could be characterized as a charitable activity. Advocacy by such a charity to obtain benefits to which persons it is assisting may be entitled to receive from government should, it seems, be characterized as charitable in law, as well as by the Canada Revenue Agency even if it is sought to overturn a decision already made, as long as the Agency's requirements that it be connected and subordinate to the charity's purposes and be well-reasoned are satisfied.¹²¹

It does not appear necessary to accept the existence of a general rule that for advocacy to be a charitable activity it must in all cases – including the example just mentioned – be well-reasoned in the sense understood by the Canada Revenue Agency so that it would be necessary to set out the arguments on both sides. Where educational purposes are concerned, such a requirement was accepted by the majority in *Vancouver Society*, and the Canada Revenue Agency has followed suit.¹²² Such a requirement would, however, make no sense where advocacy is directed solely to the advancement of accepted, non-controversial charitable objects. The view that such advocacy will be a charitable activity is consistent with the indication in the policy statement that advocacy in support of the retention of existing law or government policy will not be political if the matter is not then under reconsideration.¹²³

It appears also to follow that the fact that advocacy of a point of view is controversial among members of the public will not be determinative. Performance of abortions, for example, is lawful in Canada and was held to be a charitable activity in *Everywoman's Health Centre*

¹¹⁸ The policy statement indicates that a purpose of "providing or working towards an accepted public benefit" will be charitable: CPS-022, s.4.

¹¹⁹ See Policy Statement CPS-021, "*Registering Charities that Promote Racial Equality*" (Sept. 2, 2003).

¹²⁰ See Guidance CG-001, "*Upholding Human Rights and Charitable Registration*", (May 15, 2010).

¹²¹ CPS-022, s.7.3.

¹²² In *Public Policy Institutes as Charities* (April, 1999), a submission to Canada Revenue Agency by the Fraser Institute, at pages 8-16, Dr Brian April argued powerfully that the view that educational activities must provide all viewpoints is both unworkable and unnecessary. See also Brooks, *op. cit.*, footnote 15 at pages 201-202.

¹²³ Section 6.2. It would also be consistent with the Agency's published views on racial discrimination and human rights abuses referred to above.

*Society (1988) v. Minister of National Revenue.*¹²⁴ The fact that it is controversial was considered to be irrelevant.¹²⁵

If, as held in *Everywoman's Health Centre*, the performance of abortions is charitable and, therefore, considered to be for the public benefit, it can be argued that pro-choice advocacy designed to retain the existing legal position in Canada should also be charitable and would not conflict with the *Bowman* principle. Advocacy of an opposing view would fall foul of the principle and in consequence would be political.¹²⁶ The court, however, distinguished the performance of abortions from the “political purpose of promoting the pro-choice view” but in so doing did not explain why it is able to decide the question of public benefit in the former case but not in the latter.¹²⁷ The position of the Canada Revenue Agency that advocating the retention of an existing law will be a political activity only if the law is under reconsideration is a compromise between the competing views.¹²⁸

While the court in *Vancouver Society* did not indicate disapproval of the approach to political activities in cases such as *Positive Action Against Pornography* and *Human Life International*, its strong recognition that political activities can be ancillary and incidental to charitable activities has confirmed that political advocacy – polemical or otherwise – may be permitted subject to the quantitative limits in 6.1 and 6.2. This, as indicated above, appears subsequently to have been accepted in *Alliance for Life* as well as by the Canada Revenue Agency.

As also indicated above, the Canada Revenue Agency's position is that material presented as part of a public awareness campaign may contain some emotive content without detracting from its charitable character. It is stated that it would be “unacceptable” for a charity to undertake an activity using primarily emotive material. If interpreted literally this statement may mean that such an activity would be considered to fall within the category of prohibited conduct rather than that of political activities.

¹²⁴ [1992] 2 F.C. 52 (F.C.A.).

¹²⁵ Para 16.

¹²⁶ As Professor Parachin has commented, a distinction between supporting and opposing legal change would reinforce the criticism that the doctrine of political purposes unduly favours the status quo and is not receptive to developments in political, social or economic thought.

¹²⁷ See Parachin, *op. cit.*, footnote 44 at page 884 (footnote 83). The view that, under the existing law, opposing and supporting legal change are equally inimical to charity has received other judicial and academic support: see, for example, *Re Hopkinson*, [1949] 1 All E.R. 346 (Ch.D.) at page 350; *Re Co-operative College of Canada and Saskatchewan Human Rights Commission* (1975), 64 D.L.R. (3d) 531 at page 538 (no distinction between an object of changing existing law, enacting new laws or resisting such changes or enactments); Sheridan, “The Charpol Family Quiz”, above, footnote 8: (“On principle, if promoting legislation is not charitable because it is a political activity, opposing it must be non-charitable for the same reason”); Drassinower, *op.cit.*, footnote 45 at pages 301-304; *contra*, Bromley, *op. cit.*, footnote 1 at pages 80-81.

