Reforming the Advocacy Rules in Canadian Charity Law: Legislative Amendments, Judicial Action or Administrative Discretion?

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March 2011

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws.

Table of Contents

Acknowledgements

This thesis would not have been possible without the wisdom and guidance of my supervisor, Professor Kim Brooks, who not only advised me throughout this project but also introduced me to the endlessly fascinating and challenging field of tax policy.

To my partner, friends, colleagues and family: it is because of your insights, encouragement and the inspiring model of your lives that I was able to produce this work.

Finally, I acknowledge the professors and administrative team at McGill University's Faculty of Law for nurturing my academic growth. My success in this project is directly related to your faith in me.

Thank you all for your support. I am very grateful.

Abstract/Résumé

Reforming the Advocacy Rules in Canadian Charity Law: Legislative Amendments, Judicial Action or Administrative Discretion?

This thesis argues that the development of the political purposes doctrine in Canadian charity law has been shaped by government priorities and the Canada Revenue Agency's regulation of the charity sector. As charitable tax benefits became framed as tax expenditures in the 1970s, regulatory oversight of charities grew considerably, including rules limiting charities' political activities. This thesis shows how the Canada Revenue Agency's regulatory approach shifted with the emergence of a political agenda that situated charities as key partners in decreasing the size and role of government, with the agency then becoming more permissive of charities' advocacy activities. The thesis also highlights the role of tax officials in shaping charity regulation such as the rules limiting political activities. For charities and their regulator, court decisions offering legal guidance are rare. Instead, it is the administrative interpretation and application of legal sources that constitutes most registered charities' experience of charity law.

Réforme des règles encadrant la défense d'intérêts dans la loi canadienne sur les organismes de bienfaisance : amendements à la loi, action judiciaire ou pouvoir discrétionnaire administrative

Ce mémoire tente de démontrer comment le développement de la doctrine des fins politiques dans la loi sur les organismes de charité a été modelé selon les priorités du gouvernement et la réglementation du secteur de la bienfaisance par l'Agence du revenu du Canada (l'ARC). Alors que nous commencions à voir les avantages fiscaux pour les organismes de bienfaisance en dépenses fiscales au cours des années 1970, ceux-ci furent soumis à une surveillance réglementaire accrue, notamment dans le plafond des activités politiques admises. Ce mémoire démontre comment l'ARC a rectifié son approche réglementaire avec l'émergence d'un objectif politique vouant aux organismes de bienfaisances un statut de

partenaires dans la réduction de la taille et du rôle du gouvernement, devenant plus permissive face à leurs activités de défense d'intérêts. Ce mémoire souligne également l'influence des hauts fonctionnaires dans la réglementation des organismes de bienfaisance, notamment dans les règles encadrant les activités politiques. Pour ces organismes, comme pour l'autorité qui les contrôle, les décisions des tribunaux leur fournissent rarement des directives claires. Dans la plupart des cas, leur expérience de la loi se limite plutôt à l'interprétation administrative et à l'application des textes de loi.

Section I: The Political Purposes Doctrine in Canada

From Amnesty International to an evangelical church, the advocacy rules have troubled many a charitable organization whose activities ran afoul of its blurry lines. Greenpeace, anti-poverty groups, a political magazine, and several religious organizations have all found themselves targeted for breaking the rules that charities are not supposed to be overly political and need to stick predominantly to charitable work. Political lobbying is tricky territory for charities in Canada and if an organization engages in too many political activities, or the wrong kind, they run the risk of having their charitable status revoked. Some groups may run into trouble for their political lobbying before they are even registered as a charity, such as the Federated Anti-Poverty Groups of B.C., who were initially refused charitable status because the group spent too much time fighting poverty by seeking policy and legal changes, instead of sticking to the "purely" charitable activities of alleviating poverty by, for example, running a soup kitchen.[1] No other rule in charity law has managed to galvanize as much attention and efforts for law reform, earning its own nickname, "the advocacy chill", for its effect on the charity sector. At one point, Prime Minister Pierre Trudeau even got caught in the fray for his government's interpretation of the advocacy rules, getting heckled as a "Big Brother" in the House of Commons by a Member of Parliament.[2] In studying the history of this controversial doctrine in Canada, this thesis argues that the rules limiting political activities have evolved in tandem with increased regulation of the sector and the government's changing view of charities' role in society. Despite two concentrated periods of lobbying to reform the advocacy rules over the last four decades, this thesis asserts that the limited reform that came out of each period predominantly consisted of tax regulators exercising their administrative discretion to shift their interpretation of legal sources. This thesis situates tax officials as central to creating and shaping charity regulation; however it also argues that, while administrative discretion has significantly shifted the

[1] Globe and Mail, "Lobby Group Wins Status as Charity" Globe and Mail (September 13, 1984).
[2] Globe and Mail, "Ottawa intimidates charities, MPs say" Globe and Mail (May 2, 1978).

application and enforcement of advocacy rules, ultimately more substantive reform of the political purposes doctrine will be required.

The recent repeal of the disbursement quota in Canada and the landmark *Aid/Watch Incorporated v. Commissioner of Taxation* decision in Australia[3] make this a particularly pertinent time to review the history of the political purposes doctrine in Canadian charity law. This thesis traces the evolving relationship between government and the charity sector, beginning in the 1970s as the third sector[4] took on an increasing role in providing health, social and cultural goods and services.[5] The growth in the number of charities from the 1960s to the present day has been documented extensively.[6] With registered charities in Canada already numbering over 35,000 in 1975 and growing to almost 50,000 by 1984,[7] the speedy proliferation of charities alarmed revenue officials who wanted to ensure that what was increasingly perceived as a tax-funded sector was properly regulated. The history of the political purposes doctrine over this period provides an excellent case study to illustrate changing government and regulatory priorities. With the emerging categorization of charitable tax benefits as tax expenditures, regulatory oversight of registered charities grew substantially. A bumpy relationship plagued government regulators and the charity sector over the

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[3] *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42 (1 December 2010) [Aid/Watch].

[4] In this thesis, the terms "third sector" and "non-profit and charity sector" refer to both non-profit organizations and charities, while the term "charity sector" references organizations and foundations that specifically have registered charitable status. The former denote a much larger sector than the latter; in 2003, there were 161,000 non-profits in Canada and only a bit more than half of those non-profits were also registered charities, see: Statistics Canada, Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations (Revised 2003), online: <http://www.statcan.gc.ca/pub/61-533-x/2004001/4200353-eng.pdf>.

[5] See Neil Brooks, "The Role of the Voluntary Sector" in Jim Phillips, Bruce Chapman, and David Stevens, eds., Between State and Market: Essay on Charities Law and Policy in Canada (Montreal & Kingston: McGill-Queen's University Press, 2001) at 168-172, where he argues that the rise of the voluntary sector is directly correlated with policy measures aimed to reduce the role of the welfare state. He outlines how cuts to welfare programs were at times in step with initiatives to increase funding that encouraged the growth of voluntary organizations.

[6] See Peter Elson, "A Short History of Voluntary Sector-Government Relations in Canada" (2007) 21:1 Philanthropist 36 at 46-47; Ontario Law Reform Commission, Report on the Law of Charities (December 1996) at 304; Rod Watson, "Charity and the Canadian Income Tax: An Erratic History" (1985) 5:1 Philanthropist 3 at 13.

[7] *Ibid.*

next decades, as regulators tried to introduce more accountability for the use of charitable donations and charities adjusted to new, and at times ill-conceived, compliance burdens. Tensions only waned with the emergence of a political agenda that situated charities as key partners in decreasing the size and the role of government.

The evolution of the rules limiting charities' political activities highlights how tax officials use their administrative discretion when interpreting and applying legal sources to respond to law reform advocacy and changing government priorities. Tax regulators are central figures in creating the legal rules that most charities read and attempt to abide by. Tax policy is not created solely in the realm of the courts and the legislature. Most organizations will never see their eligibility for charitable status or the appropriateness of their political activities evaluated by a court of law. With the number of charities increasing by the tens of thousands each decade, the source for the regulations governing the ever-growing charity sector is predominantly the Canada Revenue Agency.[8]

Controversy about the rules limiting political activities has mobilized the non-profit and charity sector since the release of an administrative interpretation of the political purposes doctrine in 1978. Two periods of concentrated efforts calling for legal reform of the rules limiting charities' political activities were capped not by substantive law reform but rather by the issuance of new and more permissive administrative interpretations. Courts and the legislature have thus far largely declined to engage with reforming the political purposes doctrine. It is the administrative interpretations found within information circulars, reflecting changing government attitudes towards the charity sector, that have offered the most significant "law reform" on the rules limiting political activities. While each revised policy interpretation was initially accepted as positive, albeit limited, change, to date the reform offered has not satisfied the charity sector. Calls for

[8] The term used to reference the Canada Revenue Agency shifts throughout this thesis to reflect the name of the department during each respective time period. The Department of National Revenue, the Canada Revenue Agency, and Revenue Canada all refer to the same regulatory body.

substantive legal reform of charity law more generally and the political purposes doctrine specifically repeatedly return as a central issue for non-profit and charitable organizations in Canada.

a) The Political Purposes Doctrine

The doctrine of political purposes is the rule within the law of charities that no entity will be registered as a charity if it has political purposes. For a doctrine that can be summarized so briefly, tremendous effort has been exerted in attempts by the judiciary, legal practitioners, academics and members of the charity sector to clarify, analyze, reject and reform it. A review of the doctrine's body of case law generally stretches across centuries and borders, often beginning in 1898 with an English judgment that upheld as charitable a gift to create a Conservative club and reading room, despites the political nature of the organization, because its religious and educational purposes were considered to be charitable.[9] The typical review would then crisscross countries with a common law history, ending most recently with the widely-reported 2010 Australian High Court decision to reinstate the charitable status of Aid/Watch, whose activities analyzing foreign aid spending, previously characterized as political rather than charitable, were determined to be of public benefit and therefore charitable.[10] Around the world, the countries that inherited the law of charities (the U.S.A., Australia, Canada, England and Wales, India, Ireland, Northern Ireland, Scotland and the U.S.A.) repeatedly grapple with delineating the appropriate limitations on political activities for charities that respond to the changing role of the non-profit and charity sector while remaining consistent with both a doctrine that is over a century old and more than 600 years of charity jurisprudence.[11]

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[9] *Re Scowcroft*, [1898] 2 Ch. 638.

[10] *Supra* note 3.

[11] See e.g. Anita Randon and Perri 6, "Constraining Campaigning: The Legal Treatment of Non-Profit Policy Advocacy Across 24 Countries" (1994) 5:1 Voluntas: International Journal of Voluntary and Nonprofit Organizations 27; Peter Burnell, "Charity Law and Pressure Politics in Britain: After the Oxfam Inquiry" (1992) 3:3 Voluntas: International Journal of Voluntary and Nonprofit Organizations 311; England and Wales, Charity Commissioners, Report of the Charity Commissioners for England and Wales for the Year 1981 (London: Her Majesty's Stationary Office, 15 June 1982); Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (London and New York: Routledge, 2007), addressing the rules limiting advocacy by charities in New Zealand at 298, in the United States at 334, and in Canada at 360-361; Pieta

b) Charities and the Canadian Tax System

Charities receive a hefty "double-barreled"[12] tax subsidy, benefitting from both their tax-exempt status and from the tax incentive that taxpayers receive if they donate. In return for the privilege of this subsidy, charities must respect regulations about their activities, governance, and financial management. Registration for charitable status is administered by the Canada Revenue Agency, and the eligibility requirements for falling within the required "charitable purposes" are drawn from the common law. It is the Canada Revenue Agency that is the main charity sector regulator in Canada, administering both the registration process and all oversight activities related to maintaining charitable status. Registration as a charity is only available if an organization's objects fall under the four "heads" of charity[13] and are of benefit to the public;[14] and it devotes its resources to charitable activities.[15] Political purposes are not allowed, as, according to the doctrine of political purposes, political objectives are never charitable.[16]

c) The Political Purposes Doctrine in the Canadian Context

While the doctrine of political purposes establishes generally that a charity may not be created for political purposes, the application of this rule has evolved differently depending on the legislative and jurisprudential history of each respective common law jurisdiction. In Canada, a combination of jurisprudence,

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Woolley, "Charities Muzzled in Election" Straight.com (September 11, 2008), online: Straight <http://www.straight.com/node/161071>; "Aid/Watch Case: Important Decision on Tax Exemptions and Concessions Relating to Charitable Institutions" Arnold Bloch Leibler (December 22, 2010), online: <www.abl.com.au/ablattach/taxbul101222.pdf>.

[12] Vern Krishna, The Fundamentals of Canadian Income Tax, (Toronto: Carswell, 2006) at chapter 15.

[13] *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] AC 531 [Pemsel].

[14] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 [Vancouver Society].

[15] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, ss.149.1(1). Note that in *McGovern and Others v. Attorney General and Another*, [1982] Ch. 321 (Ch. D.) [McGovern] at 331, the third requirement for charitable status is described as follows, "the purposes of the trust must be wholly and exclusively charitable". In *McGovern*, the trust was denied charitable status because it could not pass the public benefit test- as no purpose requiring a court to determine whether a change in law was appropriate could do so. A charity that engages in political activities could pass the third requirement, but only if it's political activities were sufficiently ancillary and incidental to its entirely charitable purposes (at 342).

[16] *Bowman v. Secular* Society Ltd., [1917] A.C. 406 [*Bowman*].

legislative provisions, and administrative interpretation have established that a registered charity can never be established for political purposes and neither charitable organizations nor foundations can ever engage in partisan political activities.[17] As the rule currently stands, while charities are required to use substantially all of their resources on their charitable activities, they are allowed to engage in limited non-partisan political activities,[18] as long as these activities are ancillary and incidental to an organization's charitable purposes. The "substantially all" rule is generally interpreted by the Canada Revenue Agency to mean that no more than 10% of a registered charity's resources can be spent on political activities every year.[19] Failure to comply with the regulations limiting a charity's activities can result in immediate revocation of charitable status.[20]

d) The Political Purposes Doctrine's Chilling Effect on the Charity Sector

For several decades, representatives of the non-profit and charity sector in Canada have expressed frustration with the rules limiting charities' political activities. Complaints about the political purposes doctrine often focus on compliance difficulties. Charity law experts argue that it is unclear what exactly is considered a political activity, and how to quantify the resources spent on any such activities.[21] Many also protest that the rule is an unfair suppression of charities' ability to participate in public policy debates, arguing that charities should not be limited in their ability to advocate and share their expertise on issues relating to their charitable purposes. As the primary service providers and advocates for

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[17] Canada Revenue Agency, Policy Statement CPS–022, "Political Activities" (September 2, 2003).

[18] Note that partisan political activities are never allowed. It is the rules limiting charities' non-partisan political activities that are the focus of this thesis. For the reader's ease, this thesis refers to non-partisan political activities as "political activities", and will specify partisan political activities where appropriate.

[19] *Supra* note 17. Note that the Canada Revenue Agency reinterpreted the ancillary and incidental rule on a sliding scale in 2003, so that smaller charities may spend up to 20% of their resources on political activities, and, the agency is open to charity averaging its spending on political activities over several years, and then pointing out why a particular year was exceptional and required the organization to exceed its limitations on political activities.

[20] *Ibid.*

[21] Public expressions of frustration can be traced from 1977 with L.A. Sheridan, "The Charpol Family Quiz (A game of skill and luck played on the boundaries of charity and politics)" (1977) 2:1 Philanthropist 14; to 2010 with Blake Bromley, "Should Advocacy Be Charitable?" Woodstock Sentinel-Review (December 7, 2010), online: Woodstock Sentinel-Review <http://www.woodstocksentinelreview.com/ArticleDisplay.aspx?e=2882805>.

many of Canada's most marginalized populations, workers and volunteers at registered charities are well-placed to comment on legal and policy reforms relating to major societal dilemmas such as, amongst many other examples, poverty, low-income housing, homelessness, racism, barriers facing new immigrants and refugees, and drug addiction.

Charities and non-profits that would like to access the benefits of charitable status are often eager to engage in advocacy to ameliorate the lives of the marginalized people they work with, but are limited in their ability to ask the government to change or maintain legislation and policy, as this may be considered political activity subject to strict limitations under charity law. Charities may also be interested in advocating in the interests of their sector, to increase the available funding for their organizations, for example, and worry that this too may be considered political activity. There are also a number of non-profit organizations without charitable status that may at first glance seem like the type of organizations that Canadians would want to be eligible. A lack of clarity in the rules or the nature of how the political purposes doctrine is currently applied, however, may preclude them from applying for and successfully receiving this hefty tax subsidy.

Due to limitations imposed on their political activities, and ambiguity about the content of the current rules, many members of the charity sector complain of a chilling effect on their ability to participate in civil society and advocate in the interests of their organizations and the people they work with. Considering the expertise within the charity sector on matters as vast and significant as cultural heritage, arts, poverty, religious issues, education, and health, amongst others, they argue that such a chilling effect on charities' participation is a considerable loss for Canadian society. Unsurprisingly, complaints about the limitations on political activities by charities have been most predominant after 1970, in years marked by the increased role of the charity sector in the modern welfare state and by growing regulatory oversight for the sector.

e) Two Periods of Law Reform Advocacy: 1978-1987 and 1994-2003

This thesis undertakes a historical retrospective of the Canadian struggle with the political purposes doctrine, tracing the trajectory of two concentrated periods of public debate about whether to decrease or even eliminate the limitations on charities engaging in political activities. The first period began in 1978 with the release of an information circular by the Department of National Revenue containing a strict interpretation of the political purposes doctrine.[22] After a sustained period of law reform advocacy, this first period ended in 1987 following legislative amendments to the *Income Tax Act* and the release of a more permissive information circular. The second period began in 1994 with the publication of a full-page ad in the Globe and Mail by Human Life International, a group advocating against abortion, defending itself from Revenue Canada's revocation of its charitable status for excessive political activities.[23] Again following a number of efforts to reform the rules limiting political activities, this second period ended in 2003 with the release of yet another and more permissive policy statement from the Canada Revenue Agency. Each period of debate included administrative, judicial and public scrutiny of the eligibility of several organizations for charitable status whose activities could be deemed political. The law reform momentum reached such heights during each period that calls for judicial intervention intensified and several detailed proposals for legislative amendments to the *Income Tax Act* were forwarded. Despite the wide engagement of the third sector, charity law experts, legislative actors, and the attention of the courts, each period was ultimately quelled instead by limited, and ultimately unsatisfactory government action.

f) Recent Legal Changes in Canada and Abroad

A historical retrospective on Canadian public debate about reforming the rules limiting charities' political activities is particularly pertinent in the wake of recent law reform both internationally and in Canada. First, in the last months of 2010,

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[22] Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 Philanthropist 35 at 35.
[23] James Phillips, "Crossing the Line from 'Charitable' to 'Political'" (1995) 12:4 Philanthropist 33 at 33.

the High Court of Australia released its decision in *Aid/Watch Incorporated v. Commissioner of Taxation*.[24] It is arguably the most noteworthy court decision evaluating the political purposes doctrine since the High Court of England and Wales denied charitable status to Amnesty International in *McGovern and Others v. Attorney General and Another* because of the political nature of some of the organization's purposes.[25] *Aid/Watch* marks a significant departure for the political purposes doctrine in common law countries, with the Australian High Court deciding that the political purposes doctrine as expressed in *McGovern* does not in fact exist in Australia. The decision is not binding in Canada, where our rules about political activities have evolved differently, but it marks an important evolution for common law countries that share the common law inheritance of charity law. In the shadow of *Aid/Watch*, with the number of charities in Canada having increased 72% since the height of the first legal reform period in 1984,[26] a retrospective exploration of efforts to reform the political purposes doctrine offers valuable insights on the history and future of charity law regulation in Canada.

The second major legal change came with the reform of components of the disbursement quota, eliminating the rule requiring that charities use a fixed minimum of the charitable donations they receive on charitable activities. Introduced in 1976,[27] charities faced similar difficulties in applying the disbursement quota as they have with the rules concerning political activities. The distinction between charitable and non-charitable activities was difficult to ascertain and challenging to quantify in terms of resources allocated. The rules limiting political activities were also woven into the disbursement quota requirements, as no resources spent on political activities could be used to meet a charity's disbursement quota. The successful lobbying by the charity sector for the repeal of much of the disbursement quota may be the most significant

[24] *Supra* note 3.
[25] *McGovern*, *supra* note 15.
[26] Charities numbered 49, 673 on January 23, 1984, see *Watson*, *supra* note 6 at 13; At the end of 2010, the number had risen to 85,477 registered charities, see Canada Revenue Agency, Charities Listings, online: <http://www.cra-arc.gc.ca/chrts-gvng/lstngs>.
[27] Karen J. Cooper and Terrance S. Carter, "Significant Benefit for Charities in 2010 Budget DQ Reform" (March 8, 2010) 197 Charity Law Bulletin at 1.

compliance-related law reform victory for the Canadian charity sector in recent history,[28] and creates a reflective opportunity for considering the appropriate next steps for the political purposes doctrine as it currently stands in Canadian law.

Section II of this thesis, In Defense of Allowable Political Activities (1978-1987) and Section III, Thawing the Advocacy Chill (1994-2003) trace the trajectory of incidents, reports, cases and government action through each law reform period. Each story begins with the events that brought public attention to the political purposes doctrine, then turns to the flurry of judicial, charity sector and government activity that followed, and concludes with an analysis of the administrative action that capped each respective period. Section IV, What Next for the Political Purposes Doctrine in Canada? Hope from Afar, Hope from Nearby, evaluates recent developments in charity law that have the potential to alter the law reform terrain for the doctrine of political purposes, looking first overseas to recent legislative reform in the United Kingdom and the *Aid/Watch* decision in Australia, and then locally to the repeal of the disbursement quota in Canada. Section V concludes by offering several insights that emerge from this study about the role of tax officials in charity regulation, potential best practices for rule-making in tax law, the value of multiple sources for law reform, and the importance of consulting stakeholders and experts in the law reform process.

