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## Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue?

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REFORMING THE REGULATION OF POLITICAL ADVOCACY BY  
CHARITIES: FROM CHARITY UNDER SIEGE TO CHARITY UNDER  
RESCUE?

ADAM PARACHIN\*

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I. INTRODUCTION

The theme for this collection of papers—charity oversight under siege—would not ordinarily resonate strongly with charity law and policy in Canada. The native state of charity law in Canada is best described as quiet. Legislative and common law developments in Canada tend to be either non-existent or of a technical nature. The provinces, notwithstanding that they have constitutional jurisdiction over charities, are generally uninvolved in the regulation of charitable trusts. The federal government, to the extent that it is involved in the regulation of

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charity, tends to primarily concern itself with tinkering with the tax revenue aspects of charity law. As a result, one could say that charity law in Canada has been under the siege of inertia, arguably suffering for want of needed attention. Of course, inertia—something maintained through a failure to intervene with a set trajectory—seems to strain the metaphor of charity under siege. Neglect does not a siege make.

However, charity regulation in Canada recently transitioned from quiet to disquiet when the now displaced Conservative federal government took an unanticipated and controversial interest in the charity law doctrine of political purposes (the rules restricting political advocacy by charities). Evidently concerned that charities were becoming too political, the reporting obligations of charities in relation to political activities were enhanced and the Charities Directorate of the Canada Revenue Agency (“CRA”) received earmarked funding for a multiyear audit program specific to political activities by charities. The move struck a nerve, leaving many within the charitable sector with a sense that the government was attempting to intimidate charities, specifically those opposed to its policies, into silence. There were accusations of political interference in the CRA audit process, as well as related concerns that ideological bias was playing a role in the CRA’s selection of charities for political activities audits. Canada seemed poised for a regulatory crisis of sorts in the area of charity law. The unlikely theme of charity oversight under siege all of a sudden seemed rather fitting for Canadian charity regulation.

But the dynamic changed in the fall of 2015 when the Conservative federal government was replaced by a majority Liberal government. Notwithstanding that charity regulation is practically never debated in Canadian elections, the Liberal Party campaign platform included a promise to reform the rules surrounding political activities by charities. Contemplating the desirability of relaxed rules in this area, the Liberal Party campaign platform spoke favorably of the constructive role that charities play in public debate and public policy. When the Liberals won the election, the policy dialogue shifted once again, but this time from charity under siege to charity under rescue. Concern over the political activities audits, while still present, became tempered by the prospect of a reimagined doctrine of political purposes. Of course, it remains a point of contention whether charity regulation was ever really under siege owing to the political activities audits or whether it is indeed on the verge of rescue. Since the audit results

are not fully known, the alleged siege remains a matter of conjecture. For all we know the audits will ultimately come to an uncontroversial and anticlimactic close. And since the new Liberal government has yet to table any specific reform proposals, it remains too early to declare a rescue.

Having regard to the theme of this collection of papers, it seems fitting that interest of late in the state of charity regulation in Canada was inspired by a controversy surrounding the regulation of political advocacy. If there is any area of charity regulation conducive to the theme of charity under siege, it is the regulation of political advocacy by charities. This aspect of charity regulation is one in which the interests of the state and the charitable sector tend to be in natural conflict. Also, this is an area that significantly challenges the limits of the state's commitment to promoting charitable purposes. The state's promotion of charity is uncontroversial to the extent that charitable programming entails the supply of tangible public goods and services, especially where those goods and services would otherwise have had to be supplied by the state. But the obviousness of the good of charity can wane, at least from the vantage of policymakers, when charities assume an advocacy role, especially where the positions being advocated are controversial or run contrary to those preferred by the government of the day. How the state responds sheds light on the determinants of charity law and policy. Does the state regulate political activities by charities with a view to confining charities to that which is truly charitable (based on some normative conception of "charity")? Or does this area of charity regulation draw on foreign considerations—for example, economizing tax concessions—and thereby work at cross purposes with the essential nature of charity? These are the sorts of questions that I will address in this paper with a view to guiding the evolving Canadian debate over whether charity is indeed in need of rescue and, if so, what a rescue scenario might entail.