¹²⁸ For the position of the Charity Commission of England and Wales, see footnote 85, above.

It seems clear that – irrespective of the conceptual difficulties of interpretation – if 6.1 and 6.2 are to be interpreted in accordance with the apparent legislative intention, all activities that the law defines as political must comply with the quantitative limits.

(e) Political activities and purposes revisited

It does not follow that there is no room for future Canadian developments relating to the concept of political, as distinct from charitable, activities and purposes. Most fundamentally, the cases in the Federal Court of Appeal have uniformly found guidance and justification for the categorization of political purposes as excluding political advocacy in the proposition based on *Bowman* that the court is factually or institutionally unable to judge whether a particular purpose that has been characterized as political is for the public benefit. This proposition has been challenged convincingly in academic writing¹²⁹ and, most notably, in recent Australian case law. Its longevity in charity law is surprising given that the courts must make findings of public benefit or its absence whenever they are considering whether the purposes of an entity are charitable or non-charitable.¹³⁰ In *National Anti-Vivisection Society*, Lord Simonds endorsed the principle that:

... the question whether a gift is or may be for the public benefit is a question to be answered by the court by forming an opinion on the evidence before it.¹³¹

On the facts of the case as found by the revenue authorities, Lord Simonds concluded that the detrimental effects of advancing the Society's purposes far outweighed any benefits to the community.

Given the extensive jurisprudence relating to the legal concept of charity, and its previous application for the purposes of interpreting taxing statutes in Canada and elsewhere, it is understandable that, when enacting 6.1 and 6.2, the legislature intended the provisions to be interpreted in the same manner. This was, however, unfortunate as the treatment of political purposes under the general law governing charitable trusts is far from satisfactory.

For reasons of tax policy, legislators may decide to withhold tax benefits from organizations and foundations that engage in certain kinds of activities, but the attempt to do so by reference to the general law governing charities overlooks, and is necessarily tainted by, the incoherence of the law.

¹²⁹ See, in particular, Parachin, *op. cit.*, footnote 44; L.A. Sheridan, "Charity versus Politics", *supra*, footnote 8.

¹³⁰ While the task of the court may be aided by a presumption of public benefit in cases falling within the first three heads of the *Pemsel* classification, the presumption is rebuttable. A presumption was found to exist in *Everywoman's Health Centre Society* and, after a lengthy consideration of the evidence, it was found not to have been rebutted. There will be no such presumption in novel cases falling under the fourth head so that public benefit must be found as a fact; see, for example, *Incorporated Council of Law Reporting*.

¹³¹ Page 66.

Quite apart from the fact that charity law in general is notoriously technical and replete with hair-splitting distinctions and irreconcilable decisions, one might legitimately query why it is assumed that the dictates of tax policy will necessarily coincide with those that are relevant to the question whether a trust for a purpose will be accepted as valid under the general law.¹³² Such trusts are infrequently created in Canada when compared with England and, possibly, Australia. Still, the decisions in *Farewell, Lewis*¹³³ and, more recently, *Laidlaw and Levy* indicate that where taxation is not in issue, judges in Ontario have adopted a less restrictive approach to the requirements of charity. Outside Ontario, the tax decisions will very likely be authoritative for purposes of the general law. That there is a risk that tax policy may be influential for such purposes is indicated by a statement of Stone J. in *Alliance for Life*. Immediately after referring to the classic passage from *Bowman*, the learned judge added:

Also, in 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.¹³⁴

The implication that the purposes of the *ITA* may legitimately affect the evolution of the general law of charity was even more clearly recognized in *Vancouver Society* where Iacobucci J. stated that the “common law of charities must not be interpreted to undermine [the *ITA*’s] distinction between non-profit organizations and charitable organizations”.¹³⁵ This is in stark contrast with the principle accepted by the High Court of Australia in *Aid/Watch* that, where a statute adopts a term or concept of the general law, developments in the latter are, as a principle of statutory interpretation, not to be affected by the purposes of the former and such developments will *prima facie* apply to the statute.¹³⁶

More fundamentally, because obtaining legislation or other changes in the laws or policies of the government of a country will always be means to some other end, the *Bowman* principle

¹³² If, for example, it is thought that tax benefits should be withheld from organizations that advocate opinions on important social issues, one might still legitimately question whether it should follow that individuals should not be permitted to make testamentary or *inter vivos* gifts for such purposes.

¹³³ Although not consistent with the reasoning in *McGovern, Lewis* was, in CG-001, considered to provide “some insight” into the question whether the promotion of human rights should be regarded as a charitable purpose; *cf.*, *ACAT*, para 40 where it was said that while an institution devoted to the abolition of torture would *prima facie* be a charity, “the issue does nevertheless raise certain questions of a factual and legal nature.”

¹³⁴ *Alliance for Life*, para 36.