A main premise of this thesis is that the development of tax policy is a multi-sited process that is not born solely within legislative offices or courtrooms. The priorities of multiple stakeholders motivate policy development, and the prevailing attitudes towards a particular sector influence the interpretation and application of the laws and regulations governing it. In support of this premise, the methodology of this thesis relies on the assumption that sources from the key actors in a tax policy context best inform such a historical legal inquiry. The main sources employed here seek to capture the evolving positions of revenue officials,

[28] "Imagine Canada Responds to Budget 2010" Imagine Canada (March 4, 2010), online: Newswire <http://www.newswire.ca/en/releases/archive/March2010/04/c7239.html>.

charity lawyers, politicians, academics, and the charity sector. Key sources include the Philanthropist, a Canadian non-profit law journal founded in 1972 that captures in near real-time the main legal concerns of the charity sector throughout the timeline in this study.[29] The Canada Revenue Agency's interpretation bulletins, policy statements and technical interpretations offer a historical photograph of the agency's changing regulatory approach towards the charity sector and its evolving application of the political purposes doctrine. Various government green papers, discussion papers and budget statements serve to illustrate the Department of Finance and revenue officials' priorities in charity regulation and attitudes towards the sector, just as the House of Commons and Senate debates highlight elected representatives and senators' priorities and those of their constituencies. The cited case law highlights the Canadian judiciary's approach to charity law reform and its conceptualization of the court's limited role. Commissions, roundtables and publications by lobbying groups bringing together various stakeholders capture historical moments of national consensus on the leading issues of the day for the third sector, and, when they participated, government regulators. Finally, media sources offer a glimpse of the tax policy debates that caught the public eye, allowing the researcher and the reader to view, briefly, the values and priorities at another moment in time. In addition to the legal-historical nature of the methodology employed in this project, the thesis also engages in a comparative law analysis, turning to the United Kingdom and Australia to highlight recent reforms of the political purposes doctrine in each respective jurisdiction.

Section II: In Defense of Allowable Political Activities (1978-1987)

This legal-historical study begins at the end of the 1970s, during a period of increased government regulation of charities and exponential growth for the charity sector. The Department of National Revenue's attempt to articulate the rules limiting charities' advocacy activities, and the charity sector's reluctance to

[29] The Philanthropist, Chronology and History, online: <http://thephilanthropist.ca/index.php/phil/pages/view/chronology>.

accept the agency's regulatory framework reflect the tenuous relations between charities and their regulator at the time. In 1978, the first period of public debate about the political purposes doctrine was opened by the Department of National Revenue's release of an information circular for charities on political activities. The department's highly restrictive interpretation of charities' ability to engage in political activities infuriated the charity sector and led to demands for the circular's withdrawal in both houses of parliament. Calls for law reform continued, as in the years after the circular's release, the Department of National Revenue applied a stricter approach to regulating charities' political activities and denying charitable status to "borderline" organizations.

Canada was not the only place where the political purposes doctrine was capturing significant attention in the late 1970s and early 1980s. In 1983, right in the middle of intense activity and debate concerning charities ability to engage in political activities in Canada, the High Court in England released *McGovern*, a leading decision on the political purposes doctrine.[30] *McGovern* denied charitable status to Amnesty International because some of its purposes were deemed to be political and not charitable. On the Canadian side of the Atlantic Ocean, administrative and court decisions echoed the strict *McGovern* approach, denying, threatening or revoking the charitable status of organizations participating in excessive political activities.

In response to the prevailing administrative interpretation of the doctrine and court decisions of the day, the charity sector and legal practitioners began to work on proposals for legislative amendments that would clarify and expand the range of political activities permissible in Canada. After considerable pressure from elected representatives and the charity sector, the federal government signaled to the sector that the government was prepared to consider such proposals. Finally, legislative amendments were in fact adopted in 1986, although they offered little of the substantial relief proposed by the charity sector. The 1986 changes were

[30] *McGovern*, *supra* note 15.

initially accepted as a gesture of positive change because they clarified that limited political activities were in fact acceptable at a time when it seemed like any advocacy by charities whatsoever was off limits. Fairly quickly, however, the charity sector began to call again for substantive law reform, and another controversial event in 1994 lead to a second firestorm and subsequent period of lobbying for legal reform. Each phase of the first period of law reform, from the release of the information circular in 1978 to the new information circular issued in 1987, is explored in detail below.

The 1978 Information Circular on Political Objects and Activities

a) The Regulatory Context in 1978

The Department of National Revenue's information circular, "Registered Charities: Political Objects and Activities",[31] originally released with the intention of guiding charities as to the current state of the law,[32] found a most unfriendly reception in early 1978.[33] The circular took a very expansive approach to interpreting the political purposes doctrine, prohibiting many acts of advocacy that a charity might undertake. Such a strict approach was gaining popularity amongst government administrative bodies given rising concerns about the growing charity sector, a lack of sector regulation, and the perception that charities were increasingly engaging in advocacy activities. As early as 1969, the Charity Commissioners of England and Wales expressed concern over the growth in advocacy work undertaken by charities,

> One contemporary development that has given us some concern has been the increasing desire of voluntary organizations for "involvement" in the causes with which their work is connected. Many organizations now feel that it is not sufficient simply to alleviate distress arising from particular social conditions or even to go further and collect and disseminate information about the problems they encounter. They feel compelled also to draw attention as forcibly as possible to the needs which they think are

[31] Canada, Department of National Revenue, Information Circular No. 78-3, "Registered Charities: Political Objects and Activities" (1978) [1978 information circular].
[32] *Supra* note 22 at 36.
[33] *Ibid.* See also Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law (Philanthropist Award 1993-94 Honourable Mention)" (1995) 12:4 Philanthropist 3 at 17.

> not being met, to rouse the conscience of the public to demand action and to press for effective official provision to be made to meet those needs.[34]

The Charity Commissioners of England and Wales reminded charities of the risk of revocation of their charitable status if their organization engaged in excessive or non-permissible political activities. Arguably, the Charity Commissioners of England and Wales's perception that organizations were increasingly pressing for social change may not have been entirely accurate. It may also have been the overall increase in the volume of charities and the diversity of charitable causes that caught the attention of tax officials on both sides of the Atlantic Ocean, making any advocacy work seem more frequent because of the sheer number of organizations engaging in such activities.

At the same time as the charity sector grew tremendously, perceptions were shifting to view charities as the beneficiaries of tax dollars, with the resulting need for charities to demonstrate more accountability in the use of their funds. In the late 1960s and throughout the 1970s, revenue officials were asked to take on greater administrative responsibility over the growing charity sector. Several mechanisms were introduced to enhance regulation and decrease tax fraud. The development of a more robust regulatory regime was initiated through a series of tax reforms, particularly in the years following the public consultations on tax reform during the Royal Commission on Taxation and the release of its report.

First, in 1967, the Department of National Revenue introduced a mandatory registration system to address abuse in the charity sector involving receipts being issued for amounts higher than the actual donation, which increased the tax benefit for donors.[35] The new system required the registration of all current and future charitable organizations, and while most organizations that considered themselves charitable were successful in their applications, Rod Watson notes that some organizations did lose their charitable status in the registration process,

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[34] L.A. Sheridan, "Charitable Causes, Political Causes and Involvement" (1980) 2:4 Philanthropist 5 at 2.
[35] *Watson*, *supra* note 6 at 11.

> Processing 34,630 applications, the government approved 31, 373 organizations for registration in 1967. In 1968, 3,123 out of 4,322 applications were approved and thereafter about half of an average of 2,000 annual applications was approved. (The effects of mandatory registration were, it should be noted, not entirely benign. Such groups as the Union of Ontario Indians and the International Fund for Animal Welfare were deprived of their charitable status.)[36]

The increase of regulatory oversight continued after the introduction of mandatory registration. First, the government felt the need to respond to the charity sector and charity law practitioners' frustration about the lack of attention that was paid to the more intricate legal issues facing charities in the Royal Commission on Taxation's report.[37] To address the sector's displeasure, a Green Paper, "The Tax Treatment of Charities" was prepared by the Department of Finance in 1975, after a concerted effort to gather input from the charity sector and charity law experts.[38]The Green Paper adopted the language of tax expenditures, increasingly popular in the U.S.A. at the time and now widely used by tax policy scholars and governments to quantify incentives given through the tax system. Tax expenditure analysis involves the conceptualization of tax benefits as equivalent to direct spending programs.[39] In framing the tax benefits provided to charities as an actual financial cost for the Canadian state, the Green Paper emphasized the importance of the government's regulatory role in ensuring that these tax dollars were used appropriately so "that the people of Canada obtain maximum benefit."[40] The Green Paper's recommendations for legislative action followed two basic themes a) create mechanisms to ensure that charities are more accountable to the public and b) adapt charity law to the realities of an evolving charity sector.[41]

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[36] *Ibid.*
[37] Canada, Department of Finance, The Tax Treatment of Charities (Discussion Paper) (Ottawa: June 1975) [Green Paper].
[38] *Ibid.* See also Ontario Law Reform Commission, Report on the Law of Charities (December 1996) at 304-305.
[39] See Stanley S. Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures" (1970) vol. 83, no. 4 Harvard Law Review 705-38. For more extensive treatment of the subject, see Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures (Cambridge, MA: Harvard University Press, 1973
[40] *Supra* note 37 at 5.
[41] Ontario, *supra* note 38 at 304.

Most of the Green Paper's recommendations are reflected in the subsequent legislative enactments of 1976-77, laying down the framework for the regulatory regime that continues to exist today.[42] The legislation established a distinct category for charitable organizations in recognition of the growing use of the corporate structure, and created a separate foundation category with two distinct types of foundations, private and public. A disbursement quota was introduced for charitable organizations, with the goal of ensuring that charitable donations were spent on charitable rather than administrative, fundraising or political activities, all of which were excluded from being used to meet the yearly quota. New disbursement quotas were introduced for both types of foundations. The requirement that charities complete an information return available to the public was introduced, as well as limits on the type of business activities that charities could undertake, requiring that they be related to the group's charitable purposes.

It was in this larger context, a building period for the charity law regulatory regime, that the information circular on political activities was released, only three years after the Green Paper and closely following the legislative changes in 1976-1977. The Green Paper was careful to nod respectfully to the valuable cultural and social goods and services provided by the charity sector,[43] but it also sent a strong message that charities benefited greatly from tax subsidies and to ensure the proper use of these benefits, the federal revenue agency needed to step up its regulatory role. Charities faced a changing landscape as they adjusted to the new level of supervision that the Department of National Revenue was taking on, and simultaneously, took on a much larger role in providing health and social services and agitating for social welfare in Canada.[44]

[42] *Ibid* at 307-308.
[43] *Ibid* at 304.
[44] See e.g. *supra* note 5. See also *Elson*, *supra* note 6.

b) Administrative Interpretation, Take One: The 1978 Information Circular

Although the outcries that followed its release may indicate otherwise, the 1978 information circular did not introduce or interpret a new rule on political activities. Its release did not coincide with a common law decision or a legislative amendment leading to a change in law. Rather, the circular's release was part of the larger dynamic with the Department of National Revenue assuming its role as charity sector regulator. One aspect of the work of a regulatory agency is to provide information to taxpayers on the law as the department interprets it at the time, to help taxpayers make better-informed compliance decisions. Two events are said to have sparked the decision of the Department of National Revenue to draft the circular outlining the agency's understanding of the rules limiting political activities.

First, in 1976, a Christian organization organized a demonstration to show their support for Christians in Communist countries who were experiencing repression.[45] The organization, Christian Prisoners Release International, was apparently warned by the Department of National Revenue that their demonstration constituted unacceptable political activities and their charitable status could be revoked. The organization's charitable status was then revoked not because of their political activities but because they did not file their required public information returns. Much like other organizations such as The Manitoba Foundation for Canadian Studies, whose story shall be told shortly, upon applying to have their status reinstated, the Department of National Revenue refused, citing their political activities as precluding them from eligibility. When this issue was raised in the House of Commons, then Minister of Revenue Jack Cullen responded by stating his agreement that that church had indeed broken the rules limiting a charity's political activities. The minister then stated that he would ask

[45] Peter Elson, A Historical Institutional Analysis of Voluntary Sector/Government Relations in Canada (PhD Thesis, Adult Education and Community Development, University of Toronto, 2008) [unpublished] at 87–88.

the Department of National Revenue to look into the rules about political activities.[46]

In 1977, a number of women's organizations raised concerns that they were not eligible for charitable status because of their advocacy work on behalf of women's equality. The Minister of Revenue at the time, Monique Bégin, "empathized with the delegation of women's groups and subsequently directed her officials to investigate what was considered acceptable political activities by charities in other countries, particularly Great Britain."[47]The 1978 information circular was created at the behest of both the Minister of Revenue and taxpayers seeking to understand their options within the tax system.

The controversial information circular began by outlining that an organization whose main purposes were political would never qualify for charitable status, but also explained the ancillary and incidental rule, which established that an organization whose main purpose is charitable but has a related and subordinate political purpose can still be eligible for charitable status as long as it does not engage in any prohibited political activities.[48] The circular also stated clearly that charitable foundations, unlike charitable organizations, could never engage in political activities because provisions of the *Income Tax Act* specify that their purposes need to be exclusively charitable.[49] Political objects were defined as any purpose to maintain, create or change any policy or law of government, and any purpose that supports a political party.

The most controversial aspect of the circular was the section outlining the activities that were specifically prohibited, including:

[46] *Ibid.* at 88.
[47] *Ibid.* at 89.
[48] *Supra* note 31 at para. 2.
[49] *Ibid.* at para. 2.

- lobbying government, through "an organized campaign to influence members of a legislative body to vote or act according to the special interest of a group",[50]

- holding a demonstration, if its purposes are not merely to publicize the charity, but to "embarrass or apply pressure upon a government",[51]

- conducting a campaign where people send form letters to their elected representatives protesting a particular issue,[52]

- writing a letter to the editor, where the charity tries "to sway public opinion for or against a political issue",[53]

- publishing anything that presents only one side of an issue, rather than "impartial and objective coverage",[54]and

- presenting only one side of a political issue at a conference or a workshop.[55]

The government repeatedly asserted that information circular simply contained a restatement of the current law, as the agency understood it. As will be described below, the legal basis for prohibiting many of the activities listed in the information circular is tenuous at best.

c) Precarious Footing: An Administrative Interpretation Based on Inconsistent Case Law

The role of the Department of National Revenue's information circulars is to inform interested parties of the current state of the law, as the department understands it. The trouble with the 1978 information circular was that its restrictive list of permissible political activities was based on inconsistent and inconclusive jurisprudence. Charity law scholar Adam Parachin comments, "what is most striking about ... descriptions of the doctrine of political purposes is their

[50] *Ibid.* at para. 5(c).
[51] *Ibid.* at para. 5(d).
[52] *Ibid.* at para. 5(e).
[53] *Ibid.* at para. 5(f).
[54] *Ibid.* at para. 5(g).
[55] *Ibid.* at para. 5(h).

historical inaccuracy".[56]At the time of the information circular's release, courts, legal scholars and charity law practitioners were unable to agree on a clear understanding of the doctrine of political purposes in Canada, making it difficult for the Department of National Revenue to release a statement that even a majority of knowledgeable parties would support. In this context, it was most controversial that the Department of National Revenue chose to create a detailed list of prohibited activities. Allowing a wider range of activities or providing broader guidelines with less specific prohibitions would have been more appropriate considering the contradictions in the jurisprudence.

Entire treatises have been written on the doctrine of political purposes in Canada, but here a brief summary of researchers' statements that highlight the inconstancies found in the case law sufficiently establish how challenging it should have been for the Department of National Revenue to make such detailed and decisive statements about the state of the law. The leading case on the political purposes doctrine remains *Bowman v. Secular Society Ltd*,[57] where Lord Parker declared with considerable confidence: "a trust for the attainment of political objects has always been held invalid not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit."[58]A large number of decisions have echoed Lord Parker's confidence about the clear rejection of political objects in charity law. These decisions emphasize that courts need to respect parliamentary supremacy and underscore that it is not the court's role to decide whether laws should be changed.

[56] Adam M. Parachin, The Doctrine of Political Purposes in Charity Law: Its Troubled History and Problematic Rationales (LL.M. Thesis, University of Toronto, 2004) [unpublished] at 11.
[57] *Supra* note 16.
[58] *Ibid.* at paras. 442-443.

Despite so many courts following *Bowman*'s lead, however, Lord Parker's statement has also received heavy and consistent criticism.[59] Scholars express shock that Lord Parker's statement ignores the key role that courts have occupied in charitable status cases: identifying whether a charity is for public benefit. A fundamental aspect of determining eligibility for charitable status, the public benefit test, involves judges doing exactly what Lord Parker claims courts cannot do – establishing whether a proposed purpose is for the public benefit. If the prospective charity's purposes also fall under a charitable head, its application will be successful. Paul Michell describes the assessment in *Bowman* as "inconsistent with courts general assertion of their ability- indeed of their duty- to assess public benefit in the law of charities".[60] Michell also rejects Lord Parker's claim in *Bowman* that all courts had refused to accept political purposes as charitable, citing a number of law reform oriented organizations that obtained charitable status before *Bowman*, some of which continue to have charitable status today, including the John Howard Society, an organization named after the famous prisoner reformer and dedicated to prison reform, prison rehabilitation and reintegration.[61]

Professor L.A. Sheridan, in turn, berates Lord Parker's understanding of the court's role as "a true pathos" and "a strain on credulity" as "there are few people better qualified than judges to assess whether a change in the law would be for the public benefit".[62] Sheridan similarly rejects Bowman's catch-all assumption that political purposes can never be considered charitable, citing a number of cases that came both before and after *Bowman*.[63]More generally, Sheridan's conviction that the political purposes doctrine was highly contradictory was so strong that he designed the "The Charpol Family Quiz (A game of skill and luck played on the

[59] See e.g. *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31 [*National Anti-Vivisection*]; Re The Trusts of the Arthur McDougall Fund [1957] 1 W.L.R. 81; Re Co-operative College of Canada and Saskatchewan Human Rights Commission (1975) 64 D.L.R. (3d) 531, 538.
[60] *Michell*, *supra* note 33 at 6.
[61] *Ibid.* See also John Howard Society of Canada, History of John Howard Societies in Canada, online: <http://www.johnhoward.ca/about/>.
[62] *Supra* note 34 at 12.
[63] *Sheridan*, *supra* note 21 at 16.

boundaries of charity and politics)" to highlight the lack of coherence over time by courts determining the difference between charitable and political purposes and whether charities could pursue political activities.

Most relevant in our evaluation of the legal standing of the 1978 information circular is the identification by Sheridan, Michell and legal practitioner Henry G. Intven of the ancillary purposes doctrine. This doctrine of charity law has often been cited as part of the political purposes doctrine, and it allows charities to advocate to change, maintain or establish government legislation or policy, as long as the activities are related to the organization's charitable purpose and are subordinate to the charity's other activities.[64] Sheridan describes such political activities as generally acceptable as long as they do not become the main object or activity of the charity.[65] Intven also asserts that most jurisprudence supports the doctrine that a charity may pursue a change of law for a charitable purpose, although he notes that courts have been much more likely to accept charitable lobbying that pursues a well-reasoned argument rather than a public "high-profile" campaign.[66]

Considering the availability of the ancillary purposes doctrine, what then was the legal basis for the list of prohibited political activities in the Department of National Revenue's information circular? Why list presenting a brief to parliamentary committees as acceptable activity,[67] while stating with confidence that organizing a campaign to lobby a government is not?[68] What made the Department of National Revenue decide specifically that both letters to the editor with political opinions and presenting only one side of an issue at a workshop were unacceptable? The jurisprudence and scholarly references emphasize that rather than the particular activities undertaken, the limitations on political activities have more to do with whether the political activities are sufficiently

[64] *Ibid.* at 24; *Michell*, *supra* note 33 at 8; *supra* note 22 at 42.
[65] *Sheridan*, *supra* note 21 at 24.
[66] *Supra* note 22 at 42.
[67] *Supra* note 31 at para. 5(a).
[68] *Supra* note 31 at para. 5(c).

related to the charity's objects, and the percentage of political activities undertaken in comparison to the percentage of charitable activities pursued.

It is difficult to understand the logic behind the list of prohibited activities in the information circular, which seems to generally ignore the existence of the ancillary purposes doctrine and to exclude almost all advocacy work as not permissible. Surely the administrative interpretation did not, however, emerge from thin air or simply dubious analytical work. The best possible explanation for the Department of National Revenue's list of prohibited political activities seems to be that it was based on a similar understanding of the jurisprudence as Intven, identifying a preference by the courts for allowing political activities pursued via rational arguments rather than highly publicized and sentimental campaigns. This is a particularly difficult distinction to articulate into an information guide for charities, and one that is uncertain in the case law. For an area of law summarized as "complex and contradictory" where the "dividing line between 'charity' and 'politics' is fuzzy",[69] the Department of National Revenue was stepping into treacherous waters when it (over)articulated, with much confidence, the state of the political purposes doctrine in its 1978 information circular.

d) Outcries in Both Houses of Parliament: The Charity Sector Responds

For the charity sector, this expansive articulation of the doctrine of political purposes was unheard of and reaction to the information circular was swift and strong. Leading charity law practitioner Arthur Drache commented on the aftermath of the information circular's release, "when the charities learned of the issuance of the Circular, the screams were loud and long as it appeared effectively to forbid virtually any comment about public issues. Even writing a letter to the editor of a newspaper seemed to be forbidden."[70]

Charities immediately began protesting to their Members of Parliament and Senators, explaining the chilling effect that the circular had on any efforts by

[69] Young, Margaret, and Library of Parliament: Research Branch. Charities and Political Activities. Ottawa, 1984 at 5.
[70] Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 Philanthropist 21 at 22.

charities to improve the situation of either their organizations or the communities they served. Some members of the charity sector interpreted the tone and limitations in the circular as expressing a distrust of using what were increasingly seen as tax dollars to fund lobbying against the government.[71] The growing role of charities in providing social and health services was cited extensively, and, as a functional aspect of their increasing responsibilities, charities spoke of the importance of being able to advocate on behalf of the communities they worked with. Charities and their allies situated their advocacy work as a vital contribution towards maintaining a vibrant and democratic civil society, and listed the types of groups affected by the information circular on numerous occasions, such as the paragraph below:

> Charities concerned with cancer, or respiratory or heart-related ailments could not promote a government policy which would educate school children about the dangers of smoking. Charities involved in assisting the handicapped could not promote a policy of accessibility to municipal, provincial or federal government buildings. International relief charities could not promote direct government aid in a case of disastrous famine or flood in a Third World country. Even a program aimed at changing the Income Tax Act to eliminate some of the problems being discussed today would, under the information circular, constitute a political activity which could result in the revocation of the charities' registration and forfeiture of their assets to the Crown.[72]

It was surely a moment of irony for charities when they considered the appropriate path for expressing their dissatisfaction with this law or policy of government without running afoul of the restrictive information circular. Communicating with their elected representatives was, thankfully, described as permissible in the information circular, as long as charities were only representing themselves and not seeking more generally to change the law, although, as Intven suggests, putting together a larger campaign to change the charity law framework in Canada would not be acceptable.[73]

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[71] *Supra* note 45 at 89.
[72] *Supra* note 22.
[73] *Supra* note 31 at para. 5(b).