Part II provides details regarding the transition from a dialogue of siege sparked by the CRA political activities audits to a dialogue of rescue sparked by the new Liberal federal government's pledge to reimagine the doctrine of political purposes. Part III begins the process of reimaging this doctrine by locating fault in the status quo. Three errant ideas about the charity-politics distinction are identified. Part IV sketches three ideas that might properly focus reform to the charity-politics distinction.

## II. THE POLITICAL ACTIVITIES AUDITS OF CHARITIES IN CANADA

Canada recently appeared to be poised for its own version of the Internal Revenue Service (I.R.S.) “Tea Party” scandal. Charities fall under the constitutional jurisdiction of provincial governments but the federal government, acting through the CRA, has long since been Canada’s default national charity regulator.<sup>1</sup> This is why the unusually tumultuous (at least when measured by Canadian standards) relationship in recent years between the charitable sector and the Conservative federal government bore the seeds of a regulatory crisis. The tensions that erupted between the charitable sector and the government were something of a surprise. Throughout their term in office, the Conservatives evidenced what could fairly be described as a pro-charity stance. They adopted various reforms that the charitable sector had championed (not always wisely, in my view), including the near total repeal of the infamous “disbursement quota”<sup>2</sup> and the enhancement of charitable donation incentives.<sup>3</sup> Of course, in politics no one is remembered for what they give but rather what they take (or are per-

1. There are a few reasons for this. First, provincial governments in Canada have, to say the least, typically evidenced very little interest in exercising their exclusive constitutional jurisdiction over charities (which jurisdiction derives from the exclusive jurisdiction of the provinces over “property and civil rights” under section 92 of the *Constitution Act, 1867*). Second, the federal government controls the most coveted of legal advantages enjoyed by charities—exemption from federal income tax and federal income tax concessions for charitable gifts. Even if the provinces were to more aggressively assert themselves in relation to the private law dimensions of charitable trusts, the regulatory conditions set at the federal level would still define the gold standard as few charities would trade off federal income tax concessions for, say, a provincial exemption from the rule against remoteness of vesting. Third, although provincial income tax concessions for charities also exist, they are comparatively modest. Fourth, provincial income tax concessions are not administered as discrete tax expenditure programs but rather piggyback federal determinations of which institutions qualify as charitable and which donations qualify as tax receivable charitable gifts.

2. The “disbursement quota” is an annual expenditure requirement that registered charities are required to comply with as a condition to maintaining charitable status for federal income tax purposes. See *Income Tax Act*, R.S.C. 1985, c 1, subs. 149.1(1) (Can.). Previously, the disbursement quota required charities to expend on charitable activities (or gifts to “qualified donees”) each year an amount equal to 80% of receipted donations from the previous year (subject to an exception for endowed gifts) plus 3.5% of assets not directly used in charitable programming or administration. The 80% portion of the disbursement quota was repealed in the federal budget of 2010. See DEP’T OF FIN., *BUDGET 2010: LEADING THE WAY ON JOBS AND GROWTH* 349–51 (2010) (Can.), <http://www.budget.gc.ca/2010/pdf/budget-planbudgetaire-eng.pdf>.

3. For example, the 2006 budget exempted certain donations of public securities and ecologically sensitive land from capital gains tax. DEP’T OF FIN., *THE BUDGET PLAN 2006: FOCUSING ON PRIORITIES* 120–23 (2006) (Can.), <http://fin.gc.ca/budget06/pdf/bp2006e.pdf>. The 2013 budget introduced a new “first-time donor credit,” which increased the charitable tax credit by 25% for certain donations by first-time donors. DEP’T OF FIN., *JOBS, GROWTH, AND LONG-TERM PROSPERITY: ECONOMIC ACTION PLAN 2013* 236–39 (2013) (Can.), <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

ceived as taking) away. In January 2012 the then Minister of Natural Resources, Joe Oliver, authored an open letter on the issue of diversifying energy export markets.<sup>4</sup> While the letter did not specifically refer to charities, it was critical of “environmental and other radical groups that would seek to block this opportunity to diversify our trade.”<sup>5</sup> The comment was taken as a dig at environmental charities speaking out against such delicate policy matters as the Keystone pipeline and the Alberta oil sands.