¹³⁵ At para 151; see, also, the learned judge’s justification of the majority’s view that changes in charity law should be left to the legislature: paras 196-203, referred to below.

¹³⁶ The majority of the House of Lords in *Dingle v. Turner*, [1972] 1 All E.R. 878 rejected the proposition that the question of the validity of a charitable trust should be affected by the existence of fiscal privileges; Lord Cross expressed an opinion to the contrary and this is consistent with the approach of the Ontario Court of Appeal in *Canada Trust Co. v. Ontario Human Rights Commission*, (1990), 74 O.R. (2d) 481 at page 515 as well as that in *Vancouver Society* and most of the decisions of the Federal Court of Appeal discussed in this article. See the discussion by Bromley, *op. cit.*, footnote 1 at page 93.

is inconsistent with the means and ends analysis of activities and purposes that is essential to an understanding of the common law of charity and was central to the reasons of the Supreme Court of Canada in *Guaranty Trust* and *Vancouver Society*. If applied consistently, that analysis would classify activities directed at changing the law by reference to the objects to be achieved by the legislation or other legal changes. If those objects are charitable, attempts to accomplish them by changes in the law should also be charitable activities and there should be no room or need for a distinction between such activities that are the sole means of advancing charity and those that are merely ancillary and incidental to the charitable objects. As in other cases, the issues would be determined not by the type of activity but by whether the court is satisfied on the evidence, and in the light of the applicable burden of proof, that the changes in the law would further the charitable objects.

The recognition given in *Vancouver Society* that political activities can be ancillary and incidental to charitable objects of an organization does not fit happily with the *Bowman* principle in that the asserted inability of the courts to decide whether a change in the law – and the question whether the activities at which the change is directed – would benefit the public are ignored. The logic of the reasoning in *McGovern* would suggest that this approach should be applied even where, as in *National Anti-Vivisection Society*, there is evidence that detriment to the public from a change in the law would outweigh any benefit it would confer as a means of furthering charitable objects of the organization.¹³⁷

The inconsistency with the *Bowman* principle is not avoided by treating political activities that are incidental to the advancement of charitable purposes as an exception to a general rule that political activities will not be acceptable if they become an end, or a main object, in themselves. Most political activities are essentially means to the achievement of another end, and the approach that finds the criterion that distinguishes unacceptable and acceptable political activities in the relative dominance of such activities cannot be explained in terms of a means and ends analysis or a court's factual or institutional ability or inability to determine whether a political purpose of obtaining changes in the law will benefit the public.

Moreover, the recognition in 6.1 and 6.2 that political activities can be ancillary and incidental means to the achievement of charitable purposes but will not be charitable activities requires a distinction to be drawn between political activities and other ancillary and incidental methods of advancing charitable purposes that have been considered to be charitable activities. The distinction might be justified in terms of tax policy and statutory interpretation but not by reference to the *Bowman* principle or the ends and means analysis applied in cases such as *Guaranty Trust*.

Similarly, the view endorsed by the House of Lords in *National Anti-Vivisection Society* that the law should not stultify itself by admitting that it is less than perfect is surely a relic of a

¹³⁷ See the discussion of *Re Hood*, [1931] 1 Ch. 240 (C.A.) in *McGovern* at page 341.

bygone age.¹³⁸ Is a trust for law reform – an objective approved in the creation of Law Reform Commissions and similar bodies – political and not charitable? The logic of a finding that it is charitable would not only do violence to the notion of stultification – the view that the courts must accept the law as it is – but would strike at the heart of the present law of political purposes.

In view of the above considerations and the recognition that controversial purposes are not *per se* non-charitable,¹³⁹ it seems legitimate to doubt whether there is anything left that is sufficiently coherent or even intelligible in the doctrine of political purposes that would justify its retention at common law let alone as a source of fiscal consequences. Whether one defines the criteria for identifying unacceptable political purposes and activities (a) in terms of predominance over, or subservience to, charitable purposes or activities, (b) in whether political activities are, or are not, the only activities pursued,¹⁴⁰ or (c) in terms of the quantitative limits in 6.1 and 6.2, the conclusion seems irresistible that the appropriate choice for the purpose of the *ITA* should not be dictated by the doctrine of political purposes as currently recognized and applied in Canadian jurisprudence.

(f) *Charter considerations*

Reliance on the *Canadian Charter of Rights and Freedoms* and its guarantee of freedom of expression was emphatically rejected in the cases in the Federal Court of Appeal. In *Alliance for Life*, the court endorsed the following statement in *Human Life International*:

With respect to the Charter argument based on alleged infringement of freedom of expression, the basic premise of the appellant is untenable. Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he contributes for this purpose. The appellant is in no way restricted by the *Income Tax Act* from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2 (b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held. It is possible, of course, that if it could be shown that there was discriminatory

¹³⁸ It was emphatically repudiated by Chancellor Boyd in *Farewell* and it has received short shrift from the commentators; see for example, Parachin, *op. cit.*, footnote 44 at pages 880-1: "... a poor foundation for the doctrine of political purposes."; Bromley, *op. cit.*, footnote 1, at page 83: "the legal rationale is no longer sustainable". However, in *McGovern*, Slade J. was of the opinion that a court would be usurping the function of the legislature if it did not accept the law "as it now stands": page 337.