It appears that charities communicated their outrage in such large numbers that the issue was raised in both the Senate and the House of Commons on several occasions, eventually requiring intervention by the Prime Minister himself.[74] Amongst other examples, on May 1, 1978, Senator John M. Godfrey questioned the Minister of National Revenue Joseph Guay on the information circular, arguing that it did not represent the law as it currently stood.[75]As the one-time Chair of the Canadian Tax Foundation, a corporate lawyer and a man heavily involved in the charity sector, Senator Godfrey's assessment carried considerable weight.[76] Senator Godfrey was so concerned about the issue that he wrote a follow-up letter to Revenue Minister Joseph Guay the very next day.[77]

The issue also exploded in the House of Commons on the same day as it was raised in the Senate.[78] Conservative Leader Joseph Clark and other Conservative Members of Parliament insisted that the circular be withdrawn, referring to it as "a highly intimidating document",[79] and the exchange became so heated that one Member of Parliament heckled Prime Minister Trudeau, calling him "Big Brother"[80] and insinuating that the state had stretched its regulatory role into Orwellian proportions. There was even some suggestion that specific Cabinet members or ministers might be trying to censor certain charitable organizations, such as churches.[81] Declarations that the circular simply represented an interpretation of the law as it currently stood, providing guidance that had been requested by charities, did little to quiet protest. Finally, Prime Minister Trudeau replied that the circular would be withdrawn, although, as Arthur Drache notes,

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[74] *Supra* note 70 at 22.
[75] Note that the Honourable Joseph-Phillippe Guay was the outgoing Minister of National Revenue at the time. He had been appointed to the Senate in the days before but no replacement had been named. See Globe and Mail, "Ottawa intimidates charities, MPs say" Globe and Mail (May 2, 1978).
[76] Canada, Senate, *Debates of the Senate (Hansard)*, 37th Leg., 1st sess., Vol. 139 Issue 15 (14 March 2001) (Hon. Joyce Fairbairn).
[77] *Supra* note 22 at 49-50.
[78] Supra note 2.
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*

> … He commented that the withdrawal would be of no consequence. What he appeared to mean was that if the Circular merely restated the law as it was understood, the question of whether the Circular was "outstanding" or not made not a whit of difference. While he was probably correct in law, his attitude did [not] seem to soothe the fevered charitable brows. [82]

A second circular was promised to replace the original one, but a replacement circular was not issued for nine years, until 1987.[83] On several accounts however, Revenue Canada, continued to act as if it represented the correct interpretation of the law restricting charities' political activities.[84] Legal practitioners report increased difficulties in obtaining charitable status for organizations that were perceived by Revenue Canada to be too advocacy oriented, and several organizations found their charitable status challenged because the agency believed that the charities were violating the political purposes doctrine.[85] What followed were several years of controversial cases, which either found their way into the courts, or threatened to do so.

Increased Vigilance on Political Activities Post-1978: A Case-by-Case Review

The continued concern with regulating the political activities of charities despite the withdrawal of the 1978 information circular is well evidenced by the trail of organizations denied charitable status or threatened with revocation in the years following because they had one or more political purposes or their charitable purposes were suspected to include engaging in political activities. Occurring in the wider context of a deteriorating relationship between the charity sector and government regulators, the cases described below, and the organizing in the charity sector in response to them, establish the environment that led the charity sector to call for legislative action to reform the political purposes doctrine. Although the particular legislative amendments proposed by members of the charity sector were ultimately not taken up, the pressure for amendments, as well as some charitable organizations' willingness to challenge denials of charitable registration based on the political purposes doctrine, ultimately led the

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[82] *Supra* note 70 at 22.
[83] *Supra* note 22 at 35.
[84] *Michell*, *supra* note 33 at 17; supra note 70 at 22-24; supra note 22 at 36.
[85] *Ibid.*

government to take some action by adopting legislative amendments in 1986 and issuing a new, more lenient interpretation bulletin in 1987.

a) Canadian Dimension: Refusal to Re-register Due to Political Activities (1980)

The controversy surrounding the information circular in 1978 was followed fairly shortly thereafter by the news that the Manitoba Foundation for Canadian Studies [Manitoba Foundation], the organization publishing Canadian Dimension, a left-leaning national magazine, had their application for reinstatement of charitable status refused in 1980. Initially the Manitoba Foundation for Canadian Studies lost its charitable status for failing to meet its compliance requirements to submit "certain forms",[86] however, like Christian Prisoners Release International, its subsequent application for reinstatement was denied.[87]

The tone found in reports of Revenue Canada's refusal to reinstate the Manitoba Foundation's charitable status is quite telling of the strained relationship between the charity sector and government regulators at the time. In his article published that same year in "The Philanthropist", Drache describes an increasing difficulty in registering charitable organizations.[88] He cites one experience representing an organization that Revenue Canada initially refused to register because the agency suspected that it would engage in political activities, despite the fact that the organization's bylaws and charter specifically prohibited such activities.[89] Revenue Canada was not convinced, and denied registration unless the organization could prove that its concerns were unfounded. After appealing the decision, the case was finally resolved administratively, with charitable status granted. For Drache, this spoke to the level of vigilance by Revenue officials at the time, and the refusal to reinstate the Manitoba Foundation grew out of an

[86] See Kernaghan Webb, "Cinderella's Slippers: The Role of Charitable Tax Status in Financing Canadian Interest Groups" (Vancouver: UBC-SFU Centre for the Study of Government and Business, 2000) at 47. Most likely these "certain forms" refer to the public information forms required since the legislative changes in 1976-77.
[87] *Ibid.* at 47.
[88] *Supra* note 70 at 23.
[89] *Ibid.*

atmosphere where, "it was known… that they were looking for an appropriate case to test their understanding about the legal scope of 'acceptable' political activities".[90]

Manitoba Foundation's inappropriate political activities, according to Revenue Canada, were the contents of its publication, Canadian Dimension. When the Manitoba Foundation applied for re-registration under one of the four heads of charity, advancement of education, it was refused because Revenue Canada felt, on examination of Canadian Dimension's articles, that the magazine was forwarding one particular political ideology rather than providing a well-balanced political science education.[91] This assessment of the education head of charity echoes the 1978 information circular, which outlines the requirements for charitable activities with political content to be acceptable:

> "Education" vs. "Political" Activity
> (a) The objective must be to instruct through stimulation of the mind rather than merely to provide information;
> (b) The subject matter must be beneficial to the public;
> (c) The benefits must be available to a sufficiently large segment of the population;
> (d) The interests of individuals must not be promoted;
> (e) The theories and principles advanced must not be pernicious nor subversive;
> (*f) The principles of one particular political party must not be promoted;* and
> *(g) An unbiased and impartial view of all factors of a political situation must be presented.*[my emphasis][92]

Revenue Canada refused to reregister Canadian Dimension because it failed both the "f" and "g" requirements from the agency's information circular.[93] A number of news sources and articles of the time cite the Manitoba Foundation for Canadian Studies' intention to appeal Revenue Canada's decision, however, the

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[90] *Ibid.*
[91] *Supra* note 22 at 48, in Appendix A of the article, which is Revenue Canada's article to the Manitoba Foundation of Canadian Studies informing the organization that its application for registration was denied.
[92] *Supra* note 31.
[93] *Supra* note 86 at 47.

organization eventually dropped its pursuit of the appeal, citing financial and logistical reasons.[94] It should be noted that the costs for appealing decisions on applications for charitable status and revocations to the Federal Court of Appeal are quite prohibitive and are cited by scholars and practitioners as one of the reasons that there is not a strongly developed body of Canadian charity law.[95]

Reaction to Revenue Canada's decision not to reinstate Canadian Dimension's charitable status was mixed. For some, the decision confirmed that Revenue Canada was applying the doctrine of political purpose with newfound fervor. There was considerable concern amongst fellow charities, who, although they were not necessarily supporters of the political views expressed in Canadian Dimension, worried that if Revenue Canada continued to be so vigilant, and particularly if they were successful on appeal, any political speech by charities would need to articulate all sides of an issue.[96] Churches in particular were cited as possible victims of pulpit censorship regarding social justice issues.[97] Charity law expert Drache theorized that while Canadian Dimension was a fairly obvious case of prohibited political activities, it was also described as an ideal test case. Drache believed that Revenue Canada could then turn to more borderline cases as it tried to develop clear case law on the political purposes doctrine in Canada.[98] More generally, a "chilling effect" was described by charities facing a climate of uncertainty as they considered what, if any political activity they could undertake. It was in this climate, and as news came out about the cases described below, that calls for legal reform and legislative amendment began to be voiced.

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[94] See e.g. *supra* note 70 at 21-24; *supra* note 22 at 35.
[95] For more information and proposed alternatives, such as the having the Tax Court of Canada hear appeals, see e.g., Ontario Law Reform Commission, Report on the Law of Charities (December 1996) at 298, 339, 341; Abraham Drassinower, "The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis" and in Jim Phillips, Bruce Chapman, and David Stevens, eds., Between State and Market: Essay on Charities Law and Policy in Canada (Montreal & Kingston: McGill-Queen's University Press, 2001) at 41; and Patrick Monahan and Elie Roth, "Federal Regulation of Charities" (2000) 15:4 Philanthropist 29 at 45-46.
[96] *Supra* note 70 at 24.
[97] *Ibid*.
[98] *Ibid.*

b) Renaissance International: Status Revoked for Excessive Political Activities (1982)

The Renaissance International case again confirmed that Revenue Canada intended to intervene with any organization engaging in excessive political activities. This evangelical charity had its charitable status revoked after publishing a full-page ad in a newspaper calling on voters to select a "moral majority" in the upcoming elections.[99]Revenue Canada lost the case on appeal, but not on grounds related to Renaissance International's political activities. In a turning point in administrative justice for charities, the Federal Court of Appeal found that the agency had violated principles of natural justice and the decision established specific procedural protocols that Revenue Canada needed to follow when revoking charitable status.[100]

c) Amnesty International: Too Political for Registration in the United Kingdom (1982)

The *McGovern* decision in the United Kingdom came out in 1982 and contributed significantly to the feeling in the charity sector that it was time for public debate about what the modern definition of charity should be in Canada.[101] In what became the leading case in common law countries on the political purposes doctrine for the next few decades, the High Court in England refused to grant charitable status to Amnesty International on the grounds that some of its purposes were political and not charitable because they involved advocating to change the laws of foreign governments. The court reviewed the history of charity jurisprudence and walked through the steps required in assessing an application for charitable status. Recalling that first the trust's purposes must fall under one of the four charitable heads, then its purposes must be for the public benefit, and finally its purposes need to be entirely and exclusively charitable, the court held

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[99] *Supra* note 86 at 48.
[100] *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860, 83 DTC 5024.
[101] *McGovern*, *supra* note 15. Interpretations of *McGovern* are likely to be fundamentally shifted by *Aid/Watch*, as the recent Australian decision stretches the boundaries of the political purposes doctrine to accommodate a changing charity sector and a more active civil society, see supra note 1.

that Amnesty International did not pass the public benefit test and therefore its application for charitable status had to fail. Citing *Bowman* and *National Anti-Vivisection Society v. Inland Revenue Commissioners*,[102] Slade LJ explained that generally it is very difficult for a court to ascertain whether a particular change in law would be of public benefit to the United Kingdom, and when the laws of a foreign country were involved, that assessment – which would need to analyze the impact of a change of foreign law on the people of the United Kingdom (as well as the residents of the foreign country) – was near impossible.[103]

McGovern did clarify that the ancillary purposes doctrine – the ability to engage in political activities ancillary and incidental to an organization's charitable purposes – remained alive and well in the common law, stating, "the mere fact that trustees may be at liberty to employ political *means* in furthering the non-political purposes of a trust does not necessarily render it non-charitable[emphasis in original]".[104]Although the preservation of the ancillary purposes doctrine may provide comfort to charitable organizations that some political activities continued to be allowed, it remained quite difficult for charities to comply with. What was the difference between pursuing a political means and a political purpose? Was it acceptable to seek the change or maintenance of a government law or policy when it was done for a "non-political" purpose? With no new information circular released after the withdrawal of the ill-fated interpretation in 1978, charities in Canada had few sources for understanding the rules limiting political activities. *McGovern* would not provide them much guidance, particularly for non-legally trained volunteers and staff seeking to understand the constraints on their organization's activities so they could assess how they were allowed to advance the interests of their organization and the communities they work with.

[102] *National Anti-Vivisection Society v. Inland Revenue Commissioners*, *supra* note 59.
[103] *McGovern*, *supra* note 15 at 338.
[104] *Ibid.* at 340.

The *McGovern* decision was released in the same year that the *Canadian Charter of Rights and Freedoms* came into force.[105]For a country that just achieved a human rights milestone through the constitutional entrenchment of the *Charter* and a non-profit and charity sector increasingly pursuing a more active social reform agenda, the *McGovern* decision spoke to the aging nature of charity law. It was time to re-consider what kinds of organizations should have charitable status in a modern Canadian society, and whether common law court decisions like *McGovern* reflected Canadian perspectives about which civil society organizations to subsidize through the tax system. Most striking, perhaps, and shining a glaring spotlight on the incongruence in charity law across jurisdictions, the Canadian branch of Amnesty International actually received charitable status in 1974 and never lost it, despite the *McGovern* decision.[106]The state of charity law in Canada, and its level of adherence to the United Kingdom's common law of charity, then, was definitely not clear.

Similar societal shifts were afoot in the United Kingdom in the early 1980s, with an increasing focus on human rights and the growing role of the charity sector in civil society. The High Court stressed in *McGovern* that it was not the defense of human rights per se as much as the organization's stated political purposes to change legislation that precluded its registration as a charity. Despite the differentiation by the court between advocating for human rights and political activities, by 1986 Amnesty International had managed to obtain charitable status in the United Kingdom. Several human rights instruments were enacted or signed by the United Kingdom during the four-year interim period since its first refusal to grant charitable status to Amnesty International.[107]

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[105] *The Constitution Act*, *1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11, [*Charter*].
[106] *Supra* note 69 at 3.
[107] Canada Revenue Agency, Guidance, "Upholding Human Rights and Charitable Registration" (May 15 2010) at 4.1.

d) Warning Letters to Charities (1983-84)

Revenue Canada contributed even further to fostering unease in the charity sector when it sent at least 16 warning letters to charities alerting them that the activities they were engaging in were of a political nature and posed a risk to the organization's ability to maintain charitable status.[108]The sector was in a state of "general alarm"[109] and experienced "a great deal of anxiety" in the face of this highly (and newly) vigilant regulatory environment. Ian Morrison, chairman of the National Voluntary Organizations described the charity sector's perception of the increased regulation around political activities, "Charities are talking about harassment and intimidation [by Revenue Canada]. That may not be their intent, but it is the effect."[110]For organizations that depended greatly on receipted donations from individuals and grants from charitable foundations, both of which generally rely on charitable status, their livelihood was being threatened. Making it all the more frustrating was that these rules about political activities seemed to be newly emerging and a number of legal experts disagreed that they were in fact an accurate summary of the law. Many charitable organizations do not have much disposable income to spend on legal fees, so it seems likely that most organizations would have been unable to afford a detailed legal opinion on what were or were not acceptable political activities. Further, with charity law scholars and practitioners disagreeing so publicly with Revenue Canada about the state of the political purposes doctrine in Canada, it would be difficult to accept legal opinions with confidence unless an organization was willing to pursue a court case. The resources (financial and other) required in appealing a revocation of charitable status to the Federal Court of Appeal, a burden that the Manitoba Foundation (Canadian Dimension) was unable to carry,[111] would also lead charities to proceed with extreme caution either because they'd received a warning letter or because the sector was abuzz with stories about them. Many

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[108] *Michell*, *supra* note 33 at 17-18; *supra* note 69 at 4.
[109] *Young*, ibid.
[110] Ann Silverslides, "Charities′ political activities threaten tax-exempt status" The Globe and Mail (Apr 4, 1984).
[111] *Supra* note 95.

charities began to pull back from almost all advocacy activities out of fear for their organization's survival.[112]

The warning letters targeted organizations that were fairly mainstream and not associated with any particular political ideology, echoing concerns expressed by Arthur Drache that while Manitoba Foundation was an easy test case, other less controversial charities may be the next targets.[113]Oxfam Canada received a letter, as did the Canadian Mental Health Association, an organization that had charitable status for 66 years at the time it received its warning letter focusing on a particularly section of the organization's statement of purpose.[114]In describing the Canadian Mental Health Association's objectives to ensure that people with mental health difficulties were well cared for, their statement of purpose said that the organization would, "urge governments at all levels to take legislative and financial action to further those objectives."[115] Revenue Canada warned that this statement implied that Canadian Mental Health Association might engage in political activities that would jeopardize its charitable status. The letter was quite surprising, as the Canadian Mental Health Association had a long history of working closely with governments on health care policy issues. The organization was founded in 1918, one year after the *Bowman* case in England, approved for mandatory registration as a charity in 1967,[116] and advocated for change in government law and policy from its first days. In its founding five years, Canadian Mental Health Association successfully pushed provincial governments to change their policies and improve the conditions in mental health facilities in several provinces and create special classes for children with intellectual disabilities.[117]

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[112] *Supra* note 110.
[113] *Supra* note 70 at 24.
[114] *Supra* note 110.
[115] *Ibid.*
[116] *Supra* note 26.
[117] Canadian Mental Health Association, Our History, online: <http://www.cmha.ca/bins/content_page.asp?cid=7-135&lang=1>.

Another charity that was warned about its political activities was the Canadian Home and School and Parent-Teacher Federation, because its objectives were too patriotic,[118] even though its application for charitable status was approved in 1972.[119] Researcher Rod Watson points out the particular irony in patriotism being defined as too political by the Department of National Revenue, "67 years after the first income tax deductions for charitable donations were permitted as a means of encouraging support for the Canadian Patriotic Fund."[120]For groups like the Canadian Mental Health Association and the Canadian Home and School and Parent-Teacher Federation, news of the alleged limitations imposed by the political purposes doctrine took decades to arrive at their doorstep, after a long history of their organization freely advocating and lobbying for a variety of political causes.

Around the same time that news of warning letters being sent to charities was spreading, actual proposals for legislative reform begin to emerge in media reports and the Philanthropist. These calls for legislative amendments are best understood in the light of a series of cases that also came between 1983 – 1985, and the general tax reform dialogue occurring between charities and Revenue Canada during this period.

e) Fighting for the Right to Advocate: Federated Anti-Poverty Groups of B.C. (1984)

On September 13, 1984, the Globe and Mail announced that Revenue Canada had granted an application for charitable status to the Federated Anti-Poverty Groups of B.C. after initially denying it registration because its objects violated the political purposes doctrine. The organization is a coalition group bringing together groups throughout B.C. who work to eradicate poverty and support poor people, and the coalition had engaged in lobbying activities to fight cuts to social program spending. In rejecting the organization's application, Revenue Canada

[118] *Watson*, s*upra* note 6 at 13.
[119] *Supra* note 26. Note that the organization has now changed its name to the Canadian Home and School Federation.
[120] *Watson*, *supra* note 6 at 5, 13.

determined that the group had already participated in political activities prior to its application for charitable status and would continue to do so in order to accomplish its purposes.[121] Federated Anti-Poverty Groups of B.C. appealed the administrative decision, but a month before a scheduled hearing, Revenue Canada backed down. Interestingly, the agency explained its change of heart by stating that, "it was registering the organization as a charity to spare it the expense of further litigation,"[122] and further insisted that, despite the pursuit of an appeal of its decision by Federated Anti-Poverty Groups of B.C., it had never actually reached a final decision to deny charitable status.

Revenue Canada's comment that it was trying to avoid the expense of further litigation is particularly interesting in the light of the fact that it was facing an upcoming appeal regarding its denial of charitable status to Scarborough Legal Service.[123] Why allow Federated Anti-Poverty Groups of B.C. to obtain charitable status when they were clearly engaging in the types of lobbying activities that the agency was busy warning charities could put their status at risk? Perhaps Revenue Canada assessed Scarborough Community Legal Services as a better test case, with its political activities more evidentially central to their purposes and their purposes not as classically charitable under the four heads of charity. Federated Anti-Poverty Groups of B.C., on the other hand, may have been seen as more likely to obtain judicial relief under the ancillary purposes doctrine, particularly because their mission fit so neatly under the firmly established charitable head, the relief of poverty.[124] Regardless of Revenue Canada's rationale, Federated Anti-Poverty Groups of B.C. viewed the administrative decision as a victory not only for themselves, but also for the entire charity sector. The organization went

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[121] *Supra* note 1; *Michell*, *supra* note 33 at 29; M.L. Dickson & Laurence C. Murray, "Recent Tax Developments" (1985) 5:2 Philanthropist 53.
[122] *Globe and Mail*, *ibid.*
[123] *Re Scarborough Community Legal Services and the Queen*, (1985), 17 D.L.R., (4th) 308 (F.C.A.), [*Scarborough*].
[124] See Peter Broder, "The Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process" (2001) 17:3 Philanthropist 3 at 16, where he notes that it is easier to meet the public benefit test when qualifying under one of the three heads of charity, religion, education or poverty, while it is significantly harder to prove the public benefit requirement under the fourth head, other purposes beneficial to the community.

public with its analysis of how to approach agency officials when applying for charitable status if your organization intends to engage in political activities. Its lawyer, David Mossop, shared his strategy with other organizations, "if you apply for charitable tax status they will deny it, but if you appeal to the court they will probably give it to you. We want other groups to know that if they push Revenue Canada, they will probably capitulate."[125] Patrick Moore, one of the directors of Greenpeace,[126] agreed with Mossop's assessment, stating, "Revenue Canada has always tried to take a broad interpretation - that it covers any lobbying aimed at changing government policies - but they have been rebuffed every time they have tried to impose such a ruling."[127]

Both Greenpeace and Federated Anti-Poverty Groups of B.C. suggest that the agency was simply posturing – if an organization fought back, their application was likely to be successful. Either the agency would reconsider its initial decision, or the courts would overturn it. These messages were inspiring for some groups in a period where non-profits who included advocacy as part of the scope of activities to accomplish their goals felt targeted and prevented from obtaining the benefits of charitable status. Unfortunately, however, the strategy advocated by both groups was not as successful as hoped, a discovery felt quite close to home for Greenpeace's Moore. Eventually suffering the same fate as the Manitoba Foundation for Canadian Studies, Greenpeace lost its charitable status in Canada in 1989, and despite several attempts at alternative legal structures that briefly achieved charitable registration, was unable to maintain charitable status in Canada.[128] As described below, another organization, Scarborough Legal Services did fight back and appeal, but was ultimately unsuccessful.