It was seen as no coincidence that, three months later, the Federal Budget of 2012 announced new measures relating to political advocacy by charities. Specifically, the budget announced new reporting obligations for political advocacy<sup>6</sup> along with a new penalty for engaging in excessive and/or prohibited political advocacy.<sup>7</sup> Other than a new provision stipulating that funding the political activity of another charity is itself political,<sup>8</sup> the new measures were not thought to alter the substance of what is charitable versus what is political. That initial view may have been wrong.<sup>9</sup> Regardless, the enduring story emerging from the 2012 federal budget was that the federal government was giving

4. Press Release, Natural Resources Can., An Open Letter from the Hon. Joe Oliver (Jan. 9, 2012), <https://www.nrcan.gc.ca/media-room/news-release/2012/1/1909>.

5. *Id.* (emphasis added).

6. The budget proposed that the CRA “[i]mprove transparency by requiring charities to provide more information on their political activities, including the extent to which these are funded by foreign sources.” DEP’T OF FIN., ECONOMIC ACTION PLAN 2012: JOBS GROWTH AND LONG-TERM PROSPERITY 204–05 (2012) (Can.), <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf> [hereinafter BUDGET 2012]. This feature of the budget resulted in a revised T3010, the Annual Information Return for Registered Charities, in 2013. Charities now have to supply additional information about their political activities. See CAN. REVENUE AGENCY, REGISTERED CHARITY INFORMATION RETURN T3010 E 2 9 (2013), <http://www.craarc.gc.ca/formspubs/prioryear/t3010/t3010-13e.pdf>.

7. New paragraphs 188.2(2)(e) and (f) of the Income Tax Act were introduced. R.S.C. 1985, c 1, paras. 188.2(2)(e)–(f) (Can.). They allow for a one-year suspension of gift receipting privileges where a charity has engaged in excessive or prohibited political advocacy. *Id.* Previously, the only formal sanction was loss of charitable registration. While the 2012 budget did not specifically say so, the government was evidently concerned that the rules were perhaps going unenforced due to the extreme sanction for noncompliance.

8. See the definitions of “charitable purpose” and “political activity” in subsection 149.1(1). R.S.C. 1985, c 1, § 149.1(1) (Can.).

9. New paragraphs 188.2(2)(e) and (f) of the Income Tax Act provide that a registered charity may be penalized—that is, have its receipting privileges suspended for one year—where it engages in political activities other than those contemplated in subsections 149.1(6.1) and (6.2)). R.S.C. 1985, c 1, §§ 149.1(6.1)–(6.2), 188.2(2)(e)–(f) (Can.). The implication is that it is impermissible for charities to engage in political activities other than those identified in subsections 149.1(6.1) and (6.2). Previously, it was a matter of some debate whether subsections 149.1(6.1) and (6.2) prescribed the only kind of permissible political activities or a non-exhaustive list of permissible political activities. New paragraphs 188.2(e) and (f) complicate the latter interpretation and may therefore impact upon the application of subsections 149.1(6.1) and (6.2).

the CRA multiyear earmarked funding to enhance “compliance activities” in relation to political advocacy by charities. In practice, this meant a multiyear audit program specific to political activities.<sup>10</sup>