¹³⁹ In *Everywoman's Health Centre Society*, the Court rejected the Minister's argument that "there can be no charity at law absent public consensus" para 16.

¹⁴⁰ As appears to be the view of the Charity Commission for England and Wales.

treatment in the registration and revocation of registration of organizations in a way which would offend section 15 of the Charter there might be some basis for a constitutional attack. But the appellant does not allege and certainly has not demonstrated any such discrimination in this case.¹⁴¹

The possibility that the Supreme Court might be more receptive than the Federal Court of Appeal to a challenge based on section 2 (b) of the Charter is not outside the realm of possibility. If, when advertising their products, commercial enterprises have the protection afforded by the guarantee of freedom of expression in section 2 (b) so that the Crown must then discharge its onus under section 1,¹⁴² it is difficult to see why charitable organizations should not have similar protection when pursuing their objects. Where the ability of the charity to do this depends to any significant extent on its exemption from taxation and its authority to issue tax receipts, it defies reality to say that its freedom of expression is not significantly restricted by the quantitative requirements imposed on political activities by 6.1 and 6.2.

The suggestion in *Human Life International* that successful challenges under section 15 of the Charter might be possible was taken up in *Vancouver Society* where it was argued that a denial of registration would mean that immigrant and visible minority women that the appellant proposed to assist would be deprived of benefits available to others by virtue of irrelevant personal characteristics. The argument was rejected on the ground that registration was denied as a consequence of the appellant's purposes and activities and not because of the characteristics of the intended beneficiaries. It was held that the denial of registration was the result "not of any discrimination within the meaning of s. 15, but because of the organization's inability to bring itself within established guidelines of uniform application."¹⁴³

The analysis in *Human Life International* was directed at arguments that the provisions of the *ITA*, as interpreted by reference to the legal definition of charity, infringed the Charter. The possibility that the values reflected in the Charter might be permitted to inform the interpretation of the statute was not addressed. In view of the finding of the majority in *Vancouver Society* that the proposed political activities were unobjectionable, the failure to give specific consideration to the possibility that Charter values might limit the concept of non-charitable political purposes for the purpose of interpreting provisions of the *ITA* is understandable. The majority was, however, firmly of the opinion that any significant expansion of the legal concept of charity should be effected by the legislature and not by the court. As Iacobucci J. stated:

¹⁴¹ *Human Life International*, pages 220-221.

¹⁴² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

¹⁴³ Para 208.

In my view, the fact that the *ITA* does not define “charitable”, leaving it instead to the tests enunciated by the common law, indicates the desire of Parliament to limit the class of charitable organizations to the relatively restrictive categories available under *Pemsel* and the subsequent case law.... For this Court suddenly to adopt a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system.¹⁴⁴

As the dissenting judges were of the opinion that the appeal should be allowed, they did not find it necessary or appropriate to consider whether changes to the definition of charity were desirable. Nevertheless they expressed their disagreement with the majority’s view that the courts should leave significant changes to be made by the legislature:

The task of modernizing the definition of charity has always fallen to the courts. There is no indication that Parliament has expressed dissatisfaction with this state of affairs, and it is plain that had Parliament wanted to develop a statutory definition of charity, it could have done so. It has not. This leads me to the conclusion that Parliament continues to favour judicial development of the law of charity.¹⁴⁵

While, for the same reason, the minority did not find it necessary to consider whether section 15 of the Charter had been infringed, they were of the opinion that it was undoubted that “the Charter is the repository of fundamental values which should be taken into account in the development of the common law...”¹⁴⁶

The refusal of the majority to accept that the legislature’s incorporation of the common law definition of charity impliedly recognized and accepted the historical role of the courts over the development of the common law is, at least, counter-intuitive and, of course, it is in stark contrast with the view of the High Court of Australia in *Aid/Watch*. Acceptance of the view that it is for the legislature and not for the courts to determine the effect of the Charter would be even more surprising.

10. Prospects and Possibilities for Reform

Virtually all of the many Canadian commentators whose published views have been cited above have expressed dissatisfaction with the present treatment of political activities of

¹⁴⁴ Para 200. The reasoning in the passage raises obvious questions about the appropriateness of treating the cases under the *ITA* as authoritative for purposes of the law of charitable trusts. It is notable that in the United States, where the private law governing charitable trusts is not tied to or conflated with the tax treatment of charities as in Canada, a significantly more lenient approach to the political activities of charitable trusts has been adopted: see *Scott and Ascher on Trusts* footnote 45 above, paras 38.7.7 – 38.7.9; *Restatement of the Law Third, Trusts*, para 28. Several United States cases are referred to in the articles of Professor Sheridan, above, footnote 8.