[125] *Supra* note 1.
[126] A registered charity at that time.
[127] *Supra* note 1.
[128] The Wall Street Journal Europe, "Canada Leaves Greenpeace Red-Faced" The Wall Street Journal Europe (July 22 1999).

f) Scarborough Community Legal Services: The Ancillary Purposes Doctrine (1985)

Scarborough Community Legal Services is a legal aid clinic that was denied charitable status because of its participation in political activities, with the reasons for refusal listing the group's participation in a demonstration about a social benefits program and its involvement in a neighbourhood activist group, the Committee to Improve the Scarborough Property Standards By-laws.[129] The court rejected the clinic's argument that its political activities were merely ancillary and incidental to its charitable purposes, assessing rather that the clinic was engaged in "sustained efforts to influence the policy-making process…" which "constitute an essential part of its action and are not only "incidental" to some other of its charitable activities."[130]As in *McGovern*, the court denied the applicability of the ancillary purposes doctrine to Scarborough Community Legal Service, but it did recognize its existence in Canadian charity law, albeit a narrow reading of it,

> An organization should not lose its status as a charitable organization because of some quite exceptional and sporadic activity in which it may be momentarily involved, and, above all, I do not think that an activity would be deprived of its charitable nature only because one of its components or some incidental or subservient portion thereof cannot, when considered in isolation, be seen as a charity [my emphasis].[131]

It may have been comforting for charities that some "exceptional and sporadic" political activities would not jeopardize an organization's charitable status, however, the fact that a legal clinic's minimal engagement in political activities through participating in a demonstration and sitting on a local activist committee exceeded the allowable limit would likely chill any brief comfort taken from recognition by the court of the ancillary purposes doctrine.[132] If Revenue Canada was looking for a test case that held up its interpretation that charitable organizations were severely limited in their ability to participate in political activities, it was overwhelmingly successful with *Scarborough*.

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[129] *Supra* note 123 at 2; supra note 86 at 48-49.
[130] *Supra* note 123 at 3.
[131] *Supra* note 123 at 12.
[132] See *supra* note 86 at 49.

g) Native Communication Society: Sui Generis Charitable Status (1986)

Native Communication Society was originally denied charitable status because Revenue Canada was not convinced that its activities fit within one of the charitable heads, advancement of education, reasoning that the organization focused on delivering news rather than educating through the training of the mind. Revenue Canada was also concerned that, in describing its mandate to train native people to deliver journalistic content on issues facing native people, Native Communications Society named political activities amongst the content to be delivered. The Federal Court of Appeal disagreed, finding that the organization qualified under the fourth charitable head, "other purposes beneficial to the community",[133] relying in its decision on aboriginal people's special status in Canada and federal government obligations towards native communities. *Native Communication Society of British Columbia v. Minister of National Revenue* was initially a hopeful case for the charity sector,[134] potentially modernizing charity law,[135] but quickly became categorized as a sui generis assessment by the courts specific to the unique circumstances of native people in Canada.

The same year that *Native Communications* was decided, legislative amendments were added to the *Income Tax Act* to clarify the rules limiting political activities, and capture the ancillary and incidental rules allowable limited political activities, as described in the *Scarborough* ruling. The amendments may have brought an inch of clarity about the advocacy rules for the charity sector, but they did not represent the proposals the sector lobbied for. To gain some insight into the tenor of law reform efforts, and why they were ultimately unsuccessful, it is necessary to review the turbulent relationship between the charity sector and their regulator that marked the period between the release of the information circular in 1978 and the legislative amendments in 1986.

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[133] See E.B. Zweibel, "A Truly Canadian Definition of Charity and A Lesson in Drafting Charitable Purposes: A Comment on Native Communications Society o f B. C. v. M.N.R." (1987), 7:1 Philanthropist 4 at 6.
[134] *Native Communication Society of British Columbia v. Minister of National Revenue*, (1986) 23 E.T.R. 210 (F.C.A) [*Native Communications*].
[135] See e.g. *supra* note 124 at 19-20; *supra* note 133 at 4.

Reforming the Advocacy Rules: Round One

a) A Strained Relationship: Dialogue between the Charity Sector and Revenue Canada

From the Carter Commission to the current day, an ebb and flow relationship exists between the charity sector and government regulators, with periods of consultation and collaboration followed by strained relations tainted by suspicion and frustration. Following the disappointment because of the lack of attention paid to charities in the Carter Commission Report, the Minister of Finance Edgar J. Benson tried to build stronger relationships with the charity sector through extensive consultation. His efforts proved to be a consensus-building process, and even though they were facing increased supervision, charities felt like valued participants in the tax reform. Some charities even welcomed a clearer and more comprehensive regulatory framework.[136] The reform proposals emerging from this process were captured in the Green Paper on charities, with many of its proposals then enacted in the legislation passed in 1976-77, establishing the foundation of today's modern regulatory framework.[137]

The valuable work undertaken in building a relationship with the sector leading up to the reforms in 1976-77, described by Drache as "a model of consultation between government and taxpayers",[138]was obliterated by the approach then taken in drafting the recommendations for the 1981 budget. Consultation with charities ceased, with the government expressing little interest in the impact of its reform proposals on charities. Reflecting the attitude expressed in the aftermath of the release of the 1978 information circular, from the charity sector's perspective, government officials' attitude seemed to be that "if the effect is negative on charities, this is not necessarily bad."[139] Drache also cites the increasingly popular use of tax expenditure language to frame the tax benefits given to charities as a

[136] Arthur B.C. Drache, "Viewpoint: The 1981 Budget: Failure of Process?" (1982) 3:2 Philanthropist 43 at 44.
[137] *Ibid.* Drache notes that in this successful consultation process the committee read over 200 briefs, and committee members also attended 30 presentations by charitable organizations.
[138] *Ibid.*
[139] *Ibid.* at 46.

key reason for the shift in the government's attitude.[140] Perhaps this expressed the growing feeling, which began to be expressed in the 1975 Green Paper, that charities were reaping great benefits from public coffers, and, with the sector growing at such an incredible rate, a tougher regulatory approach was required. The failure to involve the sector in the lead-up to the 1981 budget made the reforms completely unpalatable, as described by Drache,

> …the changes proposed in the Budget are undoubtedly harsh and potentially disastrous to charities. The process was undemocratic, especially when viewed against the past experience. But the signs of bureaucratic hostility to charities have been around for several years for all to see. These changes were just a statutory culmination of the anti-charities mood rampant in the backrooms of Ottawa.[141]

From Drache's perspective, the opportunity to provide input would have created more responsive and sector-aware reforms, and such a dialogue was cited as a cornerstone in fostering a health relationship between regulators and the regulated in a democratic society.[142] Repeatedly, the history of the relationship between the charity sector and government officials shows that consultation can go a long way in decreasing tension and improving relationships.

Another discussion paper, "Charities and the Canadian Tax System" was released in 1983,[143] and was again greeted with "a storm of opposition".[144] It echoed the predominant preoccupations and focused mostly on the need to increase regulation of charities to ensure that they were using charitable donations appropriately. Following the increasing tendency to frame charitable tax benefits as costs to the national treasury, the paper noted the contributions of the charity sector to Canada, and then emphasized the need for regulation to "meet the public

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[140] *Ibid.* at 45.
[141] *Ibid.* at 47.
[142] The need to establish a relationship of trust between the regulator and the regulated community and strike a balance between oversight and flexibility is explored more in Susan D. Phillips, "Governance, Regulation and the Third Sector: Responsive Regulation and Regulatory Responses" (Paper presented to the Annual Meeting of the Canadian Political Science Association, London, Ontario, June 2, 2005).
[143] Canada, Department of Finance, Charities and Canadian Tax System (Ottawa: Tax Policy and Legislative Branch, May 1983), [1983 discussion paper].
[144] *Watson*, *supra* note 6 at 12.

interest of ensuring that the charitable donations and investments being encouraged through substantial tax benefits are disbursed, in fact, for charitable purposes."[145]

The 1983 discussion paper provided the perspectives of both the charity sector and the government, but then focused on recommendations that addressed the government's concerns. For charities, two key problems were outlined, 1) the disbursement quota limited their ability to accept certain endowments and 2) foundations claimed that the rules about disbursing funds were eroding their capital base in an era of high interest rates.[146] For the government, the problems were the numerous ways that charities could work around the disbursement quota and other rules to avoid spending their funds on charitable purposes, and lengthy proposals were listed to limit charities' ability to avoid disbursements. Protests to the proposals were so strong that the government eventually withdrew its proposals, much like it had been forced to withdraw its 1978 information circular on political activities several years earlier. The government ultimately re-released mediated versions of their tax reform proposals in 1984, adjusted to reflect some of the opposition expressed by the charity sector. These reforms once again expanded the regulatory framework to increase accountability and ensure the appropriate use of charitable donations.[147]

In addition to the tax reform process, charities were adjusting to the stronger presence of an institutional body with a growing mandate and more resources to oversee the charity sector. In the early 1980s, Revenue Canada began to increase its staff members in its charities department. Staff additions were required for the agency to take on its growing administrative role, with the list of tasks for Revenue Canada rising substantially since mandatory registration was introduced in 1967, obligatory public information returns were introduced in 1976, and as the

[145] *Supra* note 143 at iii.
[146] *Supra* note 143 at 2.
[147] Ontario Law Reform Commission, *supra* note 95 at 314.

number of charities multiplied rapidly.[148]In 1984 alone, the agency hired 12 lawyers to work in the charity division and created a team of staff members to review charity information returns and investigate complaints.[149] Interestingly, although the charity sector felt an increased oversight presence in comparison to what was formerly a regulatory void, Revenue Canada's charity division felt that their presence was really quite small in comparison with the number of charities in Canada, with their director describing their work investigating charities in 1984 as "minimal".[150]It is likely that for an agency responsible for ensuring that almost 50,000 registered charities[151] across Canada met their compliance burdens, 62 staff members felt like a drop in the bucket.[152]

The Ontario Law Reform Commission's "Report on the Law of Charities" released in 1996, reviewed the history of government relations in the charity sector, and noted the long-term impact of the increasing regulatory role of Revenue Canada, and the feeling in the sector that the agency lacked understanding and failed to consult,

> The whole process since the institution of the registration regime in 1967 has shaped the sector's perspective on the role of government in the charity sector profoundly. Still, a decade after the 1981 to 1984 reform process, there is a great deal of skepticism and even fear about the motives of government regulation. For the most part, the presence of government is felt as antagonistic, counterproductive, and unduly burdensome.[153]

An evaluation of the relationship between the regulated and the regulator would be remiss without considering the regulatory body's perspective. Certainly the agency did not have an easy task at hand as it instituted a complex oversight system for a growing and diverse sector. Regulating from a complicated body of common law required considerable additional resources and reliance on sources

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[148] *Watson*, *supra* note 6 at 11.
[149] *Supra* note 110.
[150] *Ibid.*
[151] *Watson*, *supra* note 6 at 13.
[152] *Supra* note 110.
[153] Ontario Law Reform Commission, *supra* note 95 at 314.

that the agency was not necessarily accustomed to.[154] The regulators needed to create a fair administrative system that provided support to charities but also prevented them from abusing dollars deferred from the treasury. The charitable groups and foundations the agency was charged with overseeing were diverse and had quite different value systems, with an incredible range including long established religious institutions, hospitals, schools, private foundations run predominantly by families, public community foundations funding many local organizations, cultural institutions, larger charities trying to relieve poverty through service provision, and smaller grassroots organizations committed to an empowerment model with services created by and for marginalized people. Beginning from a context where there was little regulatory oversight, and faced with such an enormous volume of new responsibilities, the agency was in a difficult position to begin nurturing a relationship of trust with such a diverse spectrum of groups.

Conflicting tendencies in Canadian society at the time also influenced the tumultuous relationship between government and the non-profit and charity sector. The collective desire to spend less, have a smaller government, and cultivate a strong voluntary sector led to numerous disputes between the third sector and government, tensions that were easily polarized in the political arena. The identification of charitable tax benefits as tax expenditures left Canadians and the government jumping on the idea that the sector was using "treasury money" without any accountability. Excessive spending frustrated Canadians who, at the time, were voting in elected representatives who urged more fiscal constraint. At the same time, the image of government regulators telling charities that they could not even write letters to editors rang to Canadians like "Big Brother" government becoming too big and picking on ordinary citizens who were going about their business as engaged citizens. Debates about the role of charity sector and the

[154] For further insights on the challenges in creating a regulatory regime that met the needs of both the government and the charity sector, see *supra* note 142.

appropriate regulation of its activities reflected the larger ideological tensions at the time about the role of government.

The Canadian government also turned to the charity sector as a means of offering some of the services that it would no longer fund within the emerging paradigm of small government, less spending. For many in the charity sector, it seemed like the "government was content to leave charities alone until it saw them as means of serving government purposes."[155] What resulted was a "relationship which deteriorated between the late 1980s and the mid-1990s to mutual isolation and suspicion and outright antagonism."[156] In such an environment, satisfying law reform that emerged from public debate and genuine consultation about the role of charities in modern civil society was nearly impossible. The conditions were, however, quite well suited to stimulating advocacy for law reform. The law reform proposals that emerged from 1983 - 1986 are outlined below.

b) Proposed Legislative Amendments to Reform the Advocacy Rules

Law reform proposals began immediately in the years after the information circular on political activities was released and continued steadily for several years. By 1980, Drache was arguing for legislative amendments that clarified the rules on political activities and stopped Revenue Canada's interventions on the subject.[157] Two proposals responded to his call. Starting in 1981 and continuing steadily through 1983, the Coalition of National Voluntary Organizations, the primary national representative of the charity sector until 1989, began urging the federal government to redefine charities within income tax legislation in order to clarify what political activities charities were allowed to engage in. Executive Director Ian Morrison explained that his organization's proposal embraced the idea that a statutory definition should outline what charitable objects are, identify

[155] Lynn Bevan, "From the Editor" (1985) 5:1 Philanthropist 2 at 2.
[156] *Elson*, *supra* note 6 at 54.
[157] *Supra* note 70 at 24.

exactly which activities are prohibited by charities, and then all other activities could be presumed to be acceptable.[158]The proposed definition was the following:

> I (a) For the purposes of this Act charitable objects include:
> (i) assistance to a disadvantaged person or group of persons;
> (ii) advancement of religion;
> (iii) advancement of education;
> (iv) advancement of health;
> (v) conservation of natural environment; and
> (vi) other purposes beneficial to the community including cultural or social development or improvement of the physical or mental well-being of the community.
>
> (b) In this section: the meaning of "disadvantaged" includes, but is not limited to, a lack of opportunity to participate fully in the life of the community due to geographical, environmental, economical, racial, health, sex, age or disability factors.
>
> 2. Charitable activities mean all activities carried on in Canada or the inter- national community by a charitable organization in furtherance of its charitable objects except those activities set out in Section 3.
>
> 3. The following activities shall not be considered charitable:
> a. incitement to sedition or violence;
> b. the support or opposition, financial or otherwise, of a political party or candidate at any level of government;
> c. or the acquisition or expenditure of money or anything of value for the benefit of any member of the charity.

Morrison explained that the aim of the proposal was not to expand the availability of charitable status to more groups but rather to outline as fully as possible which organizations were eligible for charitable status as the law stood. Charities would then know that if they registered under one of the purposes outlined, they could engage in any charitable activities related to those purposes, as long as they were not in the excluded list. The Coalition of National Voluntary Organizations argued that adoption of this definition would ease the regulatory burden for revenue officials and increase the fairness of administrative decision-making by reducing the arbitrariness involved in applying the inconsistent common law on the subject. The Minister of Finance, in correspondence with Morrison, expressed

[158] Ian Morrison, "Redefining 'Charities' in the Income Tax Act" (1983) 3:3 Philanthropist 10 at 11 – 12.

his openness to considering the proposed amendments, and in an article written in 1983, Morrison appears to be extending his hand to the government in the hope of implementing law reform that would ultimately improve relations between the government and the charity sector.[159]

Lawyer Henry Intven offered the second law reform proposal in 1983, proposing again that a legislative amendment would clarify the allowable political activities by charities. Intven's proposal echoes the understanding of the political purposes doctrine suggested by Senator John Godfrey to Minister of Revenue Joseph Guay following the issuance of the 1978 information circular.[160]Instead of concerning itself with the activities of a charity, both Intven and Godfrey suggested that it is charitable objects that should be relevant. As long as a charity's objects are charitable, it should be able to carry on any activities to pursue those objects (except illegal activities, of course, which are already prohibited by law, and generally, in bylaws as well). Intven's proposed legislative amendment was the following:

> 1. "Charitable objects" shall include:
> (a) Assistance to economically or physically disadvantaged classes of persons;
> (b) Advancement of religion;
> (c) Advancement of education;
> (d) Other purposes beneficial to the community, including social or cultural development or improvement of the physical or mental health of the community.
>
> 2. "Charitable activities" means all activities carried on by a charity in furtherance of its charitable objects.[161]

Invten argued that the amendment would basically eliminate the need to continue addressing charities' activities as a regulatory issue. The focus point instead would be on which organizations qualified for charitable status and once qualified, all activities would be a go if they pursued the appropriate charitable purposes. Invten emphasized that the proposed amendment would ease both the

[159] *Ibid.* at 11–12. See also *supra* note 110.
[160] *Supra* note 22 at 49-50.
[161] *Supra* note 22 at 45.

administrative burden of Revenue Canada and the burden on charities trying to comply in an unclear regulatory environment. Invten also urged organizations throughout the sector to get involved in a dialogue with the government about law reform possibilities, pointing out that "it is hard to imagine that a judge or a National Revenue official would even consider deregistration of a charity for promoting policy or legislative change."[162]

c) The 1986 Legislative Amendments: A Measure of Clarity

After his successful election in 1984, Prime Minister Brian Mulroney followed through on his promise to strengthen relations with the voluntary sector. Mulroney's desire to forge a stronger "partnership" with charities was an essential part of his political platform to cut spending and decrease the size of government.[163]The Mulroney government took several steps to calm the charity sector about the application of the political purposes doctrine. In a symbolic gesture, the Prime Minister attended the Annual General Meeting of the Coalition of National Voluntary Organizations in 1986,[164] and appointed a member of his cabinet to specifically strengthen the government's relationship with the sector. While the Mulroney government did not accept any of the law reforms proposed by the voluntary sector, they did introduce legislative amendments in 1986. The amendments were subsections 149.1(6.1) and 149.1(6.2) for foundations and organizations, respectively:

> (6.1) Charitable purposes [limits to foundation's political activities] – For the purposes of the definition "charitable foundation" in subsection (1), where a corporation or trust devotes substantially all of its resources to charitable purposes and
> (a) it devotes part of its resources to political activities,
> (b) those political activities are ancillary and incidental to its charitable purposes, and
> (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, the corporation or trust shall be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.

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[162] *Supra* note 22 at 46.
[163] *Supra* note 5 at 171.
[164] *Supra* note 45 at 100.

> (6.2) Charitable activities [limits to charity's political activities] –
> For the purposes of the definition "charitable organization" in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and
> (a) it devotes part of its resources to political activities,
> (b) those political activities are ancillary and incidental to its charitable activities, and
> (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.[165]

The provisions entrench into the *Income Tax Act* a rule that charities can engage in limited political activities as long as substantially all of their activities are charitable. Revenue Canada interprets substantially all to mean "more than 90%".[166] The Mulroney government's amendments were commonly understood to legislate *Scarborough*'s narrow reading of the ancillary purposes doctrine. They were far from daring and substantial law reform efforts that responded to the charity sector's calls, as they sidestepped the heart of the problems with the political purposes doctrine. In the new provisions, the nature of "political" in contrast to "charitable" activities remains undefined. The 10% rules created the obligation to quantify the resources used on political activities and then differentiate those resources from the ones used on charitable activities. From a compliance perspective, with the charity sector commonly understood to be an under-resourced sector with high numbers of volunteers, it seems predictable that such a quantification exercise would raise compliance difficulties.

In a context in which it seemed like no political activities were previously allowed, the legislative amendments appeared to offer some relief. Charity law experts who were aware of the details of the *Scarborough* decision, however, were still quite wary of engaging in advocacy considering that the organization was denied charitable status despite being involved in quite few political activities– surely less than 10% compared to its substantial activity of running a

[165] *Income Tax Act*, supra note 15 at ss. 149(6.1) – ss. 149(6.2).
[166] Canada Revenue Agency, CRA Views: Technical Interpretation 2002-0137767, "Meaning of substantially all" (2002).

legal clinic.[167] In addition, how to calculate the resources allocated to political activities was far from clear. If the ancillary purposes doctrine was not available to Scarborough Legal Services, it would be hard to feel certain of who exactly it was available to. Charities faced severe consequences for miscalculating their expenditure limits, leaving most charities likely to err on the side of caution. The less political activity undertaken, the safer one's charitable status.

Before the Mulroney government's legislative amendments, the political purposes doctrine was an unclear burden for charities and a challenge for Revenue Canada to administer. Unfortunately, the new amendments did not offer a substantial solution to these problems, although they did change the regulatory environment for those charities that were previously frightened from engaging in any political activity at all. Some charities welcomed the amendments because they offered additional clarity,[168] establishing that limited political activities were allowed, a position that was not necessarily the one reflected in Revenue Canada's regulatory behaviour in the years immediately preceding the amendments. The offer of a quantifiable number of allowable political activities could help guide charities' choices in deciding how to allocate resources to advocacy work. Most importantly, perhaps, to the government's goal of changing the existing dynamic, as described below, the amendments and the subsequent release of a new information circular were successful at improving the government's relationship with the charity sector, regardless of the limited nature of actual law reform in the legislative action undertaken.

Law Reform or Administrative Discretion? A New, More Permissive Information Circular

a) Administrative Interpretation, Take Two: The 1987 Information Circular

Following the legislative amendments in 1986, Revenue Canada drafted an information circular that applied the lessons learnt from the negative reception to one released in 1978. The 1987 circular adopted a tone that reflected the

[167] *Supra* note 123 at 2; *supra* note 86 at 49.
[168] *Supra* note 121 at 53.

Mulroney government's political platform, emphasizing a small bureaucracy and pro-charity approach. As Elson points out, the phrasing of the introductory sentences in the 1987 information circular immediately gestured to charities that a different approach was being embraced:[169]"The purpose of this circular is to familiarize interested persons with those provisions of the *Income Tax Act* which permit registered charities to pursue ancillary and incidental political activities of a non-partisan nature."[170]Compare the tone to the opening statement of the controversial 1978 information circular: "The purpose of this circular is to explain to registered charities and to charities seeking registration the consequences of having objects and carrying on activities that are political in nature."[171]The old circular began by focusing on the consequences of engaging in political activities (quite dire, of course, as violating the rule can lead to revocation of status) and for organizations with political purposes seeking charitable status (also severe, as a political purpose is enough to make an organization ineligible for registration).

The 1987 information circular also artfully employed creative discretion in framing the ancillary purposes as a new development,

> Subsections 149.1(1.1), 149.1(6.1) and 149.1(6.2) of the Act permit a registered charity to devote some of its resources to ancillary and incidental political activities of a non-partisan nature provided the charity devotes substantially all of those resources to charitable activities. *These relieving provisions* take effect for the 1985 and subsequent taxation years and *provide the rules under which charities may engage in political activities* without jeopardizing their registration status. [my emphasis][172]

Employing strategic wording, the 1987 information circular described the legislative amendments in 1986 as relieving and characterized them as the introduction of a new rule, even though the *Scarborough* decision had already recognized the ancillary purposes doctrine in Canada. Of course, even before

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[169] *Supra* note 45 at 100-101.
[170] Canada, Department of National Revenue, Information Circular No. 87-1, "Registered Charities: Ancillary and Incidental Political Activities" (February 27, 1987) [1987 information circular] at para. 1.
[171] *Supra* note 31 at para. 1.
[172] *Supra* note 170 at para. 3.