Predictably, the move instantly soured the relationship between the Conservative government and the charitable sector. The government was accused of intimidating charities into silence. The audits were criticized for being ideologically motivated. There was discussion of a “chill effect” whereby charities were said to be self-selecting out of the public debate to avoid regulatory repercussions.<sup>11</sup> A war of words ensued. The Minister of the Environment was quoted as saying that environmental groups “launder offshore foreign funds for inappropriate use against Canadian interests.”<sup>12</sup> Responding to a question about why environmental charities were being audited for political advocacy, the Minister of Finance was quoted as saying “charities are not permitted to accept money from terrorist organizations.”<sup>13</sup> The rhetoric only served to enhance the newsworthiness of the audit program and to fuel speculation over its motives. Charity had, for the first time in memory, become a major Canadian news story for something other than a donation scam. As the topic made its rounds through the editorial pages of newspapers, a prominent columnist went so far as to propose the repeal of all income tax concessions for charities, a “simple solution,” as he called it, to the problem of political advocacy by charities.<sup>14</sup>

10. The 2012 budget set aside \$8.0 million to develop revised reporting obligations and conduct a two-year audit program. BUDGET 2012, *supra* note 6, at 205. The funding eventually morphed to \$13.4 million for a five-year audit program. See Dean Beeby, *Canada Revenue Agency's Political-Activity Audits of Charity*, CBC NEWS (Aug. 5, 2014, 3:21 PM), <http://www.cbc.ca/news/politics/canada-revenue-agency-s-political-activity-audits-of-charities-1.2728023> (Can.).

11. See, e.g., Dean Beeby, *Canadian Charities Feel “Chill” as Tax Audits Widen into Political Activities*, THESTAR.COM (July 10, 2014), [http://www.thestar.com/news/canada/2014/07/10/canadian\\_charities\\_feel\\_chill\\_as\\_tax\\_audits\\_widen\\_into\\_political\\_activities.html](http://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html) (Can.); see also Gareth Kirkby, *An Uncharitable Chill: A Critical Exploration of How Changes in Federal Policy and Political Climate are Affecting Advocacy-Oriented Charities* (June 2014) (unpublished M.A. thesis, Royal Roads University), <http://garethkirkby.ca/thesis/posting-final-version/>.

12. See Peter O’Neil, *Vancouver Environmental Group Accused of “Laundering” by Oilsands Lobbyists*, VANCOUVER SUN (Aug. 8, 2012), <http://www.vancouver.sun.com/business/Vancouver+environmental+group+accused+laundering+oilsands+lobbyists/7061146/story.html>.

13. Dean Beeby, *Canada Revenue Agency's Political-activity Audits of Charities*, CANADIAN PRESS (Aug. 5, 2014), <http://www.cbc.ca/m/touch/politics/story/1.2728023>.

14. Andrew Coyne, *Andrew Coyne: Problem with Charities Isn't Their Politics, it's Their Generous Tax Credit*, NAT’L POST (Aug. 27, 2014), <http://news.nationalpost.com/full-comment/andrew-coyne-preferred-tax-status-corrupts-the-definition-of-charity-and-should-be-abolished> (Can.).

At some level, the renewed attention brought to the charitable sector was positive. Charity law and policy are often ignored in Canada. They tend to be viewed, if viewed at all, as time-weathered features of the legal and policy landscape, which is not entirely a bad thing. Flying under the radar can be beneficial in that it wards off harmful political meddling. However, being ignored can impede both good and bad change. The political activities audit program, and the rhetoric surrounding it, at least meant that charity law and policy were being actively discussed. It did not take long, though, for the tone of the discussion to disintegrate on both sides. A Canadian version of the I.R.S. “Tea Party” scandal appeared to be in the works when the CRA was accused of allowing ideological bias to inform which charities were being selected for audit.<sup>15</sup> It was alleged that the CRA was targeting environmental charities and champions of other progressive causes. The independence of the CRA also came under attack with the suggestion that the CRA was taking political direction in relation to which specific charities were being targeted for audits.<sup>16</sup> All of this seemed strangely reminiscent of the scandal surrounding the I.R.S. targeting program.