¹⁴⁵ Para 122.

¹⁴⁶ Para 123.

registered charities. The criticisms fall under a number of general categories. Some have been concerned with perceived deficiencies in the treatment of charities in the *ITA* viewed from the standpoint of a fair and efficient tax system. Others have focused on what are considered to be inappropriate restrictions on the rights of charities to influence public opinion and promote public discussion in pursuit of their objects – rights that they consider, and the Supreme Court has recognized, as inherent in the concept of a parliamentary democracy. Still other criticisms have been directed at the difficulties faced by charity administrators concerned to operate within the existing rules but faced with a degree of *de facto* discretion of the Agency that is actually enlarged by the seemingly more liberal approach endorsed by it in contrast with that applied in the Federal Court of Appeal.

Underlying the discussion in this paper is a belief that, if one puts aside the larger issues of tax policy that question the justification of conferring tax benefits on the voluntary sector, the most fundamental obstacle to reform is the uncertainty engendered by the incoherence of the governing legal principles.

It has been accepted as a cardinal principle of Canadian taxation law that “the goal” of the *ITA* is to:

... provide sufficient certainty and predictability to permit taxpayers to intelligently order their affairs.¹⁴⁷

A similar, if slightly more elaborate, statement was made in an English case:

The taxpayer is entitled to be told with some reasonable certainty in what circumstances and under what conditions liability to tax is incurred or else to be told explicitly that the circumstances and conditions of liability are just those which the Commissioners of Inland Revenue in their administrative discretion may consider appropriate.¹⁴⁸

These statements of general principle are as applicable to those in the voluntary sector who seek to obtain fiscal benefits that will enhance their ability to pursue philanthropic and other socially beneficial objectives as they were to the taxpayers whose rights were in issue in the cases in question. It is beyond doubt that the current state of the law applicable to the political activities of charitable foundations and organizations does not conform to the cardinal principles.¹⁴⁹

¹⁴⁷ *The Queen v. Canada Trustco Mortgage Company*, [2005] 2 S.C.R. 601 at para 75.

¹⁴⁸ *St. Aubyn v. Attorney-General*, [1952] A.C. 15 (H.L.) at pages 44-45 per Lord Radcliffe.

¹⁴⁹ As Juneau, *op. cit.*, footnote 54 at page 1-2 has commented, the conceptual uncertainty inevitably fosters the perception of arbitrariness in the Agency’s decisions.

There are several factors that contribute to the present uncertainty. The most fundamental is, of course, the legislative decision to confer and delimit tax benefits by reference to the common law concept of charity. The problems this has created stem in the first place from the unsatisfactory state of the principles of equity that define charitable purposes and, in particular, the judicial adoption and formulation of the concept of non-charitable political purposes. In addition, there are the doctrinal and practical difficulties involved in distinguishing activities that will be considered to be charitable from those that are ancillary and incidental to the achievement of charitable objects – a distinction that is now incorporated in the *ITA* but has no significance in the common law as traditionally interpreted, and has not been explained in the decisions of the Federal Court of Appeal or those of the Supreme Court of Canada. The uncertainty is aggravated by the failure to recognize and resolve the contradiction between adhering to, and applying, the common law and, at the same time, deferring to considerations of tax policy and implications from the provisions of the *ITA*. It seems abundantly clear that, in contrast to the position in England, Australia, and the United States, the common law that determines whether individuals are free to dispose of their property for purposes beneficial to the community is, in Canada, being shaped by fiscal considerations.

In the background to the doctrinal difficulties is the tension created by the potential effect that decisions on the interpretation of the *ITA* may have on the development of the law of charity for non-fiscal purposes. Notwithstanding the evident influence of fiscal considerations in the reasoning and the decisions on political activities and purposes, the courts have shown no willingness to accept that the “common law” they purport to apply has been modified.

Officials of Canada Revenue Agency have indicated an awareness of the complexity of the policy issues and have consulted with charity administrators in their attempts to strike the right legal balance between the competing social and fiscal considerations. As indicated above, the latest policy statements appear to reflect some views that are less restrictive than the Canadian decisions would support but without further legislative or judicial guidance there are obvious limits to the Agency’s ability to move forward.¹⁵⁰

Some of the commentators who have decried the unsatisfactory state of the relevant Canadian law as it has evolved judicially have called for a new statutory definition of charitable purposes – others have urged the courts to undertake the task. Their opinions have differed on the relative merits of the two methods of achieving reform.

Given the intractable nature of the subject and its torturous history, and the deficiencies in the legal analysis that the courts have considered appropriate, it is understandable that indications of any legislative will to embark on a redefinition of charity have been lacking.

¹⁵⁰ For a very clear and thoughtful discussion of the complexity of the issues and the restraints imposed on the Agency by the existing jurisprudence, see Juneau, *op. cit.*, footnote 54 *passim*.