Scarborough and the addition of 149(6.1) and 149(6.2) to the *Income Tax Act*, the common law's acceptance of the ancillary purposes doctrine was evident as early as 1948,[173] and was also cited in the widely reported *McGovern* decision in 1982.[174] Even the controversial and restrictive 1978 information circular acknowledged with full confidence the existence of the ancillary purposes doctrine, stating, "It is equally well established that an organization, whose primary purpose is clearly charitable but has a secondary or ancillary purpose which is stated to be political, does not fail to be recognized as charitable, in common law, because of its ancillary or secondary purpose."[175]

Most significantly for charities, the 1987 information circular also specifically allowed activities that were prohibited in the 1978 information circular. Resources spent on any activities deemed political would go towards the charity's yearly expenditure limit for political activities. For illustrative purposes, examples of the shift in activities from the 1978 administrative interpretation to the one issued 9 years later in 1987 are illustrated in the table below.

b) Table of Prohibited vs. Permissible Activities, 1978 and 1987

1978 Information Circular– Prohibited Activities	**1987 Information Circular**	**Comments on Changes**
"Letters to Editors-A letter-to-the-editor campaign may be used by a registered charity to explain its purposes and programmes, recruit members and raise funds but may not be used to air political views or attempt to sway public opinion for or against a political issue." [176]	"The provision of information and the expression of non-partisan views to the media… as long as the devotion of resources … is intended to inform and educate by providing information and views designed primarily to allow full and reasoned consideration of an issue rather than to influence	1978 circular: Letters to the editor expressing political views or trying to influence the public are prohibited. 1987 circular: Letters to the editor and any other representation to the media are now acceptable, as long as

[173] *National Anti-Vivisection*, *supra* note 59 at 61, 77.
[174] *McGovern, supra* note 15 at para. 342.
[175] *Supra* note 31 at para. 2(b).
[176] *Supra* note 31 at para. 5(f).

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
	public opinion or to generate controversy."[177]	the intention is to inform rather than influence. These activities are not subject to expenditure limits.
"Publications-A registered charity may publish a magazine, a review or a news- paper, etc. on a political subject provided that an impartial and objective coverage is given to all facets of the subject matter. Coverage of only one viewpoint is a political activity since it represents the political principles of one faction in particular. The same comment applies to newspaper advertisements."[178]	The following activities become acceptable but must respect limitations: "Publications, conferences, workshops and other forms of communication which are produced, published, presented or distributed by a charity primarily in order to sway public opinion on political issues and matters of public policy".[179] "Advertisements in newspapers, magazines or on television or radio to the extent that they are designed to attract interest in, or gain support for, a charity's position on political issues and matters of public policy".[180]	1978: Publications and advertisements that provided one perspective on an issue were not allowed. 1987: Publications, advertisements (and other forms of communication) that try to influence public opinion are allowed but subject to expenditure limits.
"Public Demonstrations-The holding of public events to attract public support, recruit new members, raise funds, explain purposes and programmes, and generally	The following activities become acceptable but must respect limitations: "Public meetings or lawful demonstrations that are organized to	1978: Any event or demonstration that focused on government action or inaction was likely prohibited. 1987: Demonstrations

[177] *Supra* note 170 at para. 9(c).
[178] *Supra* note 31 at para. 5(g).
[179] *Supra* note 170 at para. 12(a).
[180] *Supra* note 170 at para. 12(b).

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
publicize the organization and its charitable activities is an acceptable activity of a registered charity, but if the purpose of the demonstration is to embarrass or apply pressure upon a government it is considered a political activity."[181]	publicize and gain support for a charity's point of view on matters of public policy and political issues."[182]	and events on political matters are now allowed, subject to expenditure limits.
"Form Letters-A registered charity may carry on a mail campaign to attract public support, recruit members, raise funds, and explain its charitable objectives and proposals but it may not use this device for a non-charitable purpose, for example, to solicit the public to write letters of protest to their elected representatives."[183]	The following activities become acceptable but must respect limitations: "Mail campaign -- a request by a charity to its members or the public to forward letters or other written communications to the media and government expressing support for the charity's views on political issues and matters of public policy."[184]	1978: Organizing a mail campaign about a political issue was prohibited. 1987: Organizing a letter campaign is acceptable but subject to expenditure limitations.

The above-listed changes constitute the most tangible law reform that occurred in 1986-1987. In terms of impact on charities, the 1987 information circular expanded charities' ability to participate in political activities. Administrative discretion, in reinterpreting the ancillary purposes doctrine to create a more permissive description of the state of law, turned activities that were prohibited in 1978 into acceptable activities in 1987. It was not legislative reform that created this new list of rules; section 149.1(6.1) and 149.1(6.2) of the *Income Tax Act* simply captured a rule with a lengthy existence in the common law, a rule that

[181] *Supra* note 31 at para. 5(d).
[182] *Supra* note 170 at para. 12(c).
[183] *Supra* note 31 at para. 5(e).
[184] *Supra* note 170 at para. 12(d).

was already mentioned explicitly within the first restrictive information circular in 1978. Nothing in the legislative amendments addressed what types of activities are deemed political, and subject to expenditure limits. It was alternative administrative interpretations that led to those law reforms.

The 1987 information circular also took an additional step in gesturing how helpful Revenue Canada wanted to be in supporting charities, the government's new partner is providing health, social and cultural goods and services to Canadians. The circular even took the space to explain that charities that were interested in devoting more than the allowable expenditure limits to political activities could consider setting up a sister organization to engage in advocacy work, but of course such an organization would not be eligible for charitable status and could not use any of the sister charity's funds or resources.[185]

c) The Courts, The Legislature, The Regulator: No Substantive Reform

At the end of an extended period of public debate, litigation, and charity sector lobbying for law reform, there was no major overhaul to the political purposes doctrine by 1987. The courts declined the opportunity in cases such as *Scarborough* and *Native Communications*, instead articulating a narrow version of the ancillary purposes doctrine, and eking out a limited expansion of the definition of charity to include the unique situation of aboriginal peoples of Canada. There is little evidence that the government carefully considered the proposals by the charity sector and charity law experts, whose hands were extended in an effort to resolve the regulatory dilemma at hand. The government declined the opportunity to engage in a sustained dialogue about the appropriate definition of charity and allowable activities by such organizations in a modern civil society. Instead, the new legislative provisions offered a brief, almost technical amendment, as part of efforts to calm the sector's advocates, in combination with a more permissive sounding policy statement from the Department of National Revenue, and gestures of partnership with the charity sector through dialogue with a cabinet

[185] *Supra* note 170 at para. 5.

minister and public appearances by the prime minister. Strategic regulating managed to temporarily improve relations with the sector and give the appearance of legal changes from the government while actually doing little substantive law reform.

This approach was temporarily successful. A period of relative quiet did follow without further lobbying from the charity sector about the political purposes doctrine, despite a few cases arising on the issue.[186] Within four years, however, frustration about the political purposes doctrine returned front and centre, this time making an appearance in a discussion paper addressing the difficulties charities face in understanding the advocacy rules. By 1994, another spark had reignited the charity sector and the general public into debates about the appropriate role charities should play in public policy issues. The sector, bolstered by its expanding role in Canadian society, harnessed its growing resources to double its mobilization efforts around the advocacy rules. By the end of the 1990s, the Supreme Court of Canada was being asked to comment on the political purposes doctrine, and throughout the first years of the 21st century, the government faced numerous law reform proposals for legislative action.

Section III: Thawing the Advocacy Chill: 1994-2003

In the years immediately following the legislative amendments of 1986 and the 1987 information circular, attitudes about the political purposes doctrine improved and representatives of the charity sector pulled back from lobbying for legislative action. The government's relationship-building approach may have been enough to initiate a change in the attitude of the government towards the charity sector. In addition, perhaps some law reform momentum was lost due to disappointment over the lack of a legislative amendment and the evident reluctance of the courts to overhaul the doctrine of political purposes. It was not

[186] See *Notre Dame de Grāce Neighbourhood Assn. v. M.N.R.,* [1988] 3 F.C. D-39, 85 N.R. 73 (C.A.); *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.); *Everywoman's Health Centre Society v. Canada*, [1991] 2 C.T.C. 320, 92 D.T.C. 6001 (F.C.A.).

until 1994 that the rules limiting political activities again caught the attention of the greater public and re-mobilized the charity sector, although their lack of clarity had already reemerged as a regulatory issue by 1991.

The In-Between Years: 1991 Revenue Canada Discussion Paper

In 1991, Revenue Canada published the discussion paper, "A Better Tax Administration in Support of Charities", marking the Mulroney government's continued efforts to improve relations with an ever-expanding charity sector.[187] In its introduction, the paper lavished praise on generous Canadians who in 1989 alone donated 2.5 billion dollars to charities as individuals and 400 million as businesses, resulting in one billion dollars in tax revenues being transferred to the charity sector.[188]The discussion paper attempted a careful balance between recognizing the "checks and balances" required to keep organizations that benefit from tax revenues accountable while still fostering an independent, "self-governing" sector.[189] The paper described charities as being co-signors of a "social contract" to provide goods and services in exchange for the generosity of Canadians. Showing the government's preference for less spending on social programs and a stronger "voluntary sector", the discussion paper quoted Prime Minister Brian Mulroney's speech to the Canadian Centre for Philanthropy,

> We want vibrant voluntary organization that bring vision and solutions to Canadians… Financial dependence on government stifles creativity, sandbags initiatives and reinforces bureaucratic responses at the very moment when a flexible, innovative human touch will make a real difference in someone's life… We must be faithful to the destiny imagined by our ancestors of a caring, compassionate society growing in a united, tolerant and generous country.[190]

The paper went on to outline measures that will better support charities, while urging the sector to take on its own self-governance, with the goals of "promoting openness and accountability."[191] It focused on improving perceptions of fairness,

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[187] Canada, Revenue Canada, A Better Tax Administration in Support of Charities (Ottawa: Revenue Canada, Taxation, November 1990), [1991 discussion paper].
[188] *Ibid.* at 7.
[189] *Ibid.* at 9.
[190] *Ibid.* at 7.
[191] *Ibid.* at 19.

maintaining compliance burdens while increasing accessibility, and expanding regulation about the use of charitable donations on administrative costs.

The rule about political purposes made a fairly prominent appearance in the discussion paper, with two of its twenty-three pages devoted to explaining the history of the political purposes doctrine, the recent legislative amendments, and the current rules as understood by Revenue Canada.[192] Various compliance difficulties with the rules were then outlined, focusing on the complicated nature of the prohibitions and the difficulties that charities have determining at what point an activity ceases to be educational and becomes political, and which political activities are considered acceptable. After outlining all the challenges posed by the advocacy rules, the paper went on to offer quite little in terms of law reform, instead proposing that charities be given plain language information about the rule on political activities. (Perhaps the agency was considering drafting yet another information circular.) The paper also added another compliance requirement concerning political activities; despite all the reasons that the discussion paper provides explaining why charities have trouble applying the rule and understanding which activities are considered political, a new requirement is introduced requiring charities to disclose the percentage of political activities they engage in on their annual information returns.

Just five years after the legislative amendments in 1986, despite the permissive tone of 1987 information circular, and all the government's relationship building efforts, by 1991, the rule limiting political activities by charities was front and center as a regulatory issue. The limited action previously taken by the government was not enough to resolve the compliance and administrative problems. It seems, though, that despite its omnipresence, Revenue Canada was not prepared to do much more to advocate for changes to the application of the political purposes doctrine. Blake Bromley, a charity law practitioner, in responding to the discussion paper in The Philanthropist, praised the agency for

[192] *Ibid.* at 17-18.

its efforts to improve its administration of the charity regulatory regime. He explained that Revenue Canada was actually quite limited in the paper's scope, as "the Department's ability to influence the law of charities is limited by the fact that it only administers the *Income Tax Act* and does not write the provisions in it."[193] Those limitations did not stop the agency, however, from noting the government's intention to seek legal changes in at least two other areas in the discussion paper.[194] Mark off the 1991 discussion paper, then, as another refusal by the government to undertake substantial law reform on the political purposes doctrine.

Law Reform Advocacy in the Second Period: To the Courts First

In ongoing debates about the definition of charitable purposes and the rules limiting political activities, the question continues to arise as to who is best placed to reform charity law. In the law reform proposals addressing the doctrine of political purposes, the Coalition of National Voluntary Organizations and Henry Intven focused on legislative action, with little attention to the courts' potential role as a vehicle for reforming charity law. Perhaps this legislative focus was in part due to association of the political purposes doctrine with court decisions such as *Scarborough* and *McGovern*. In response to such judicial action, the legislative reform proposals emphasized parliamentary supremacy over what may have been perceived to be the incremental, analogous and inaccessible decision-making style of the common law. Recall, though, that it was only in 1982 that Canada entrenched the Canadian *Charter*, with the *Canadian Human Rights Act* introduced but a few years before, in 1977. Canadians did not yet know the range of possibilities for judicial action in a *Charter* era and the larger role that courts could play in law reform movements, or at least the role that some movements came to hope they could play. Legislative reform may have felt more properly democratic, carried out by elected representatives, and not requiring the

[193] Blake Bromley, "A Response to 'A Better Tax Administration in Support of Charities'" (1991) 10:3 Philanthropist 3 at 12.
[194] *Supra* note 187 at 15, 19.

tremendous specialization needed to advance a legal case that fundamentally shifted the proceeding jurisprudence.

By the late 1990s, however, the charity sector's eyes had turned to the judiciary. One organization, Human Life International, undertook fundraising efforts to support its legal action. On several occasions, the courts faced the opportunity to reform charity law substantially, and reframe or overhaul the political purposes doctrine. Each time, the courts insisted that in a parliamentary democracy, big decisions about eligibility for charitable status and the definition of charitable activities are best left to the legislature, and refused to do more than create limited, incremental change in the faithful style of the common law.

a) The Spark: Human Life International (1994)

The second period of potential law reform began in 1994 with the publication of a full-page ad in the Globe and Mail by Human Life International, a group advocating against abortion.[195] The organization used the ad as a fundraising effort to defend itself from Revenue Canada's imminent revocation of the organization's charitable status on the basis of its political activities. Human Life International was originally audited in 1989 after running an anti-abortion postcard campaign targeting elected representatives and organizing an anti-abortion demonstration on parliament hill.[196]No consequences came of this initial audit, possibly because the demonstration and the postcard campaign stayed within expenditure limits for political activities. After another audit that covered the years 1990 – 1992, Revenue Canada advised Human Life International that from its assessment the organization was devoting an excessive number of its resources to political activities. Several months later, after giving Human Life International the opportunity to disagree with the agency's assessment, Revenue Canada revoked the organization's charitable status.

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[195] *Supra* note 22 at 33.
[196] *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202, [1998] 3 C.T.C. 126 at para. 3, [Human Life International].

One of Human Life International's core legal defenses was that it was engaged in activities for charitable purposes, either fitting under the charitable head, advancement of education, or "other purposes of benefit to the community". Revenue Canada disagreed, citing the intention and content of Human Life International's activities,

> The courts have established that activities which are designed essentially to sway public opinion on a controversial social issue are not charitable, but are political in the sense understood by law. An organization may devote a limited amount of its resources including volunteer help, to political activity of a non-partisan nature provided that such activity is both incidental and ancillary to an organization's objects. Our review has concluded that HLIC is devoting substantial resources on political activities which are not incidental and ancillary to charitable objects.[197]

The agency accepted limited political activities that were sufficiently related to an organization's charitable purposes, so in limited quantities, a postcard campaign or a demonstration against abortion were acceptable. Human Life International appealed to the Federal Court of Appeal, with the aim of persuading the court that activities "designed essentially to sway public opinion on a controversial social issue" are not necessarily political.[198]The organization also argued that its political activities were within expenditure limits, and that the *Income Tax Acts* provisions relating to charitable status should be "void for vagueness".[199] Human Life International forwarded multiple lines of argument to overturn the revocation decision, several of which the court refused to hear further evidence on: that the minister abused his discretion in revoking the organization's status, that the agency should be estopped from revoking Human Life International's status because its earlier audit did not lead to a revocation, and that the revocation was violating its *Charter* rights to freedom of speech and expression.

The challenge the court faced was drawing the line between activities that fit under the advancement of religion head and remained charitable, and activities that crossed into the political field. Human Life International offered the court an

[197] *Ibid.* at para. 9.
[198] *Ibid.* at para. 6.
[199] *Ibid.*

opportunity to address the "lack of coherence to a legal regime which at one and the same time permits purposes which 'advance religion' and prohibits those that are 'political'."[200] If rules limiting political activities violated charter rights, would charitable organizations then be able to engage in any political activities they wanted as long as they related sufficiently to their chosen religious doctrine? Such a decision might lead many advocacy groups to consider discovering the religious underpinnings to their arguments and apply for charitable status under advancement of religion.[201] With the rising concern about the cost of charity tax expenditures, the legislature might then consider an amendment removing religion as a charitable purpose.[202] Alternatively, if the court found that many religious teachings are, in fact, political, it was possible that religious charities would be much more widely restricted to spiritual matters.

The court rejected Human Life International's appeal, agreeing with Revenue Canada's assessment that the activities the organization engaged in were political and exceeded expenditure limits. A 1988 precedent, *Positive Action Against Pornography v. M.N.R.*, had established that an organization that presents one-sided information about a controversial issue is not engaged in activities that fit under the advancement of education head, and the court determined that Human Life International activities were analogous to that case.[203]The court did take two opportunities, however, during its evaluation of Human Life International's arguments, to comment on the state of the definition of charity in Canada and the political purposes doctrine, call for law reform, and then defer responsibility for expanding the definition of charitable purposes and political activities to the legislature.

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[200] *Supra* note 23 at 35.
[201] *Ibid.*
[202] *Ibid.*
[203] One year later, the Federal Court of Appeal came to a similar decision about in *Alliance for Life v. M.N.R.*, 1999 FCA, [1999] 3 F.C. 504, although relying less on the controversial nature of Alliance for Life's activities, which the court felt could be acceptable as long as they were sufficiently related and subsidiary to the organization's charitable purposes. In Alliance for Life, Stone J.A. decided that because the organization's political activities presented but one point of view, they did not fit under the advancement of education head, and therefore, were not activities that were ancillary and incidental to a charitable purpose.

First, the court described the definition of charitable purposes and the fourth charitable head, "other purposes of benefit to the community" in Canadian law as "…an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts."[204]The court commented on the argument that the rules in the *Income Tax Act* relating to charities and the 1986 legislative amendments specifically – 149.1(6.1) and 149(6.2) were void for vagueness. The decision affirmed the agency's assessment that Human Life International violated the ancillary purposes doctrine by engaging in activities properly characterized as political due to their controversial nature. During its evaluation of Human Life International's arguments, however, the court identified many of the problems with complying and administering the political purposes doctrine, noting the subjectivity involved in differentiating between political and charitable activities and determining what resources were allocated to those activities.[205] The court then voiced its support for law reform to clarify the rule,

> I would heartily agree that this area of the law requires better definition by Parliament which is the body in the best position to determine what kinds of activity should be encouraged in contemporary Canada as charitable and thus tax exempt. But I am not prepared to say that the vagueness here is of a degree in excess of the constitutionally permissible.[206]

Despite the court's acknowledgement that rules limiting political activities and the common law definition of charitable purposes were ill defined and badly in need of clarification, it deferred to the legislature as the appropriate law reform vehicle. The court also situated itself amongst the list of actors who require parliament's assistance to modify the rule, right next to taxpayers and administrators, in a nod to the role of parliamentary supremacy in creating rules that taxpayers comply with, tax officials administer, and the courts adjudicate.

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[204] *Supra* note 196 at para. 8.
[205] *Supra* note 196 at para. 14.
[206] *Supra* note 196 at para. 19.

b) To the Supreme Court of Canada: Vancouver Society of Immigrant and Visible Minority Women (1999)

In 1999, the Supreme Court of Canada had the opportunity to guide the law of charitable purposes in Canada when it reviewed the denial of charitable status to Vancouver Society of Immigrant and Visible Minority Women.[207]The Canadian Centre for Philanthropy, with oft-cited charity law expert Arthur Drache acting as one of their lawyers, intervened to take full advantage of this opportunity to ask the court to overhaul the law of charities, as did the lawyers for Vancouver Society of Immigrant and Visible Minority Women. Most of the Supreme Court of Canada's decision focused on the appropriate test for charitable status and what purposes are covered under advancement of education, a category that it broadened in the decision, as well as the charitable head "other purposes beneficial to the community". The decision only made limited reference to the rules limiting political activities, with two elements of the case that are insightful for this historical retrospective on the political purposes doctrine. First, despite both the appellant and the intervener laying out nuanced roadmaps and options in their strong arguments for revising the definition of charity in Canada, both the dissent and the majority refused to undertake such an initiative, albeit for different reasons. The majority repeatedly pointed to parliament as the appropriate venue for charity law reform, echoing the law reform proposals that came forward during the 1980s, and, as we shall see, the proposals offered in the late 1990s and first years of the 21st century. Second, legal scholars identified a new reading of the political purposes doctrine in the case, a reading that limits the applicability of the rules and that, if accepted, expands charities' abilities to engage in political activities.

The majority upheld the decision that Vancouver Society of Immigrant and Visible Minority Women did not qualify for charitable status, but took the opportunity to comment on the current state of charity law in Canada. The court repeatedly noted that they did not find the definition of charity law in Canada and

[207] *Supra* note 14.

its current legislative framework to be adequate, echoing the cry for legislative action in the area to adapt to a changing society. The court's hands were tied, however, explained Iacobucci J., writing for the majority, because of "limits to the law reform that may be undertaken by the judiciary."[208] He went on to explain that the courts must follow the common law pattern of incremental change and that judicial action is not the appropriate way to expand the definition of charity and in the process, enlarge what is already a hefty tax expenditure. The consequences could be tremendous, Iacobucci J. explained,

> 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. In my view, especially in light of the prominent role played by legislative priorities in the "new approach", this would be a change better effected by Parliament than by the courts.[209]

The court decisively asserted that tax policy decisions with potentially sweeping impacts on Canada's treasury are best made by elected representatives in a parliamentary system. That did not stop the majority from encouraging parliament to reform charity law, not only urging the legislature to step in, but actually providing recommendations about which reform proposals were worthy of consideration. Throughout their reasons, the majority recognized the legitimacy of calls for law reform around the definition of charitable purposes, and repeatedly deferred that responsibility to parliament,

> …I agree that the law in this area is in need of reform but there are limits to the degree of change that the common law can accommodate. It is one thing to change the law by legislative amendment and quite another to alter the existing jurisprudence by a fundamental turning in direction.[210]
>
> …it is difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded.[211] (201)

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[208] *Ibid.* at para. 150.
[209] *Ibid.* at para. 200.
[210] *Ibid.* at para. 179.
[211] *Ibid.* at para. 201.