But there was one significant difference with the scandal that was brewing in Canada. Absent in Canada was anything even approaching a Lois Lerner like apology and acknowledgement of improper conduct. To the contrary, Cathy Hawara, the Director General of the CRA Charities Directorate, flatly denied the allegations of bias and political interference.<sup>17</sup> Furthermore, there was no empirical evidence to contradict her denial. Since the CRA is prohibited by federal income tax law from publicly disclosing confidential taxpayer information, there was no public record of the specific charities being audited for political activities. While this meant the CRA could not disprove allegations of bias, it also meant that those allegations lacked concrete proof. The allegations of bias were instead based on anecdotal evidence. What little information the CRA was able to publicly disclose seemed to contradict

15. See Dean Beeby, *Canada Revenue Agency Accused of “Political” Targeting of Charities*, MACLEANS (Aug. 3, 2014), <http://www.macleans.ca/news/canada/canada-revenue-agencys-political-targeting-of-charities-under-scrutiny/> (Can.).

16. See Blake Bromley, *Don’t Select Charities to Audit Based on Their Political Leanings*, HUFFINGTON POST CAN. (Oct. 1, 2014), [http://www.huffingtonpost.ca/blake-bromley/charity-audit\\_b\\_5641948.html](http://www.huffingtonpost.ca/blake-bromley/charity-audit_b_5641948.html).

17. See Andy Levy-Ajzenkopf, *A Conversation with Cathy Hawara—Director General of the Charities Directorate*, CHARITYVILLAGE.COM (Sept. 24, 2012), [https://charityvillage.com/Content.aspx?topic=A\\_conversation\\_with\\_Cathy\\_Hawara\\_Director\\_General\\_of\\_the\\_Charities\\_Directorate#VpZsv17SlEtE](https://charityvillage.com/Content.aspx?topic=A_conversation_with_Cathy_Hawara_Director_General_of_the_Charities_Directorate#VpZsv17SlEtE) (Can.).



the allegations that only (or even primarily) specific types of charities were being audited. The CRA disclosed that a total of 54 charities were scheduled to be audited for political activities.<sup>18</sup> The charities selected for audit were drawn from all four heads of charity at common law.<sup>19</sup> While the list of charities selected for audit was disproportionately weighted to the fourth head of charity—other purposes of public benefit—the CRA noted that almost half of all charities that report political activities are fourth head charities.<sup>20</sup>

The allegations of improper CRA conduct were being mooted with incomplete information regarding both the roster of charities selected for audit and the results of the audits. The rhetoric surrounding the audit program might have given the impression that being selected for a political activities audit was effectively tantamount to having charitable registration revoked. All the while an important question was being ignored: What if the audit program concludes that the audited charities were fully compliant with the law? Alternatively, what if the audits only result in sanctions for grossly noncompliant behavior? Obviously, the results of the audits, whatever they may be in the final tally, will be incapable of providing a complete response to concerns over improper targeting.<sup>21</sup> But it does not follow that the results of the audits are somehow irrelevant either. This is especially true here, given that the CRA did not independently initiate the political activities audits. To the contrary, the CRA received funding in the 2012 federal budget for the specific purpose of carrying out political activities audits. If, having performed the very audits it was funded to perform, the CRA concludes that no regulatory reprisals or corrective measures are warranted, or only imposes regulatory sanctions for instances of gross-

18. *Charities and Political Activities (Budget 2012)*, CAN. REVENUE AGENCY, <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltlcl-ctvts/pltlclctvts-dts-eng.html> (last modified Jan. 20, 2016).

19. The breakdown released by the CRA is as follows:

- 2 charities with purposes of relieving poverty;
- 10 charities with purposes of advancing education;
- 6 charities with purposes of advancing religion; and
- 36 charities with other purposes beneficial to the community including animal welfare, upholding human rights, protecting the environment, international development, promoting health, and community development. *Id.*

20. *Charities Program Update – 2015*, CAN. REVENUE AGENCY, [http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/chrtsprgrm\\_pdt-2015-eng.html](http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/chrtsprgrm_pdt-2015-eng.html) (last modified Feb. 22, 2016) [hereinafter *Charities Update*].