Similarly, despite the window left open by the minority judges in *Vancouver Society* – and particularly in view of the interaction of fiscal and non-fiscal considerations – it may well be that the courts will be reluctant to revisit the majority’s rejection of the invitation to revamp and reformulate the definition of charitable purposes applicable in tax cases.

If, as seems most likely, calls for wholesale legislative or judicial revision of the law of charity continue to fall on deaf ears, there remains the possibility that reform of this area of the law might be achieved through incremental changes of the kind endorsed by the majority in *Vancouver Society* and that this should be the direction in which those who regard the trend of the decisions as out of touch with current values and conditions in Canadian society should concentrate their efforts.

While the existence of 6.1 and 6.2 would probably be viewed as precluding a wholesale abandonment of the concept of non-charitable political purposes based, perhaps, on considerations similar to those found persuasive in *Aid/Watch*, it is still possible that these and Charter considerations might influence the future development and scope of the concepts of political purposes and activities. For this purpose the court may be forced to consider whether more than lip-service is to be given to the notion of charity as an evolving legal concept that must reflect changing social needs and values.

It is one thing to recognize the possibility of incremental reform but a more difficult matter to envisage the nature of the changes in the law that would solve the problems of uncertainty and unpredictability or meet the criticism that the restrictions imposed by the existing law are too draconian.

One possible incremental change in the law that would not necessarily be excluded by the statutory incorporation of a concept of political activities would be to confine political purposes more narrowly than those referred to in the decisions of the Federal Court of Appeal that have built on the classification in *McGovern*.

The most significant respect in which the reasoning in the decisions has inhibited the freedom of expression of organizations seeking to obtain or retain charitable status, and which provides a contrast with the authorities in other jurisdictions, is the court’s insistence that activities primarily designed to sway public opinion on important social issues are political and not charitable. In consequence, a purpose of achieving the same result would be a political purpose and would extend the scope of that concept beyond that endorsed in previous cases such as *McGovern*.

If the analysis of the Federal Court of Appeal is to be applied strictly, no enquiry into the existence of public benefit would be relevant. It would mean that there would be no exception for cases where there may be a general consensus that public benefit would be

served.¹⁵¹ Efforts to persuade people to avoid drinking and driving or to recycle would be examples.

While the rationale for such expanded concepts of political activities and purposes may involve a rejection of the fine line between exerting pressure directly and indirectly on legislators and government, it also denies relevance to the Charter right to freedom of expression and the value that the Supreme Court¹⁵² has attributed to public discussion under Canada's democratic system of government – a value that, arguably, is insufficiently accommodated by the concept of education accepted in *Vancouver Society*. An abandonment of the extension, or of its rigid application, would remove obstacles to the evolution of the law of charity in the light of rights and values prevailing in contemporary Canadian society.¹⁵³

By confining the concepts of political purposes and activities more narrowly in the manner suggested it would still be necessary to impose some qualitative control to distinguish serious from frivolous purported contributions to public discussion. It would not follow that a requirement that contributions be well-reasoned would necessarily mean that both sides to an issue must be presented as distinct from the more lenient approach adopted by the Charity Commission in England.

The relevant decisions of the Federal Court of Appeal were referred to by the majority of the court in *Vancouver Society*, but their correctness was not in issue and was not considered. Whether a future challenge in the Supreme Court to the continuing authority of the aspects of the decisions that have been mentioned might be directed at their correctness or, more deferentially, should be characterized as merely an incremental change in the law, it does appear that, at least in the foreseeable future, any meaningful reform is likely to be achieved in that forum.

By leaving in place a narrower concept of political purposes that are not charitable, a successful challenge of the kind mentioned above would still not meet the criticisms that have been levelled at judicial attempts to explain and justify the existence of the concept. Nor would it satisfy those who have argued that, like all other purposes, political purposes should be classified as charitable or non-charitable according to whether public benefit can be proven, by reference to the *Pemsel* classification and the process of reasoning by analogy required by the current understanding of the spirit and intendment of the *Statute of*

¹⁵¹ Note the Court's emphatic rejection of the relevance of the presence or absence of a "public consensus" in *Everywoman's Health Centre*, para 16.

¹⁵² Above, footnote 95.

¹⁵³ It should also alleviate to some extent concerns about the application of – or the failure to apply – the extended definition to the activities of religious charities; see the discussion by Juneau, *op. cit.*, footnote 54 at pages 1-17 – 1-20; A.B.C. Drache, "The Changing Landscape of Political Activities for Charities" from the *National Charity Law Symposium*, (Canadian Bar Association, 2013), pages 13-14; *cf.*, *Fuaran Foundation*, above, footnote 112.