> …I reiterate that, even though some substantial change in the law of charity would be desirable and welcome at this time, any such change must be left to Parliament. (203)[212]

Gonthier J., writing for the dissent, found that the Vancouver Society of Immigrant and Visible Minority Women qualified for charitable status within the current jurisprudence. The dissent's reasons cited the fact that parliament had not yet legislated the definition of charity as a clear indication that the legislature, to date, chose the courts as the appropriate venue for incremental changes to the definition of charitable purposes.[213] Despite parliament's choice to date to let courts take charge of developing the definition of charity, Gonthier J. agreed with the majority that legislative action was now required,

> My colleague calls for legislative intervention in the law of charity to rectify certain deficiencies (para. 203). I acknowledge those deficiencies, and I agree that legislative intervention on a principled basis, leaving adequate flexibility in the application of the law to respond to changing social needs, would be desirable, particularly in light of a restrictive interpretation of the common law.[214]

In regards to the most appropriate reform choice available, the majority supported the Canadian Centre for Philanthropy's outline for a revised test for determining charitable status, a three-step process that would include the *Pemsel* heads of charity but offer a method of expanding the fourth head, "other purposes of benefit of the community". Iacobucci J. chose to offer his opinion, noting that it was not necessary for him to do so or offer any comment at all on possible options for the legislature. He devoted over 600 words not only to comment on the proposals for legislative reform and note his preferred option, but also to include a step-by-step summary of the majority's preferred reform option.[215] The decision to include a summary of the proposal within the decision is striking. Many interveners never even see mention of their arguments in a Supreme Court of Canada decision, let alone find their submissions explicitly endorsed. Iacobucci J.

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[212] *Ibid.* at para. 203.
[213] *Ibid.* at 122.
[214] *Ibid.* at 124.
[215] *Ibid.* at 202-203.

and the remaining majority, then, were quite consciously putting on record an invitation to the legislature to undertake charity law reform, even including one pre-reviewed recipe for moving forward.

Legal scholars Patrick Monohan and Elie Roth interpret the *Vancouver Society* decision as altering the doctrine of political purposes' scope, because, from their understanding, Iacobucci J. viewed political activities that were ancillary and incidental to an organization's charitable purposes as charitable.[216] Under this analysis, the only requirement of the rules limiting political activities would be for the activities to remain related and subsidiary to the organization's charitable purposes. The strict expenditure limit would then cease to be a strict rule, but may remain useful as a compliance guideline, although Monohan and Roth argue that the limits could be increased up to 20%.[217]This reading of *Vancouver Society* as it applies to the political purposes doctrine is the most generous in the literature; generally the case is not understood as affecting the rules limiting charities political activities as they stood before the decision.

c) Who, If Not the Courts: Reflections on Instrument Choice after Vancouver Society

What did *Vancouver Society* mean for the political purposes doctrine and its related rules? Over the next few years, legal scholars, practitioners, and the third sector debated the best approach to reforming charity law. Despite efforts to ask the courts to clarify or revise the rule, the courts continuously refused and deferred such a decision to the legislature, remarking that decisions about sensitive issues such as conceptualizing what is political and distinguishing those activities from charitable ones, and decisions that could have serious effect on the Canadian treasury through increasing a tax expenditure, are best left for the legislature. The case highlights the judiciary's deference to the legislature not just on the political purposes doctrine, but also on the wider definitional issues in charity law. The majority decision in *Vancouver Society* represents a clear and

[216] *Supra* note 95 at 46-47.
[217] *Ibid.* at 47.

recurring message from the courts: we will not and we cannot do this type of law reform.

Drache certainly heard that message loud and clear. After co-representing the Canadian Centre for Philanthropy in this case and doing his utmost to convince the courts to redefine charity law in Canada, Drache wrote a strong article in favour of a legislative amendment, stating, "as it is abundantly clear that the Courts will not undertake a "re-writing" of the law in Canada, the need for legislative action, which is the thesis of this paper, becomes more pressing."[218]Similarly, the year following the *Vancouver Society* decision, legal practitioner Wolfe D. Goodman called for a legislative amendment to the definition of charity, expressing sadness and regret over the court's narrow reading of the definition of charitable purposes in *Vancouver Society*, which he felt did not keep up with the modern Canadian context. In calling for a statutory definition, Goodman wrote, "a movement is on foot at the present time to achieve this reform."[219] Goodman was not exaggerating; the next three years saw a flurry of lobbying activity to "modernize" the definition of charity law, including a concentrated focus on decreasing the scope of the doctrine of political purposes, if not eliminating it entirely.

Not all charity law scholars and practitioners shared the conviction that legislative reform needed to redefine charity and the law of political purposes in Canada. Blake Bromley questioned the necessity of turning to parliament to modernize the definition of charity law, arguing that the common law effectively and incrementally modernized the charity law for hundreds of years, and will continue to do so. [220] Bromley worries that in *Vancouver Society*, counsel for the organization and the intervener focused so much on getting the Supreme Court of

[218] Arthur Drache, with Frances K. Boyle, Charities, Public Benefit And the Canadian Income Tax System: A Proposal For Reform (1999) at 2.
[219] Wolfe D. Goodman, "A Personal View of the Vancouver Society Decision" (2000) 15:2 Philanthropist 20 at 22.
[220] Blake Bromley, "Answering the Broadbent Question: The Case for a Common Law Definition of Charity" (1999-2000) 19 Est.Tr. & Pensions J. 21 at 28-30.

Canada to redefine charity that it did not actually make a strong enough case that Vancouver Society for Immigrant and Visible Minority Women actually qualified for charitable status based on the existing body of case law. Gonthier J., in dissent, seems to confirm Bromley's concern, explaining that he found the organization eligible under the existing jurisprudence despite being presented very little evidence on the issue,

> Regrettably, in my view, the Society expended little effort on locating authority to support its argument that its purpose qualifies as charitable under the fourth head of the *Pemsel* scheme. Instead, the Society concentrated its efforts on urging this Court to engage in a wholesale revision of the common law definition of charity. This is most unfortunate. No such revision is necessary, in my view, because the Society's purpose can be placed within the existing *Pemsel* categories. The Society was, consequently, too quick to ask this Court to make new law and insufficiently attentive to the possibility of succeeding under the existing regime. Before asking this Court to modify the common law, litigants should demonstrate that they have exhausted the possibilities of the existing law. In the law of charity, those possibilities are considerable.[221]

Gonthier J. expressed his disappointment that the counsel for Vancouver Society for Immigrant and Visible Minority Women did not expend more effort on proving themselves eligible by analogy to over 600 years of jurisprudence. Bromley, Dan Borgeouis,[222]Patrick Monohan and Elie Roth agree, believing that, when provided with the opportunity, courts show a consistent flexibility in adapting the definition of charity in the common law to changing times. Monohan and Roth argue that it is the dearth of charity law decisions in Canada that is responsible for the lack of clarity in the area; the courts simply have not been given sufficient opportunity to create a robust body of jurisprudence clarifying the doctrine of political purposes and the definition of charity more generally due to the inaccessibility of appeals.[223] Between 1985 and 2000, despite the large number of registered charities and an average of 4000 applications for charitable

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[221] *Supra* note 14 at 81.
[222] *Supra* note 45 at 66-67.
[223] Patrick Monohan and Elie Roth, "Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform" York University (2000) at 61, 63.

status per year, the Federal Court of Appeal only heard 20 cases, and the Supreme Court of Canada heard just one.[224]To improve the state of charity law in Canada, Monahan and Roth recommend alongside several other charity law authorities and commission reports and consultation findings, changing the appeals process, and support in particular the Tax Court of Canada as an appropriate venue, given its reputation for fairness, the availability of an informal procedure, and its expertise in tax matters.[225]

Bromley also questioned the wisdom of legislating the definition of charity law in an era of funding cuts and concerns about the largess of tax expenditures.[226] If parliament is asked to write a new definition of charity, he argues, it is certain that fiscal considerations will be a key, if not the determining factor in deciding how broad it should be. Any expansion of the definition of charity will only be considered alongside questioning about its potential price tag for the government treasury, and in a context where, since the 1980s, the government has intently focused on cutting all spending programs, a broad definition from parliament is far from a guarantee.

If parliament did enact a broader definition of charity, Bromley argued, its motivations should raise suspicion. Bromley points to government funding cutbacks for non-profits and charities that put pressure on organizations to find other sources of revenue to fund their ever-increasing workload.[227] Broadening the definition of charitable purposes point organizations to the private sector for funding, abdicating government responsibilities. Services that used to be funded entirely by the government are now a shared responsibility with the private sector, with all the strings that may be attached to private sector money. Some argue that charitable giving is a form of participatory democracy with dollars, but this does

[224] *Ibid.* at 65.
[225] *Ibid.* at 107.
[226] *Supra* note 220 at 40-41
[227] Blake Bromley, "Answering the Broadbent Question: The Case for a Common Law Definition of Charity" (1999-2000) 19 Est.Tr. & Pensions J. 21 at 41-42.

not accurately represent how the tax expenditure works.[228] It is not elected representatives who decide where tax revenues go, but rather individuals and corporate donors with no accountability to the public at large, choosing who to give their money to, and then, deciding on all taxpayers' behalf, who taxpayers will give money to as well.[229] It is also more of a tax benefit for rich individuals than poor people, with the rich getting a tax credit for money that, had it been taxed, would have gone into the general treasury but instead is spent on the charities of their choice.[230]

One also understands why so many organizations in the third sector wanted access to charitable status and considered the broadening of charitable purposes and the ability to undertake advocacy activities so important. Since the 1970s, non-profit organizations and charities are increasingly the sole sources for providing certain health, cultural and social services. The funding landscape is scarce and many organizations are not able to access limited and frequently decreasing government funding. Forced to diversify their funding sources, charitable status is not only an effective revenue-raising mechanism, it also allows access to foundation grants, a significant option for funding projects that help cover some of an organization's activities and overhead, particularly with decreasing sources of core funding. In the everyday reality facing the third sector, organizations may be simultaneously protesting funding cuts and the downloading of government services while desperately trying to raise funds to continue offering their services. As non-profits increasingly take on the role of working with some of Canada's most marginalized populations, they also find themselves with a considerable expertise on the challenges facing these communities. Many grassroots organizations embrace an empowerment approach, where workers at the organization may themselves come from the communities they work with. Frustrated about the

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[228] See Neil Brooks, "The Tax Credit for Charitable Contributions: Giving Credit where None is Due" in Jim Phillips, Bruce Chapman, and David Stevens, eds., Between State and Market: Essay on Charities Law and Policy in Canada (Montreal & Kingston: McGill-Queen's University Press, 2001) at 457-458.
[229] *Ibid.*
[230] *Ibid.* at 460.

policy choices that cause their continued marginalization, groups want to speak freely in favour of or against legislative and government decisions without facing the risk of losing their revenue source and being denied the financial lifeline that may be their group's charitable status.

By the end of the 1990s, the third sector gave up on the courts as a venue for changing the rules limiting political activities or expanding the definition of charitable purposes. Bitterly disappointed that more substantive change did not come out of *Vancouver Society*, the sector turned to self-organizing and lobbying to seek change from their legislative officials. They began by initiating their own consultation process, the Panel on Accountability and Governance in the Voluntary Sector, in an effort to build consensus about the leading issues facing the sector. The effort successfully raised the profile of the third sector's needs with government, and led to the Voluntary Sector Initiative, a dialogue between the sector and government. The rules limiting political activities by charities and precluding political purposes were a key focus of each of these endeavors, with law reform proposals emerging from both projects. The momentum for law reform grew, with coalition groups like the Ontario Coalition of Agencies Serving Immigrants and the Institute for Media, Policy and Civil Society chiming in to lobby the government to reform the political purposes doctrine.

Reforming the Advocacy Rules: Calling for Legislative and Regulatory Reform

a) Ontario Law Reform Commission: Redraft the Income Tax Act (1996)

In 1996, the Attorney General asked the Ontario Law Reform Commission to review the law of charities in Canada and Ontario's role in regulating the charity sector.[231] The Attorney General's request followed several decades of complaints from the courts, government and the general public that there was too little regulation of charities in Ontario. In an effort to understand the regulation of charities federally and the role of the provincial government, the Ontario Law

[231] *Ontario Law Reform Commission, supra* note 95.

Reform Commission engaged in a detailed review of the history and current state of charity law in Canada and the province of Ontario. The Commission also laid out a series of recommendations, including legislative amendment to clarify the rules limiting political activities.

> The *Income Tax Act* should be redrafted to clarify the regulation of the political and apparently political activity of charities. Partisan and other unrelated political activity should be prohibited; subordinate and apparently political activity should be permitted. The Act should also implement an optional quantitative rule to make compliance easier for most charities. Stricter regulation of political activity in the case of private foundations and laxer regulation of the political activities in the case of social welfare charities might also be implemented.[232]

The actual differences between these recommendations and the state of the law at the time are not extensive. The *Income Tax Act* already reflected that partisan activities were strictly prohibited in s.149.1(6.1(c)) and s.149.1(6.2(c)), the subordinate nature of these political activities are described in s.149.1(6.1(b)) and s.149.1(6.1(b)), and Revenue Canada already created the 10% rule to delineate the limits on political activities.[233] The most significant aspect of the recommendations is the description of the quantitative limit on political activities by charities as "optional". It is commonly recognized that a numerical value can be useful in aiding taxpayers in understanding and meeting a compliance requirement. Similarly, while not addressed in the Commission's recommendation, Revenue Canada, tasked with regulating a large number of charities, is likely to find that a rule-of-thumb number serves as a useful guideline for spotting behaviour that exceeds limitations. With the political activities rules, however, charities complain of difficulties in allocating and quantifying the resources spent on political activities, as well as determining which activities fall under the definition of "political". Here, the Commission seems to be balancing the desire for a quantifiable limit as a compliance aid for charities and an administrative aid for regulators with the need for flexibility in the application of a rule dealing with indiscrete categories and unclear quantification procedures.

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[232] *Ibid.* at 735.
[233] *Supra* note 170 at para. 13.

Note that the 10% rule comes from an administrative interpretation rather than a clear legislative rule; there is no quantification in the *Income Tax Act* declaring when a charity's political activities cease to be ancillary and incidental. The crux of the Ontario Law Reform Commission's recommendation, therefore, seems to focus on clarifying this interpretation process through a legislative amendment that provides quantifiable guidelines, and statutorily entrenching flexibility, an interesting concept that might lead to continued confusion on both the compliance and administrative end.

The Ontario Law Reform Commission's recommendations on the rules limiting political activities are perhaps best understood as recognition that the political purposes doctrine did indeed pose significant regulatory and compliance difficulties for charities and tax authorities. Its efforts to offer substantive remedies to these burdens, however, were insignificant, likely limited in part by the report's provincial rather than federal nature, restraining its ability to make sweeping recommendations for regulatory change involving the *Income Tax Act*. Nonetheless, the Ontario Law Reform Commission added itself to the building chorus of voices calling for law reform in the 1990s and early 2000s.

b) The Broadbent Report: Make the Rules More Flexible (1999)

In the mid-1990s, the growing charity and non-profit sector realized the need for sector-wide representation to help advocate for the charity sector, develop a better relationship with regulators, and improve the sector's image in the general public.[234] In response, the sector initiated and funded the Panel on Accountability and Governance in the Voluntary Sector (the "Broadbent Panel"), chaired by Ed Broadbent. The Broadbent Panel extensively consulted with registered charities and non-profit organizations across Canada, pulling together recommendations to improve the strength of the voluntary sector while addressing a key issue

[234] See *Elson*, *supra* note 6 at 54- 55, noting that the Broadbent Panel and its predecessors, the Voluntary Sector Roundtables, filled a representative void in the absence of a strong national organization representing the sector.

identified: the need to build public confidence in the sector.[235] The majority of the report's recommendations focused on accountability and governance, hence the title of its final report, Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector, released in 1999.

The Broadbent Report covers a number of themes that have continuously reoccurred since the introduction of a more robust regulatory system in 1976, including the sector's opinion that the disbursement quota as it was structured imposed an unfair burden on charitable organizations, the need to clarify and modernize the rules around acceptable business activities by charities, and the appropriateness of imposing similar compliance burdens on both larger, higher resourced and smaller, under-resourced charities.[236] The political purposes doctrine specifically made an appearance in the Broadbent Report's list of "Proposals for Better Regulation", as did reform of the disbursement quota and other proposals related to the common list of complaints.[237] Affirming the vital role that charities play in creating social change through non-partisan political advocacy, the report recommended changes quite similar to those the Ontario Law Reform Commission recommended three years previous,

> … The rules governing advocacy activity need to be clarified in ways that can be better understood, that militate against arbitrary application and that cohere with the values of a healthy civil society. In particular, the 90/10 rule has to be regarded as only an approximate standard since allocations under it are extremely difficult for a registered organization to calculate or Revenue Canada to measure.[238]

The Broadbent report cited the general complaints about the rule; mainly that because of its ambiguous nature, charities are stifled or self-censor and their participation in civil society is limited. Its recommendations, however, are not expansive, simply calling for the 10% rule to be flexible because of the quantification difficulties frequently raised. The Broadbent Report did not suggest

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[235]Panel on Accountability and Governance in the Voluntary Sector, Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector (February 1999), [Broadbent Report].
[236] *Ibid.* at 69-70.
[237] *Ibid.* at 71.
[238] *Ibid.*

exactly how the 10% rule should be changed, but this may be because they felt that they lacked the necessary expertise in tax policy matters, an issue that was raised when the report recommended changes to the disbursement quota but declined to propose specific details, stating that it did not have the required knowledge. A similar limitation may have influenced the depth of the panel's suggestions for reforming the advocacy rules.

Much like the Ontario Law Reform Commission's report, the Broadbent Report highlighted the issues with the rules limiting political activities, but did not offer suggestions that would substantially change the application of the rule. A flexible quantification rule may allow a bit more flexibility on both the compliance and administrative end, but it does not address the core of the issues with the doctrine of political purposes: the lack of definition of what specifically are political activities, what non-partisan political activities are acceptable, how many are permitted,[239] and how an organization should quantify which resources were allocated to those activities. Further, it does not address a fundamental question of whether all activities that may be deemed political should be considered political for charity law purposes if they are meeting an organization's charitable purposes. At their heart, the Broadbent report's proposals offered little actual law reform to address the political purposes doctrine, but did help keep the spotlight on the rule limiting political activities and contributed to the rising momentum around the issue.

Political and media channels were also keeping the political purposes doctrine in the public eye. In 1999, Reform MP Jason Kenney raised the issue in parliament, arguing that, in his perception, Revenue Canada inconsistently applied the rule limiting political activities. [240] He complained that while two anti-abortion organizations lost their charitable status for excessive political activities, abortion support groups that provided information and referrals to pregnant women about

[239] Beyond the proposed flexibility between, for example 8% and 13%,
[240]Ottawa Citizen, "Faith and Charity" Ottawa Citizen (January 28, 1999).

abortion services did not face the same scrutiny for their activities. In response that same week, an editorial in the Ottawa Citizen commented that the rules limiting political activities "seem unnecessarily restrictive"[241] and pointed out that charities in Canada have an important role to play in public policy debates. In a rallying cry to reform the rule, the editorial ended by stating, "societal benefit should be based on the principle of allowing more Canadian voices to be heard, not fewer."[242]

c) Voluntary Sector Initiative Calls for a Legislative Amendment (2002)

In 1999, following the release of the Broadbent Report, representatives of the government of Canada and the voluntary sector came together in the Voluntary Sector Initiative with three goals: "building a new relationship, strengthening capacity, and improving the regulatory framework".[243] The Liberal federal government embraced this opportunity to build a stronger relationship with the charity sector as a key part of a policy agenda that "transferred" out those government programs it deemed more appropriately or efficiently run by the private or charity sectors.[244] The federal government's "partnership" with the third sector was ever growing, as was the number of registered charities, reaching 75,000 that same year.[245] Privatization and public/private partnerships also became increasingly popular aspects of a policy agenda that emphasized involving non-government partners in social services and state infrastructure. This shift is evident in the Voluntary Sector Initiative's report, Working Together – A Government of Canada/Voluntary Sector Initiative (the "Joint Tables Report"), where there is less emphasis on the need for regulation to ensure accountability for the tax expenditures spent on charitable tax benefits and more attention paid to the possibilities offered by forging a stronger relationship with the charity sector. The change in tone begins in the report's first pages, which overtly describe the

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[241] *Ibid.*
[242] *Ibid.*
[243] "Working Together: A Government of Canada/Voluntary Sector Initiative" Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative < http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf>.
[244] *Supra* note 5 at 171-172.
[245] *Supra* note 240.

shift, albeit using a more positive brush to paint the history of strained relations with the sector,

> Now, after decades of working together on a fruitful but mostly ad hoc basis, and of pursuing common objectives from sometimes divergent or even opposing positions, the government and the voluntary sector have taken an historic step toward working together to achieve mutual goals.[246]

The Joint Tables Report also moves to situate the charity and non-profit sector as the "third sector", occupying a key role in Canadian society as one of the three pillars in a democratic nation,

> Canada's voluntary sector plays a crucial and complex role in our society, including making Canada a more *humane, caring* and prosperous nation. The sector is also enormously broad and diverse. And its unique contributions — both at home and abroad — afford it singular *knowledge* and *expertise*. The voluntary sector is a vital pillar in our society, as are the public and private sectors.[my emphasis][247]

As one of the three pillars of Canadian society, it was difficult to justify limiting the ability of organizations with such *knowledge* and *expertise* from contributing to public policy debates and pushing Canada to be more *humane* and *caring*. In the recommendations for "improving the regulatory framework", two out of the four proposals for legislative change addressed the problems emerging from the political purposes doctrine. There was an ever-increasing sense in the charity and non-profit sector that the rules limiting political activities were unfair considering the role of the sector in offering services to marginalized Canadians, and the Advocacy Working Group of the Voluntary Sector Initiative captured these feelings after canvassing the opinions of organizations across Canada,

> Like the canary in a coalmine, the sector serves as an early warning system for society. Organizations that work at the community level, on the front lines and in the field are often the first to recognize a pattern, or gap that indicates a public policy that needs to be addressed systemically. It would be irresponsible and self-serving if the sector did not use its experience to advocate – how many years should food banks watch the

[246] *Supra* note 243 at 15.
[247] *Ibid.* at 9.