21. Improperly targeted nuisance audits amount to harassing regulatory scrutiny and thus remain abusive even when they do not result in regulatory reprisals. Likewise, the discovery of non-compliant behavior, even grossly non-compliant behavior, does not vindicate a biased fishing expedition.

ly noncompliant behavior, then the regulatory scandal over political activities audits might start to look somewhat less scandalous.

All of this may make the whole episode seem rather uneventful. However, Canadian political culture is not consumed by perpetual political scandals. While Canada is not immune to scandal, there is absent a scandal cottage industry. Canada lacks a naming protocol for political scandals analogous to the U.S. practice of using the suffix “gate” to name scandals. It is not taken for granted in Canada that scandals are so normative that they need to be catalogued according to such a uniform naming system. Further, the activism and political agitation that might be the norm for the charitable sector (or at least segments of it) in the United States lacks a parallel in Canada. Charities speak out on issues but an open spat with the regulator and/or the elected government is highly unusual. The fact that allegations of regulatory bias and political interference were being mooted, and given a platform by mainstream media, was therefore in and of itself noteworthy when experienced from the vantage of Canadian political culture. There was a feeling (whether accurate or not) within the charitable sector that charities were being intimidated into silence. Something had changed in the sector’s relationship with government and the sector openly objected to that change.

Flash forward to the fall of 2015. While the political activities audits remain a sore spot, the atmosphere of scandal is dissipating. Attention is slowly (but perceptibly) shifting away from concerns over the regulator (and more generally the regulatory model for charities in Canada) and toward concerns over the body of law administered by the charity regulator. There are a few reasons for this.

First, since both the specific charities selected for political activities audits and the full results of the audits remain unknown, the fury over the political audits has mellowed. It is difficult to sustain a scandal without a smoking gun of some sort.

Second, the information released by the CRA to date regarding the audits is not especially scandalous. To date, only 21 of the 60 planned political activities audits have been completed.<sup>22</sup> The CRA reports that the 21 completed audits resulted in 6 education letters, 8 compliance agreements, 5 notices of intention to revoke, 1 voluntary revocation and 1 annulment.<sup>23</sup> While none of the audits completed so far resulted

22. *Charities Update*, *supra* note 20.

23. *Id.*

in a clean bill of health, the early results do not go very far in lending credence to the worst fears surrounding the political activities audits. The most common outcomes of the political activities audits—education letters and compliance agreements—correspond with the most common outcomes of charity audits generally.<sup>24</sup> Revocations of charitable status are overrepresented in the political activities audits performed to date relative to charity audits generally.<sup>25</sup> However, it is not known whether the revocations (and for that matter the education letters and compliance agreements) following from the political activities audits relate to improper political activities versus other serious infractions discovered as part of the political activities audits. The CRA hinted at the latter by emphasizing that the political activities audits “revealed several *other serious* noncompliance issues, beyond those related to political activities.”<sup>26</sup> As things currently stand there is inadequate evidence to sustain the allegation that political advocacy by charities has come under regulatory siege.

Third, and most importantly, the Conservative government, whose decision it was to fund the political activities audits in the first place, was replaced in the federal election held in October of 2015 with a majority Liberal government. Although charity law and policy rarely factor into election campaigns, the Liberal Party campaign platform included the following policy position on the regulation of political advocacy by charities<sup>27</sup>:

We will allow charities to do their work on behalf of Canadians free from political harassment, and will modernize the rules governing the charitable and not-for-profit sectors.

This will include clarifying the rules governing ‘political activity,’ with an understanding that charities make an important contribution to public debate and public policy. A new legislative framework to strengthen the sector will emerge from this process.

Following time-honored campaign traditions, this particular pledge studiously avoided letting details get in the way of a good idea. It remains unknown what, if any, reforms to this area of law will ensue.