Elizabeth.¹⁵⁴ It would, however, permit such an approach to be applied outside the narrow concept. Rather than permitting the existence of 6.1 and 6.2 to freeze the further development of the law by assuming that the legislature intended to do this, it would cast on it the responsibility of defining any charitable activities that were considered to require quantitative limits and any prohibited activities in addition to the partisan activities already addressed in 6.1 and 6.2. This would be a more manageable task than the wholesale revision of the law of charity referred to by the majority in *Vancouver Society* and more consistent with the view that it is for Parliament, and not for the courts, to determine the conditions to be attached to income tax benefits.

If, in the prevailing judicial climate, incremental changes of the kind just mentioned might be the most that critics of the existing legal position could realistically anticipate, it is at least doubtful that it would be capable of inserting an adequate degree of certainty and predictability into the interpretation and application of the provisions of the *ITA*. Nor would it remove or resolve the underlying tension between purported deference to the common law and the influence of fiscal considerations. It is suggested that for such purpose what is required is to accept that the common law applies for purposes of the *ITA* to the extent that it is not excluded expressly or by clear implication in the provisions of the statute. In the absence of such exclusions, the common law should be permitted to develop regardless of fiscal consequences and it should be recognized that, to the extent that it is excluded expressly or impliedly by the provisions of the statute, it is not thereby modified. As with the incremental changes referred to above, this would cast an increased onus on the legislature not to formulate a new definition of charity but rather to focus its attention on, and describe, activities that are not considered to justify fiscal latitude and, as well, to do so free from the shackles imposed by the present unhappy intermarriage of legal and statutory concepts.

Opinions will differ on whether the potential benefits of a challenge to the law as stated and applied in the Federal Court of Appeal would be outweighed by the risk that an unsuccessful challenge would jeopardize the continued implementation and further development of the Canada Revenue Agency's more flexible administrative policies.

Despite the fact that the Supreme Court of Canada has not been called upon to confront the problems and uncertainties attaching to the doctrine of political purposes, the view has been expressed that "there is no hope of progress through the courts".¹⁵⁵ Whether or not clarification of the law should be considered as progress in itself – and keeping in mind the

¹⁵⁴ See, for example, Sheridan, "Charity versus Politics," above footnote 8 at page 67; the same view was endorsed in the Report of an Inquiry ordered by the Australian Federal Government in 2000: "Non-party political purposes or activities such as advocating on behalf of their causes or needs, contributing to the development or implementation of public policy, entering into the public debate, or seeking to change a particular law or public policy, should be assessed against the same principles as other purposes and activities": *Report of the Inquiry into the Definition of Charities and Related Organisations*, Chapter 26 (Commonwealth of Australia. 2001).

¹⁵⁵ Drache, *op. cit.*, footnote 151, page 3.

extent that legal analysis of the court in charity cases is likely to be significantly fact driven – it does not seem unduly optimistic to believe that the last word has not yet been said on the doctrine of political purposes in Canada.

Apart from the expense involved, there is, of course, the need to persuade the Supreme Court to hear a further appeal if, as could be expected, the Federal Court of Appeal adheres to its own jurisprudence. There would, however, appear to be strong grounds for a belief that an appeal that sought clarification of the law in this area would raise issues of public importance that should be heard by the Supreme Court of Canada.

The grounds include the uncertainty and unpredictability of the present law; the legitimacy of permitting fiscal considerations to affect the development of the common law of charity that applies to issues of property and civil rights within provincial jurisdiction;¹⁵⁶ the shaky juristic and precedential foundations of the *Bowman* principle, the large body of well-reasoned academic criticism it has received; its rejection by the courts in the United States and Australia; the expanded interpretation of *Bowman* accepted by the Federal Court of Appeal; the failure of that court to consider and give weight to the importance of public discussion and debate in Canada's parliamentary democracy as well as the Charter guarantee of freedom of expression; and the problems of interpretation of 6.1 and 6.2 that, for example, appear to assume that political activities that are ancillary and incidental to charitable purposes are not charitable activities although it has been held by the Supreme Court that the latter generally include non-charitable activities that are ancillary and incidental to such purposes.

11. Conclusions

It is suggested that the above discussion provides support for the following conclusions about the ability of charitable organizations and charitable foundations to engage in political activities for the purposes of, and in accordance with, the provisions of the *ITA* and the policy of the Canada Revenue Agency:

- (1) Subject to any contrary indications to be found in the *ITA*, its interpretation is governed by the general law applicable to charities. Most notably this includes the description of charitable purposes in accordance with the *Pemsel* classification and the decisions that have interpreted and applied it, including the law relating to political purposes.
- (2) Charitable organizations as well as charitable foundations must be constituted exclusively for charitable purposes.

¹⁵⁶ This is contrary to the rule stated and applied in *Pemsel* (see above footnote 7) which was, in effect, also endorsed by the High Court of Australia in *Aid/Watch*.