> demand for their services go up without speaking about the underlying poverty that drives the need?[248]

Bob Wyatt, writing in the pages of the Philanthropist in 2001, in anticipation of the Voluntary Sector Initiative's recommendations, argued that now was clearly the time for law reform, with his title, "If Not Now, When?"[249] succinctly summarizing the general sentiment in the sector. Understanding charities' desire to speak out freely in public policy debates and their growing frustration, the Joint Tables Report went further than the proposals from the Ontario Law Reform Commission and the Broadbent Report. First, the Joint Tables Report recommended legislative amendments that created more certainty as to which political activities are permissible. Highlighting the recurring nature of the calls for law reform to the political purposes doctrine, the Joint Tables Report took a very similar approach to the legislative amendment proposed by the Coalition of National Voluntary Organization in the early 1980s. Instead of spelling out what activities are allowed, the report proposed a legislative amendment that outlined those activities that are prohibited, with the presumption that other political activities were acceptable, as follows:

> a) the activities relate to the charity's objects, and there is a reasonable expectation that they will contribute to the achievement of those objects;
> b) the activities:
> i) are non-partisan;
> ii) do not constitute illegal speech or involve other illegal acts;
> iii) are within the powers of the organization's directors;
> iv) are not based on information that the group knows, or ought to know, is inaccurate or misleading;
> v) are based on fact and reasoned argument.[250]

This list of prohibited activities appears to attempt to summarize the main themes emerging from the case law and other relevant legislation, while taking a more permissive approach to allowing organizations with charitable status to engage in political activities.

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[248] "The Sound of Citizens' Voices: A Position Paper from the Advocacy Working Group" Advocacy Working Group of the Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative <http://www.vsi-isbc.org/eng/policy/pdf/position_paper.pdf> at 4.
[249] "Bob Wyatt, "If Not Now, When?" (2001) 16:4 Philanthropist 295.
[250] *Supra* note 243 at 51-52.

Second, the report recommended raising the percentage of allowable political activities, even arguing that a quantitative limit on political activities was not necessary as long as these activities did not become the most significant aspect of the organization's activities overall.[251] The Joint Tables Report did not suggest exactly how this increase could take place, noting, in fact, that reforming the 10% rule may require either or both legislative and regulatory avenues, stating: "The Table sees little merit in quantitative limits on the extent of advocacy activities, *whether set in law or through departmental policy*, although such activities cannot become predominant."[252]

The report's observation that the 10% rule could be reformed through policy and not just legislative means suggests that Revenue Canada's interpretation of the term "substantially all", found in ss. 149.1(61.) and 149.1(6.2), could be broader, perhaps allowing more than 10% of an organization's activities to be political. The report's comment that either or both a legislative change or a change in administrative interpretation would be required speaks to the controversy around the state of the law in this area. The Canada Revenue Agency's technical interpretation bulletin cities court decisions pointing to the inability to create a "mathematical formula"[253] to determine how many activities constitute "substantially all" of an organization's work, with the particular circumstances detailing the appropriate quantification in each individual case. The bulletin goes on to explain that despite its imprecise nature, courts have recognized the 10% rule as a useful summary of the meaning of "substantially all". As such, Revenue Canada chooses to interpret the term as meaning 10% throughout the *Income Tax Act*.[254]

From Revenue Canada's perspective, then, beyond the possibility of a bit of flexibility about the 10% rule, to bring substantive change to the amount of

[251] *Supra* note 243 at 51.
[252] *Ibid.*
[253] *Supra* note 166.
[254] *Ibid.*

allowable political activities required legislative reform and not administrative discretion alone. On the other hand, Monahan and Roth argue that, based on their interpretation of *Vancouver Society*, the 10% rule could be dealt with by applying the court's conclusion that activities ancillary and incidental to an organization's charitable purposes are charitable and not political, making the substantially all test irrelevant for political activities related to the charity's purposes. Betsy Harvie, a charity law practitioner and author of a research report for the Voluntary Sector Initiative's Advocacy Working Group, suggests that in *Alliance for Life*, the court found the essential rule for political activities was whether they were sufficiently ancillary and incidental to the charity's purposes, also side sweeping the importance of the 10% rule.[255] The Joint Tables Report captured the lack of clarity of the law in this area, and advocated for elimination of the quantification rule, leaving only a mechanism for insuring that an organization's political activities do not overwhelm its charitable work.

Finally, addressing the barriers that advocacy non-profits experienced in obtaining charitable status, the report proposed the creation of a new category of "public-benefit organizations", that, if certain requirements were met, could have access to all the tax privileges of charities (similar to, for example, National Arts Service Organizations) even if the organization's purposes did not fit under the four charitable heads.[256] The Joint Table's general hypothesis was that other non-profits organizations not eligible for charitable status deserve additional support from the tax system, in the interests of building a stronger civil society. A main premise for extending additional tax benefits to non-profits without charitable status who engage in advocacy activities was that because business can write off advocacy or lobbying expenses, non-profits that engage in advocacy should also be able to obtain additional support through the tax system. Limits were imposed on what types of groups would have access to this new "deemed charity" status.

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[255] Betsy A. Harvie, Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses (January 2002) Voluntary Sector Initiative Report, Voluntary Initiative Secretariat at 17.
[256] *Supra* note 243 at 52 – 53.

Eligibility requirements included non-profit status, not working primarily for the interests of the organization's members, and engaging in a particular type of activities deemed to be of public benefit although not eligible for charitable status, including, amongst other examples provided, activities that

> • promote tolerance and understanding within the community of groups enumerated in the Canadian Human Rights Code;
> • promote the provisions of international conventions to which Canada has subscribed;
> • promote tolerance and understanding between peoples of various nations;
> • promote the culture, language and heritage of Canadians with origins in other countries;
> • disseminate information about environmental issues and promote sustainable development[257]

This final proposal takes an alternate approach to much of the law reform activity around modernizing the law of charities. Instead of proposing a wider legislative definition of charity or turning to the courts for an expansion of the interpretation of the original charitable heads, the Joint Tables Report proposes skipping the issue of the definition of charitable purposes entirely, instead creating another category of organizations that are basically charitable in nature- having all the regulatory obligations and all the tax benefits. The report did not address the fiscal consequences of extending charity-like tax benefits to so many non-profit organizations.

The Joint Table Report's proposals represent a peak in the second period of calls for law reform. Frustration with the rule had returned to significant heights in the charity and non-profit sector, and government officials agreed with the need for significant law reform. The report forwarded three concrete proposals that, if accepted, would have significantly altered the doctrine of political purposes and the availability of charitable status for a number of non-profits in Canada. If government regulators and the non-profit sector agreed, law reform seemed almost inevitable. But the calls for law reform did not stop in 2002, as more organizations and legal scholars chimed in.

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[257] *Ibid.*

d) Institute for Media Policy and Civil Society: More Options for Legislative Action (2001-2005)

Although the Institute for Media Policy and Civil Society (IMPACS) ceased its operations by 2007, in the beginning of the 21st century, it became one of the most prominent voices calling for legal reform to the rules limiting charities' ability to participate in advocacy work. Their Charities and Democracy Project aimed to harness the momentum and mobilize the charity sector to lobby for law reform of the rules limiting advocacy. In a number of reports, toolkits, and research papers designed for a general audience, IMPACS explained the problems faced by community groups because of the advocacy rules, looking at both the inability of some organizations to register for charitable status, and the silencing of registered charities unable to share their expertise because of the rules constraining their ability to speak out on public policy issues.[258]

In their report, The Law of Advocacy by Charitable Organizations: The Case for Change, IMPACS continued the argument that charities are muzzled from participating fully in debates to which they would bring great expertise, even arguing that these rules impede on an organization's right to freedom of expression.[259]IMPACS' widely distributed "Law of Advocacy by Charitable Organizations: Options for Change", a document listing four proposed options for changing the rules limiting political activities, and outlining the advantages and disadvantages of each proposal.[260]

IMPACS first option was to remove the restriction on advocacy activities in the Income Tax Act, leaving only a clear identification of the partisan activities that a

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[258] See e.g., Institute for Media, Policy and Civil Society, The Law of Advocacy by Charitable Organizations: Options for Change (2001); Institute for Media, Policy and Civil Society, Let Charities Speak: Report of the Charities and Advocacy Dialogue (March 2002); Institute for Media, Policy and Civil Society, Charities: Enhancing Democracy in Canada, 2nd ed. (2003); Institute for Media, Policy and Civil Society, Tax Policy, Charities and Democracy in Canada: A Summary of the Problem and Remedy (2004); Institute for Media, Policy and Civil Society, Charities and Democracy Project Election Kit (November 2005).
[259] Note that this *Charter* argument was dismissed in *Human Life International*, supra note 196.
[260] Options for Change (2001), *supra* note 258.

charity cannot organize or participate in.[261] According to IMPACS, this would allow charities to engage in as much advocacy as they desire, so long as it is non-partisan and connected to their charitable purposes. Interestingly, this proposal seems to situate the legislative amendment in 1986 as the key problem, despite the fact that the provisions were originally introduced to be relieving. The proposal does not address the common law history of the political purposes doctrine, which, despite its inconsistent state, has also been interpreted as significantly limiting the types and quantity of political activities allowable by charities.

IMPACS second proposal was to "broaden the definition of education" to "expressly include public policy input or strong reasoned arguments on public policy issues."[262] This type of public policy input would be considered charitable. IMPACS suggested that the amount of public policy input a charity could engage in could either be unlimited, or limited to a "quantifiable amount, e.g. half of a charity's educational activity".[263] IMPACS argued that this would not only allow registered charities to participate more freely in advocacy work, it would also increase the number of community groups who were eligible for charitable status. IMPACS did not specifically address how this reform would come about, although in implying that government resistance would be minimal because it was not an expansive redefinition of charities, one imagines that IMPACS was proposing a legislative amendment. This proposal stands out for suggesting expanding the common law definition of charity through legislative action, but only as it relates to the charitable head of education. In a context where there is no legislative definition of charity, it would be interesting and perhaps a bit peculiar to include legislative wording that expanded the definition of one charitable head, while ignoring the others.

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[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*

IMPACS third option was to "create a new category of tax exempt organizations",[264] based on Professor Kernaghan Webb's proposal to allow for organizations that are neither charities nor simple non-profits, but somewhere in between: "registered interest organizations" that, like charities, would also be able to provide tax receipts for donations, but would not be restrained from providing input on public policy. This proposal echoes the Joint Tables Report recommendation, where advocacy organizations that are not eligible for registration due to the political purposes doctrine would be able to access the same benefits, without redefining charity law through legislative amendment. Like the Joint Tables Report's proposal, this option has significant fiscal consequences, and again, these are not addressed. On a stand-alone basis, however, as IMPACS points out, this option would do little to address the problems that the political purposes doctrine poses for actual registered charities (unlike the Joint Tables Report, which recommended two other regulatory changes in combination with the creation of another organizational category under the *Income Tax Act*).

IMPACS fourth option was the introduction of a legislative definition of charity, moving away from the definition of charitable purposes in the 1891 Pemsel decision towards a more "modern and comprehensive definition of charity for the *Income Tax Act*".[265] IMPACS noted the enormity of such a task, although it also highlighted the benefits of a wide public debate on what constitutes charitable activity and the ability to modernize charity law. Of course, as already discussed, a number of legal scholars and charity law practitioners are against the suggestion for a legislative definition charity, preferring to leave such work to the courts.[266]

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[264] *Ibid.* See also *supra* note 86.
[265] Options for Change (2001), *supra* note 258.
[266] See e.g. Bromley, *supra* note 218, who argues that the courts have shown themselves adept at incremental change of charity law, while parliament would surely get wrapped up in fiscal considerations and would not necessarily be willing to expand the definition. See also Parachin, *supra* note 56 at 138 – 139, who prefers legal change through the courts, but also believes ss. 149.1(6.1) and 149.1(6.2) of the *Income Tax Act* should be repealed.

IMPACS also funded the Ontario Council of Agencies Serving Immigrants (OCASI) so that the group could undertake a study of how the rules limiting political activities impacted the organizations in their coalition. OCASI member organizations serve "communities where advocacy is a fundamental activity in providing services that seek to eliminate systemic discrimination and disadvantages of the clients, members or communities".[267] OCASI was concerned that many organizations working with racialized people were unable to obtain charitable status because of the political advocacy work they must do to accomplish their goals. They also worried that registered charities were afraid to speak out about government laws and policies that hurt the people they work with, for fear of losing their charitable status. The OCASI study summarized the problems caused by the political purposes doctrine:

> The law, as it is, impedes the agency's capacity to serve refugees and immigrants in a more effective way. It encroaches on the agencies ability to launch public education and advocacy campaigns aimed at removing barriers, participate in the public policy making process, and secure enough funds to ensure the efficient running of offices.[268]

OCASI recommended that, based on a survey of their member organizations' opinions, the entire charity law framework be overhauled, including "expanding the advocacy realm" so "that Canada can live up to its *Charter of Rights and Freedoms* and the agencies can attend to their societal obligations without reservations."[269] With its widely circulated resource and lobbying materials and its support for the OCASI study, IMPACS helped spread the call for law reform far and wide throughout the non-profit and charity sector in Canada. It was also one of the organizations that expressed its disappointment with the end results of so much lobbying; the release of yet another administrative interpretation on political activities in 2003, with no sign of further law reform to come on the issue.

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[267] Tendai Musodzi Marowa, "How the Law of Charities and Advocacy Can Be Changed to Better Serve Immigrants and Refugees" Ontario Council of Agencies Serving Immigrants (September 2001).
[268] *Ibid.* at 12.
[269] *Ibid* at 18.

Administrative Interpretation, Take Three: The 2003 Policy Statement on Political Activities

In 2003, the Canada Revenue Agency released a newly revised "Political Activities" policy statement, responding, according to its introduction, directly to the Joint Tables Report and other calls for law reform.[270]Reflecting the evolving nature of the relationship between government and the charity sector, the introduction praises at length the role of charities in building a strong and inclusive civil society through grassroots organizing and service provision, and the expertise the sector can provide to guide major policy decisions. No mention is made of the tax dollars that go towards the charity sector or the need for regulatory oversight to ensure that dollars are being spent on the right activities. Instead, the 2003 policy statement employs a number of indicators to convey that the Canada Revenue Agency, in recognition of the unfairness of the previous limitations on political activities, is now offering "law reform" (really, an administrative reinterpretation) that responds to the many criticisms forwarded in reports, the press, and by the charity sector. This law reform seems to be framed as a conciliatory gesture, a marker of an improved relationship following the Voluntary Sector Initiative,

> The *Accord* recognizes that Canadian society has been enriched by the invaluable contribution charities have made in developing social capital and social cohesion. …It is therefore essential that charities continue to offer their direct knowledge of social issues to public policy debates.[271]

One of the most interesting aspects of the 2003 policy statement is when the Canada Revenue Agency sources its ability to and incentive for "reforming" the law,

> Much attention has been paid recently to the question of registered charities and their involvement in political activity. Many in the voluntary sector felt that *the old interpretation of the Act was overly restrictive and* did not allow a registered charity to inform the public about issues of concern or to participate adequately in the process of developing public policy. Consequently, *we reviewed recent case law related to political activity and the Act and discussed it internally, and with people from the*

[270] *Supra* note 17.
[271] *Ibid.* at 2.

> *voluntary sector.* As a result of this review we have come to the following conclusions.[my emphasis][272]

It is this paragraph that signals that there is not, in fact, any substantive law reform that occurred to change the rules limiting political activities, but rather a new interpretation of the current law after internal and external dialogue. There were no legislative changes or major court decisions that led the agency to issue a new view on political activities. Rather, much like the information circulars that were released in 1978 and in 1987, the 2003 policy statement offers an administrative interpretation of the law that reflects yet another shift in the government's attitude towards the charity sector, its vision of the sector's role, and its attitude towards the tax costs of charitable tax benefits.

The 2003 policy statement outlines the ways that the rule limiting political activities has now been reinterpreted. In what it described as a gesture of fairness to smaller organizations, the Canada Revenue Agency introduced a sliding scale rule, so that charities with less annual income could spend more of their budget (up to 20%) on political activities.[273] This change, of course, reflects the Canada Revenue Agency's perception of its limited ability to reinterpret the term "substantially all" as it exists in ss. 149.1(6.1) and 149.1(6.2) of the *Income Tax Act*. The changes do not address the numerous complaints about the difficulties with quantifying resource allocation, nor do they respond to any of the calls to eliminate the rule, or to increase the quantity of activities allowed significantly. It is unclear what justification the Canada Revenue Agency used for this new interpretation, except that perhaps it was motivated by the logic that there was little a small charity could do with 10% of its resources. Arguably, this gesture of fairness may actually introduce an inequity between large and small organizations, with larger organizations more proportionally constrained in their political activities.

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[272] *Ibid.*
[273] *Ibid.* at 9.

The Canada Revenue Agency also announced that it was prepared to make an exception for charities that use more than the maximum resources allowed on political activities.[274] If the organization did not use up all of their allowed percentage in the last two years, the agency may allow the organization to use the amount it did not spend to cover the excess spending for the exceptional year in question. This reflects some of the flexibility advocated for by the Ontario Law Commission and Broadbent Panel reports, although the flexibility is not definitive and organizations have no guarantee that the Canada Revenue Agency will agree with its resources allocation calculations and the organization's assessment that an exception is warranted.

These first two points – the willingness to stretch the 10% rule for smaller organizations and to allow organizations to access unused apportionment from previous years – represent the Canada Revenue Agency's efforts to at least appear more flexible about the political activities rule in their new policy statement. In reality, however, the significance of these changes may be quite minimal, particularly considering the ambiguity around whether the agency will actually accept an organization going over its spending in the previous year. If the intention was to create a clearer regulatory environment, it was not accomplished with this new flexibility around allocations. There are no promises that flexibility will be granted, and few charities would be willing to take the risk of over-spending on political activities on the gamble that, when revenue officials subject their expenditures over the last year few years to a closer analysis, they will rule in the charity's favour rather than the only other available option- the most dire consequence of having the organization's charitable status revoked.

Most remarkable, perhaps, is that the 2003 policy statement made a fairly significant concession in expanding the type of advocacy activities that will be considered charitable and not political. Perhaps in the light of Monahan and Roth's interpretation that the *Vancouver Society* decision saw any political

[274] *Ibid.* at 9.1.

activities undertaken for charitable purposes as fundamentally charitable, the agency expanded the list of activities that were formally considered political and subject to expenditure limitations. These newly relabelled activities would now be considered strictly charitable in nature, as long as certain rules were respected. The following are activities listed in the 2003 policy statement that are now considered charitable and not political activities:

i) Public awareness campaigns will not be considered political activities if certain criteria are met. The campaign must present a well-reasoned position,

> "Based on factual information that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present/address serious arguments and relevant facts to the contrary."[275]

If there is not space or time in an advertisement to provide all this information, a method to obtain more information on the subject must be included. An organization must also make sure that the awareness campaign falls within their mandate and make sure that it does not focus most of their resources on awareness campaigns. Finally, the Canada Revenue Agency states that public awareness campaigns cannot be overly "emotional".[276]

ii) Talking to government and elected politicians, regardless of whether the charity was invited, is not considered a political activity, even if the organization is talking about changing, keeping or stopping a law, government policy or decision.[277] Again, the information presented must be "well-reasoned" and within the charity's mandate. If the charity is not given enough time to give a full, well-reasoned presentation, this information should be provided as soon as possible after the meeting.

iii) Publishing or distributing the information given to the government or elected politicians either on the Internet or in the form of a press release, is not considered

[275] *Ibid.* at 8.
[276] *Ibid.* at 7.1.
[277] *Ibid.* at 7.3.

political activity as long as there is no request to contact the government or elected representative and demand the change or maintenance of a law or policy.[278] If there is such a request, the activity will be considered political and subject to expenditure limits.

Although these newly relabeled activities are a significant move towards allowing a greater range of advocacy activities to be considered charitable, it does not capture in full Monahan and Roth's understanding of *Vancouver Society*. They argue that "the so-called '10 per cent' rule does not accord with the Supreme Court's most recent pronouncement on the issue of political activity in *Vancouver Society* and should be substantially revised."[279]No such revision is found in the 2003 policy statement; the 10% stands strong, despite the introduction of a slight sliding scale for smaller organizations. Merely a few more advocacy activities are deemed to be charitable in nature, with a possible nod to Monahan and Roth's interpretation of *Vancouver Society*. No relief is granted for the difficulties organizations face in determining how to quantify resources allocated between its political and charitable activities, and what approach will be favoured by the agency. For example, what portion of a phone line should be deemed allocated for political activities? How much tracking is required of an executive director's conversations in an average workweek to figure out the percentage of her wage that is being used for political activities? The confusing nature of the line between political and charitable is further troubled by the introduction of terms such as "well-reasoned" and "emotional", which have no clear definition and seem bound to cause more administrative and compliance trouble.

The fact that the 2003 policy statement does not reflect "real" substantive law reform should not serve to dismiss the statement entirely, however, considering the role of agency officials. Recall that tax officials are on the frontlines of deciding which organizations to audit for their political activities and which

[278] *Ibid.* at 7.3.1.
[279] *Supra* note 95.

groups are eligible for charitable status. Only those charities that find the resources to challenge a negative audit result or appeal the rejection or revocation of charitable might ever even see a courtroom on these issues. A change in regulatory policy, then, may have a considerable impact on many charities, particularly considering that the tumultuous history of the political purposes doctrine since 1978 has been heavily based on the agency's approach to regulating this issue. What the 2003 policy statement does mark is a shift in regulating political activities and in the agency's (and government's) attitude towards charities more generally. This shift began with the release of a new statement in 1987 and is capped by the even more permissive approach in this newest policy statement. The policy statement's tone clearly indicates more openness to flexibility, an acknowledgement of the need for charities to engage in advocacy activities, and the willingness of the agency to reinterpret its own policy views based on the opinions expressed in the charity sector. Such a change in tone may have more significant impact for charities than an assessment of the limited substantive value of the "reforms" found in the 2003 administrative interpretation would initially indicate.

The Canada Revenue Agency's shift in attitude towards the sector is also captured by its release of additional policies that same year and in the years immediately following. These policies were public legal information guides explaining the potential for registering for charitable status if your organization engaged in work that was previously the subject of great scrutiny for being overly political or failing to meet the public benefit test. For example, a number of new policy statements were directed at ethnocultural organizations and groups advocating against racism, both being examples of non-profit organizations that previously had difficulty obtaining charitable status because of the characterization of their purposes as overly political.[280] One of the new policy statements on ethnocultural

[280] Canada Revenue Agency, Policy Statement CPS-023, "Applicants Assisting Ethnocultural Communities" (June 30, 2005); see also Canada Revenue Agency, Policy Statement CSP - E11, "Charitable Work and Ethnocultural Groups - Information on Registering as a Charity" (June 30,

organization explains in detail the agency's policy on registering ethnocultural groups, and appears to be responding directly to criticism from groups like OCASI about the inability of groups working with ethnocultural and racialized communities to obtain charitable status.[281] The policy statement provides detailed instructions on how ethnocultural organizations might be eligible for charitable registration, even including a table that provides a series of examples of objects that will be charitable and those that will not, for an organization's consideration. The Canada Revenue Agency is actively responding to criticisms about not only the limited availability of charitable status to ethnocultural organizations, but also the lack of accessible information as to which organizations will qualify and what language is appropriate for use in an organization's founding documents if charitable status is desired.

A new policy statement on groups that promote racial equality may go even further in enacting substantive legal change.[282] In that statement, the Canada Revenue Agency explains that previously the agency depended on a 1949 case that found "appeasing racial feeling within the community" to be political and not charitable.[283] Only organizations whose promotion of racial equality fit squarely under the education head were deemed eligible for charitable status. At this time, however, the agency determined that Canadian society had changed substantially since 1949 and parliament, on a number of different occasions and through a variety of instruments, decreed the promotion of racial equality to be of public benefit. It was time, according to the agency, to recognize the promotion of racial equality generally as a charitable purpose, not only under the education head, but also under the fourth head, as "other purposes beneficial to the community". This change in regulatory approach has the potential to significantly increase the

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2005); Canada Revenue Agency, Policy Statement CPS-021, "Registering Charities that Promote Racial Equality" (September 2, 2003).

[281] *Assisting Ethnocultural Communities*, *ibid.*; For more on OCASI's criticism of charity law, see *supra* note 267.

[282] *Registering Charities that Promote Racial Equality*, *supra* note 278.

[283] *Ibid.* at 4.

availability of charitable status to organizations previously excluded because their purposes did not fit under the education head of charity.

Highlighting the growing regulatory confidence and discretionary power of the Canada Revenue Agency, the policy statement on racial equality admits that this expansion of charitable purposes does not come from the courts. It notes that the Supreme Court of Canada, as recently as 1999, did not choose to expand the definition of charity to include groups that will now be included based on the Canada Revenue Agency's administrative discretion,

> Canada's courts have not directly addressed whether promoting racial equality would qualify as a charitable purpose. The cases where this possibility emerged did not serve to expand the limited existing case law. Most notably, in the Supreme Court of Canada decision *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.*, the Hon. Mr. Justice Iacobucci declined to comment on "whether the elimination of prejudice and discrimination may be recognized as a charitable purpose at common law."[284]

With the courts declining to clarify or develop charity law to reflect changes in society, and the legislature apparently declining to create a statutory definition of charity, it seems that it is left to revenue officials to step in and move charity law forward. Someone - a juridical, legislative or regulatory body - needed to respond to the chorus of law reform voices, and it seems that the regulatory body was the chosen reform instrument. But do these policies count as long-lasting law reform? A main problem with permissiveness that emerges from administrative discretion is that it is not bound by legal sources. Just as the policies of the Canada Revenue Agency reflect a changing attitude towards the charity sector and an evolving style of regulation, another shift in the relationship between the regulator and the regulated could substantially set back these steps accomplished solely through administrative discretion. It is doubtful, then, that more substantive law reform from other venues is off the table, especially with calls for law reform continuing, and the recent developments in charity law outlined below.

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[284] *Ibid.* at 3.

Section IV: What Next for the Political Purposes Doctrine in Canada? Hope from Afar, Hope from Nearby

a) Calls for Law Reform Continue

How did the charity and non-profit sector react to the new policy statement on political activities? Calls for law reform did not cease; in fact, in November 2004, before the Standing Committee on Finance, several coalitions representing charities in Canada listed legislative reform of the rule limiting political activities as a main priority for the government, despite the best efforts of the new policy statement from the Canada Revenue Agency.[285]The excerpts below capture the sentiment in the committee hearings that law reform of the advocacy rules is still greatly desired:

> Ms. Judy Wasylycia-Leis (Winnipeg North, NDP): … Many have screamed bloody murder for years on this, but we can't seem to move it. Do you have a suggestion for how we can make it happen this time? What's the biggest holdup? How do we make the case?
>
> Ms. Jean Christie [Executive Director, Voluntary Sector Forum]: I think we thought you were going to help us answer that question.
>
> Ms. Judy Wasylycia-Leis [Winnipeg North, NDP]: It helps with a minority government. It helps a bit, but....
>
> Ms. Jean Christie [Executive Director, Voluntary Sector Forum]: We have proposed a couple of options for wording changes. We think there is a very small wording change that would clear up a really big ambiguity. It would make things much easier. Where's the holdup? It would be quick. It could be done quickly.
>
> Ms. Laurie Rektor (Manager, National Issues, Voluntary Sector Forum): …You've heard from every single witness speaking today that charities have important information and policy input to give, and it's a waste of that if we're restricting charities' ability to do that.
>
> I was at a meeting in Ottawa yesterday with about 45 charities that wanted to learn more about the new guidelines that the CCRA put out about a year ago, which helped move this along quite a bit and made it a lot clearer, and what they came up against in writing those guidelines was the way that the current Income Tax Act is worded.

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[285] Canada, Standing Committee on Finance, *Evidence*, 38th Leg., 1st Sess., (2 November 2004) at 1640-1650.

> …Mr. David Armour [Steering Committee Member and CEO, Canadian Medical Foundation, Health Charities Coalition of Canada]: Just briefly, I'm in agreement with what's being said. The language needs to be unpacked. We need to be able to talk about advocacy that a charity does that's related to its charitable purpose. If an organization is working with the disabled year-in and year-out, they'd better advocate on their behalf.
>
> … Mr. Peter Broder (Acting Vice-President, Public Affairs, Canadian Centre for Philanthropy): I think we're out of sync with other jurisdictions on this. In the United Kingdom, for example, you can undertake any advocacy activity as long as it doesn't become more than incidental and solely for the purpose of your organization.[286]

A broad section of charity sector representatives, then, continued to agree that legislative action was required, and that, despite the best efforts of the Canada Revenue Agency, the agency's hands were now tied from more substantive change without parliamentary intervention.

One year later, in November 2005, IMPACS distributed its Charities and Democracy: Election Kit, hoping to equip charitable and non-profit organizations with the tools to lobby political candidates for change to the rules limiting political activities.[287] In this election kit, IMPACS acknowledged that the 2003 policy statement by the Canada Revenue Agency helps to clarify the existing rules for registered charities, and provides a bit more wiggle-room for advocacy work. Despite these changes, IMPACS reiterated the need for an overhaul to the charity law framework in order to allow more advocacy activities by charities. Included in the election kit were two proposed amendments to the *Income Tax Act*.

In 2007, five years after the policy statement's release, Rob Rainer, executive director of the National Anti-Poverty Organization, complained that, while the political activities statement added, "a measure of clarity… vagueness and subjectivity remain".[288] Rainer then insisted that parliament should massively

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[286] *Ibid.*
[287] *Charities and Democracy Project Election Kit* (November 2005), *supra* note 258.
[288] Rob Rainer, "An Affront to Freedom and Democracy: Canada's Control on Advocacy by Canadian Charities and the Need for Charity Law Reform by Parliament" (Paper presented to the

reform advocacy rules limiting charities' political activities, suggesting that either charities should not be limited at all in their advocacy work, or that Canada should increase the allowance limits for political activities.

The political purposes doctrine also continues to catch media attention, with stories about the David Suzuki Foundation being subjected to scrutiny from the Canada Revenue Agency for criticizing the government's environmental policies,[289] and charities being "muzzled in elections" and prevented from sharing their expertise to create "a far healthier, robust debate about the issues at election time."[290]In addition, Canadian legal scholars continue to write about the incoherency in the jurisprudence about the political purposes doctrine and call for judicial intervention, along with the repeal of section 149.1(6.1) and 149(6.2) of the *Income Tax Act*.[291]

b) Hope from Afar: Other Jurisdictions Model What Substantive Law Reform Looks Like

Legislative changes in the United Kingdom and a recent High Court decision in Australia both provide models for Canada about what more substantive charity law reform looks like. Although each of these jurisdictions' legal frameworks are different from Canada, enough similarities exist to make comparison a useful exercise, considering our shared common law history, which includes, of course, our inheritance of the political purposes doctrine. In 2006, the United Kingdom passed the *Charities Act 2006* which entrenched a legislative definition of charity

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Inaugural Conference of the Canadian Constitutional Foundation, 13 October 2007) online: Canadian Constitutional Foundation <http://www.canadianconstitutionfoundation.ca/files/pdf/An%20Affront%20to%20Freedom%20and%20Democracy%20-%20Rob%20Rainer.pdf > at 7.

[289] Judy Mcleod, "Will Suzuki Foundation go the Greenpeace route in Losing Charitable Status?" Canada Free Press (June 18, 2007).

[290] Pieta Woolley, "Charities Muzzled in Election" Straight.com (September 11, 2008), online: Straight <http://www.straight.com/node/161071>.

[291] See Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 Alta. L. Rev. 871; Parachin, *supra* note 56 at 138 – 139. See also Parachin's concern about the fiscal rationale informing the Supreme Court of Canada's decision in *A.Y.S.A. Amateur Youth Soccer Association v. Canada* (Revenue Agency), 2007 SCC 42, [2007] 3 S.C.R. 217, described in Adam Parachin, "Unraveling the definition of charity: Fiscal objectives shouldn't govern the granting of charitable status" The Lawyers Weekly (March 6, 2009).

that included thirteen (rather than four) charitable heads and made space for the creation of future analogous charitable purposes not listed in the legislation.[292] Two years later, the United Kingdom's Charity Commission released a detailed guide, *Speaking Out: Guidance on Campaigning and Political Activity by Charities*, emphasizing charities' ability to participate in political activities as long as these activities did not become the main work of an organization and the activities are related to the organization's charitable purposes.[293] The United Kingdom has nothing like the 10% rule about political activities; instead, the rule is simply that an organization must ensure that political activities do not become the sole work of an organization. Note that no particular legislative action actually addressed the political purposes doctrine in the United Kingdom; instead the reasons for the permissive interpretation provided were other factors, including:

- The acceptance, in the last few years, of some purposes as charitable that were previously regarded as political. For example, the promotion of human rights following the *Human Rights Act 1998*.

- The changes in the *Charities Act 2006* which set out thirteen descriptions of charitable headings.

- Comments in the report on the future role of the third sector in social and economic regeneration, published jointly by HM Treasury and the Cabinet Office in July 2007.

- The appointment of a Compact Commissioner in July 2006 has underlined the importance of the Compact between Government and the voluntary sector, which recognises voluntary and community sector organisations' right to campaign in its Key Compact Principles.[294]

It notable that a number of factors in the above list have some parallels to the Canadian context, including the emergence of human rights instruments and the naming of advocacy limitations as a main issue for the charity and non-profit sector during relationship-building initiatives between the government and charity sector representatives. While no particular aspect of the new *Charities Act 2006*

[292] *Charities Act 2006*, 2006 c. 50, s.2.
[293] United Kingdom, Charity Commission, Speaking Out: Guidance on Campaigning and Political Activity by Charities (Liverpool: 2008).
[294] *Ibid* at 6.

addresses political purposes, it does provide the Charity Commission with the role of issuing guidance about charities meeting the public benefit test, and its guidelines on political activities illustrate this aspect of the Charity Commission's role in action.

Despite the parallels, the Canadian context does not mirror the United Kingdom. Several Canadian legal scholars and practitioners are against enacting a legislative definition of charity. Due to the federalist nature of the Canadian charity law framework, to date Canada does not have as robust a regulator as the Charity Commission. To imitate the United Kingdom would require a consideration of proposals about regulator and tribunal choice, including Drache's proposed Charity Tribunal and Adam Aptowitzer's suggestions for a Federated Canadian Charities' Council.[295] Regardless of the distinctions, the United Kingdom's approach is worth evaluating for its suitability for Canada. The Canada Revenue Agency has certainly shown its willingness to exercise administrative discretion and take on a stronger role in providing guidance to charities following the Voluntary Sector Initiative. Most exciting for those looking to move on from the debate about charities' political activities, now entering its fourth decade, it seems likely that if Canada adopted an equally permissive approach to political activities, most of the voices who called for law reform over the last four decades would be satisfied.

On the judicial front, the decision by the High Court in Australia allowing Aid/Watch to maintain its charitable status despite its political activities caused waves throughout common law countries that inherited the political purposes doctrine.[296] The court recognized that the organization's efforts to stimulate public debate about how foreign aid should be spent to relieve poverty, deemed political

[295] See Arthur Drache & W. Laird Hunter, "A Canadian Charity Tribunal: A Proposal for Implementation" (December 1999) 2:2 International Journal of Non-Profit Law; and Adam Aptowitzer, "Bringing the Provinces Back In: Creating a Federated Canadian Charities Council" (November 2009) 300 C.D. Howe Institute Commentary, online: C.D. Howe <http://www.cdhowe.org/pdf/commentary_300.pdf>.
[296] *Supra* note 3. See also *Bromley*, *supra* note 21.

by revenue officials, are in fact charitable purposes under the fourth category, "purposes beneficial to the community". The court then went on to declare that the political purposes doctrine as described in *McGovern* does not apply in Australia –a remarkable conclusion that raised the potential that other common law countries could be so bold when adapting and molding the charity law they inherited. *Aid/Watch* can serve as an example for Canadian courts looking for a judicial role model when considering the limits of their role in reforming the political purposes doctrine. More depressing for Canada, however, is that the Australian High Court specifically referenced s.149.1(6.1) and s.149.1(6.2) of the *Income Tax Act* as the rules that created a different legal situation in Canada.[297] This assessment by the Australian High Court echoes sentiment expressed in this paper, by Parachin and by IMPACS that the legislative amendments of 1986 offered little help for reforming the political purposes doctrine and may indeed be a hindrance.

c) Hope from Nearby? Disbursement Quota Reform in Canada

When the Conservative federal government announced in its March 2010 budget that a large portion of the disbursement quota for charitable organizations would be repealed, stakeholders in the charity sector should have gained new hope for law reform of the political purposes doctrine. With the disbursement quota reform, the requirement that charities spend 80% of receipted donations on charitable activities will be removed, and capital accumulation rules will now only apply to assets over 100,000 dollars.[298] This most recent reform eliminates a regulatory mechanism first introduced in 1976, just as concerns about tax expenditures on charities was increasing, and a wave of regulation was introduced in response to increase accountability and transparency. In the decades since its introduction, the Canada Revenue Agency added a number of measures to prevent abuse, leading to increasingly complex disbursement quota rules that many charitable organizations found difficult to understand and apply to their diverse circumstances.

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[297] *Supra* note 3 at 15.

[298] Canada Revenue Agency, Charities: Disbursement Quota Reform, online: < http://www.cra-arc.gc.ca/gncy/bdgt/2010/chrt-eng.html>.

For the charity sector and interested stakeholders, the disbursement quota reform conveys two major themes. First, reform that may have seemed difficult or near impossible has proven to be quite possible, provided that the right circumstances and lobbying approach combine. The Canadian Bar Association's National Charities and Not-For-Profit Law Section carefully prepared a Concept Paper[299] and Imagine Canada, a pan-Canadian group representing the charity sector, consistently lobbied for these reforms.[300] Lessons may be drawn from their experiences as to what made these pursuits successful at this time when similar calls were ignored previously. As this thesis has done throughout its historical legal study, an analysis of the federal government's political platform may also help explain why these particular lobbying efforts paid off.[301]

The second theme is that, in announcing the disbursement quota reforms, the government outlined the role of the Canada Revenue Agency as a robust regulator who can use other mechanisms to enforce appropriate spending by charities, and then introduced broad anti-avoidance mechanisms to further aid revenue officials in this role.[302]Canadian revenue officials' role in regulating charities is only becoming more significant, and any changes to the political purposes doctrine may be most likely located in their administrative arms, especially now that, several decades later, the relationship between the regulator and regulated has improved.

Following the *Aid/Watch* decision, legislative action in the United Kingdom and our local disbursement quota reform, Canada needs to think carefully about what to do next. Attention must be paid to what changes in legal sources may be

[299] National Charities and Not-For-Profit Law Section, "Concept Paper on Reform of the Disbursement Quota Regime" (Ottawa: Canadian Bar Association, July 2009).
[300] Imagine Canada, "Imagine Canada Responds to Budget 2010" Imagine Canada (March 4, 2010), online: Newswire <http://www.newswire.ca/en/releases/archive/March2010/04/c7239.html>.
[301] See also Donald Bourgeois, "Eliminating the Disbursement Quota: Gold or Fool's Gold?" (2010) 23:2 Philanthropist 184.
[302] See *Ibid.* See also supra note 298.

needed to give the agency the discretion it requires to respond, significantly, to efforts to expand the ability of charities to engage in advocacy activities. One possibility is to repeal the 1986 legislative amendments and have the Canada Revenue Agency issue a broader administrative interpretation that is modeled on the current legal framework either in the United Kingdom or in Australia. Another option is to apply Monohan and Roth's interpretation of *Vancouver Society* more broadly in yet another administrative interpretation, expanding the 10% sliding scale rule substantially, as well as the list of political activities that will now be considered charitable as long as they are incidental and ancillary to an organization's charitable purposes. A final approach may be that the Canada Revenue will simply chose not to regulate this issue in most circumstances, thereby avoiding the kind of controversy that led to law reform advocacy in the past. This final possibility, however, will not necessarily be adequate to release charities from their fear of breaking the rules, and can of course shift with changing relationships between the sector and government. Ultimately, a chorus of voices calling for law reform approach is likely to rise again, and continuing the pattern of law reform as limited administrative discretion may not be adequate next time. With both judicial and legislative reform of the political purposes doctrine occurring in two other countries, Canada is beginning to lag behind its common law siblings.

Section V: Conclusion

The history of the political purposes doctrine in Canada since 1978 offers a number of insights into the role of tax officials in creating and administering tax policy, as well as potential best practices for rule-making in tax law. It also highlights the existence of multiple sources of law reform and the importance of consultation for a successful reform process. Insights about the role of tax officials in tax policy administration are useful not only in charity law but across the regulatory field. Government priorities influence administrative decision-making in a context where tax officials have limited resources and large numbers of regulatory responsibilities. To understand the role of administrative agencies in

applying the law, it is important to distinguish between actual legal sources and the regulation that emerges from their interpretation and application. It is at the interpretation stage that administrative discretion is exercised and government priorities influence decision-making. Although regulators' choices about how to enforce particular rules (or even about who specifically to target for rule enforcement) are often based on concerns about efficient use of resources, these decisions are also shaped by the reigning political discourse. As this thesis demonstrates, while in the 1970s there were few reported cases of organizations running afoul of the political purposes doctrine, by the early 1980s the Canada Revenue Agency had stepped up its regulatory oversight in the area by targeting a number of organizations for rule enforcement. Increased vigilance over the charity sector's political activities mirrored a general increase in charity sector regulation as the Canada Revenue Agency began to more fully assume its regulatory role. Similarly, in both 1987 and 2003, tax officials published a policy statement allowing, each in turn, many more political activities by charities, despite, on each occasion, there being little change in the substantive legal sources for the political purposes doctrine. The main reason for these shifts towards a more permissive stance on advocacy activities was the government's desire to build a stronger, more respectful relationship with the charity sector.

The significant role that tax officials themselves play in rule-making end enforcement must be acknowledged. It is not just traditional legal sources like the *Income Tax Act* and jurisprudence that create the regulatory experiences of charities and taxpayers; tax officials are key legal actors as they shape, interpret or even ignore legal sources, and chose which behaviour to scrutinize while another may be overlooked. The regulatory body does not, of course, operate in a neutral vacuum. Its decision-making is influenced by the priorities of an elected government who not only create the law through the usual channels of legislative action and supporting government lawyers in their courtroom advocacy, but also set the broader tone of their political agendas throughout all arms of government, which, in turn, are felt at the regulatory level.

The potential for some best practices guidelines in creating tax policy rules also emerges from this study. Repeatedly, law reform advocates identify problems with quantification rules about resource-allocation that are difficult to evaluate and could easily lead to a different calculation depending on the methodological approach used. Similarly, these advocates have highlighted how impossible it has been to articulate a coherent distinction between what constitutes charitable activities or purposes, and what would fall within the domain of the political. Such a lack of clarity goes against some of the basic premises of good tax policy, which emphasizes the need for a lower compliance and administrative burden. Two specific lessons therefore emerge from experiences with the evolving political purposes doctrine. First, a rule that requires quantifying resources that are difficult to measure requires some flexibility to account for the differences in calculation approaches that may be applied, unless detailed calculation guidelines are provided. Indeed, in the particular case of a percentage rule limiting the political activities of charities, Canada may be better served by looking at the United Kingdom's quantification rule, where charities that engage in political activities related to their charitable purposes are simply required to ensure that political activities do not become the main reason for their existence.[303] This subjects them to a clearer and more general rule, with less hand wringing and self-censorship by charities fearful of miscalculating the allowable amount of advocacy they can undertake. Words such as "charitable" and "political" also require more clarification, particularly when an extensive body of case law is attached to their meaning. The Canada Revenue Agency needs to exert serious efforts to adapt such weighted legal terms into more accessible language, considering that the majority of the staff and volunteers at charities have no legal background and little resources for obtaining such expertise.

Lessons from the two periods of concentrated efforts to reform the advocacy rules point to the need to recognize the multiple sources and avenues for law reform.

[303] *Supra* note 293.

Traditionally, law reform may be thought to come from legislative or judicial sources, and that it is these sources that created and adapted the political purposes doctrine. In charity law, however, as in much of tax law administration, it is the regulator's interpretation and enforcement of the political purposes doctrine that have the largest effect on most charities and organizations seeking charitable status. A decision to interpret the legal sources differently, for example, to decide that what was previously considered a political activity would now be understood to be charitable, counts as a significant law reform victory for the charity sector. On the other hand, these kinds of victories may be short-lived given that a shift in administrative interpretation requires much less formal procedure and transparency than both judicial and legislative action. As many who have dealt with administrative regimes know, changing leadership within an agency may be enough to undo a hard-fought reform in how regulators apply their discretionary power. Caution must be taken, then, to not consider changes in administrative interpretation and application of legal sources as sources of law reform on level footing with judicial and legislative action.

A final insight that emerged from this thesis is the role of expertise and consultation both in regulating a sector, and in advocating for law reform. Relationships deteriorate between the regulated and the regulator when there is not a consistent, recurring consultation process between the parties. The best reform processes occur when those most affected by changing rules have the opportunity to comment on them and alert regulators to their (possibly unintended) consequences. Genuine consultation builds good will, a valuable commodity that is difficult to regain after a loss of trust. As described throughout this thesis, the relationship between the federal government and the charity sector is still recovering from the government's past failure to maintain an open, consulting relationship. Government officials, however, are not the only ones who may regret their lack of consultation. Throughout both periods of lobbying, law reform advocates failed to undertake a tax policy analysis when forwarding their myriad of proposals for legislative amendments. Considering that the regulators of

charities in Canada are tax officials, and any decision to expand the definition of charitable purposes and acceptable charitable activities may have serious fiscal consequences, the lack of consultation with tax policy experts weakened many of the proposals. Repeatedly, the history of the rules limiting charities' political activities in Canada teaches us that both effective law reform advocacy and regulatory oversight require the genuine involvement of all stakeholders.

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