- (3) Charitable activities of a charitable organization are activities that advance, or further, its charitable purposes.
- (4) In Canada, political purposes include those described as such in *McGovern* as extended by the decisions of the Federal Court of Appeal.
- (5) Political purposes are not charitable and hence will detract from a body's charitable status unless they are ancillary and incidental to its charitable objects.
- (6) Political activities are those intended to advance or further political purposes.
- (7) Political purposes and activities that are ancillary or incidental to the achievement of charitable objects of an organization or foundation will not infringe the requirement that a charity be constituted exclusively for charitable purposes.
- (8) Activities that are ancillary and incidental to other activities or purposes are those that are a means to, or consequences of, their achievement and not ends in themselves.
- (9) Although, by itself, an ends and means analysis is inadequate to distinguish incidental non-charitable political activities from charitable activities, political activities will, under the existing law, be considered to be ends in themselves if they are not subordinate to a body's charitable activities and purposes.
- (10) Once it is accepted that political activities can be an acceptable means to a charitable end, they should logically be characterized as charitable activities in such cases. However, for the purpose of 6.1 and 6.2, charitable activities do not include political activities, though it would seem that they would probably include any other activities that are ancillary and incidental to an organization's charitable purposes.
- (11) Advocacy of a particular purpose should be a political activity only if it is designed to further political purposes. It should not be a political activity if it merely assumes or promotes a viewpoint that is consistent with values accepted in Canadian society, including those guaranteed by the Charter and, in consequence, does not raise doubts about the ability of courts to determine issues of public benefit.

- (12) The views of the Canada Revenue Agency are generally consistent with Canadian jurisprudence although, in some respects, they are apparently less restrictive and, arguably, in these respects to be preferred. Such respects include a narrower classification of political activities, characterizing as charitable representations made to politicians and government officials for changes in law or government policy, the public release of such representations, and the more intelligible tests for identifying ancillary and incidental political purposes and activities.
- (13) While the enactment of 6.1 and 6.2 may have caused the Canada Revenue Agency to adopt a more permissive attitude to the political activities of registered charities, its effect in law was to restrict the ability of such charities to pursue political activities that are ancillary and incidental to their charitable objects. The contrast with the position in Australia and in England is marked.
- (14) The language and general effect of 6.1 and 6.2 are difficult to reconcile with the general law governing charities that would not support a distinction between charitable activities and political activities that are ancillary and incidental to charitable purposes. There is a risk that considerations of tax policy and the distortion created by the language of the provisions will adversely affect the general law governing charities in cases where taxation is not in issue. The risk will continue as long as the link between the general law and the permissible activities of registered charities is maintained. While it is doubtless unlikely that the link will be broken in the foreseeable future, it would be an improvement if it were at least recognized judicially that, as is the case in the United States, tax law and the general law for other purposes involving charities are not necessarily coincident.
- (15) The approach of the Federal Court of Appeal, followed by the Canada Revenue Agency, contrasts with that in Australia and, to some extent, in England and Wales in the relatively muted value attributed in Canada to public debate and advocacy on controversial social issues. In the view of the Canada Revenue Agency, activities involving communications to the public that laws or governmental policies should be changed will, as a general rule, be political and not charitable. This approach ignores the emphasis on the importance of public discussion under the Canadian constitutional structure recognized by the Supreme Court of Canada in other contexts.

- (16) The insistence of the Canada Revenue Agency that charitable advocacy be well-reasoned in the sense that it must present or address serious arguments and relevant facts to the contrary on controversial social issues is a further, and arguably unrealistic and unworkable, limitation on effective political advocacy and discussion in the public forum.
- (17) While the reasoning in *Aid/Watch* might seem to be at least equally applicable to Canada, the existence and the language of 6.1 and 6.2 create serious obstacles to its acceptance for the purpose of the *ITA*. This is regrettable as the present treatment of political activities under the Act not merely incorporates the formalism and verbal sophistry that disfigures the general law of charity but gives its application further impetus. Even apart from the need for the law to be comprehensible and intelligible, there is a serious risk that the existence of the statutory provisions and judicial deference to fiscal considerations will hinder the development of the general law of charity for other purposes.
- (18) If, absent legislative intervention, the provisions of the *ITA* require the retention of a separate concept of political purposes, they do not necessarily exclude incremental reform of the concept by the Supreme Court of Canada or a reconsideration and reformulation of the relationship between the common law of charity and the law applicable for purposes of the *ITA*.¹⁵⁷

¹⁵⁷ I have had the benefit of the comments of several people on different drafts of this paper. These have included the directors of The Pemsel Case Foundation collectively and individually, and Professor Adam M. Parachin of the Faculty of Law at the University of Western Ontario. While I am most grateful for their comments, the views expressed in this paper are mine and should not be attributed to any of them or to the Pemsel Case Foundation. In my attempts to come to grips with the substantial body of literature that has accumulated on the topic since it ceased to provide a main focus for my professional interest, I have benefited greatly from the indefatigable expert assistance of Ms Ines Freeman, National Director Library Services of Miller Thomson.