24. *Id.*

25. *Id.* Of 799 charity audits performed in 2012--2013, only 30 resulted in a notice of intention to revoke charitable registration. Of 845 charity audits performed in 2013--2014, only 36 resulted in a notice of intention to revoke charitable registration. Of 781 charity audits performed in 2014--2015, 45 resulted in a notice of intention to revoke charitable registration. Compare these with five notices of intention to revoke charitable registration out of 21 political activities audits.

26. *Id.* (emphasis added)

27. LIBERAL PARTY OF CAN., REAL CHANGE: A NEW PLAN FOR A STRONG MIDDLE CLASS 34 (2015), <https://www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf>.

The Liberal government appears, though, to be taking the matter seriously. Upon being elected, Prime Minister Justine Trudeau gave the Minister of Finance and the Minister of National Revenue a specific mandate to reform the regulation of political activity by charities.<sup>28</sup> Notably, the Liberal government appears to see “the rules” rather than the regulator as the proper focus of reform efforts as the campaign pledge and the ministerial mandate letters referenced the modernization and clarification of “the rules.” The pledge to enact a new legislative framework could, of course, extend to replacing the CRA with a new national regulator but there is no indication that this is what is planned.

Predictably, the prospect of liberalized rules in the area of political advocacy by charities has altered the dialogue within the charitable sector. The narrative of charity being under siege by the former Conservative government or under siege by a regulator captive to political direction is maturing into a narrative about reforming the legal distinction between charity and politics. The final results of political activities audits, once they become known, could reignite the controversy surrounding the audits if they reveal regulatory overreach. But for now the emerging focus, for better or for worse, is on reimagining the distinction between charity and politics, which is what I turn to in the next part.

### III. REIMAGINING THE CHARITY-POLITICS DISTINCTION: DISTORTING IDEAS TO AVOID

The first step in reimagining the doctrine of political purposes is to locate fault in the status quo. The leading common law decision on political purposes (applied in Canada) is *McGovern v. Attorney General*.<sup>29</sup> Justice Slade famously reasoned that trusts for political purposes are non-charitable. This includes trusts of which a “direct and principal purpose” entails any of the following<sup>30</sup>:

- i. to further the interests of a particular political party; or

28. The campaign pledge was essentially repeated verbatim in the ministerial mandate letters given to the Minister of Finance and the Minister of National Revenue. Letter from Justin Trudeau, Prime Minister of Can., to Jane Philpott, Minister of Health, <http://pm.gc.ca/eng/minister-finance-mandate-letter>; Letter from Justin Trudeau, Prime Minister of Can., to William Francis Morneau, Minister of Fin., <http://pm.gc.ca/eng/minister-national-revenue-mandate-letter>.

29. *McGovern v Attorney General*, [1982] 1 c 321 (Eng.).

30. *Id.* at 340.

- ii. to procure changes in the laws of this country;<sup>31</sup> or
- iii. to procure changes in the laws of a foreign country; or
- iv. to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or
- v. to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

This formulation is deceptively broad. It is not confined to institutions established for, say, the express purpose of changing the law. Rather, it includes institutions the purposes of which implicitly contemplate law reform (such as the *abolition* of torture, which was held to be a political purpose in *McGovern*). Likewise, although the *McGovern* framework does not specifically characterize public information campaigns as political, it leaves such campaigns vulnerable to this characterization. For example, institutions promoting points of view on controversial issues have been characterized as political where the evident goal being pursued was to secure a change to law or policy.<sup>32</sup>

The *McGovern* framework has attracted many criticisms over the years on both doctrinal and theoretical bases.<sup>33</sup> Although the criticisms are numerous and varied, they tend to share an essential insight, which is that the regulation of political advocacy by charities imposes an artificial restriction on legal boundaries within which charities must operate. This is a direct result of charity regulation of political advocacy perpetuating false ideas about the character of charitable purposes. I will focus here on three errant ideas about charity that have arguably misdirected the related law and policy. The influence of these ill-conceived ideas about charity supports the current federal government's contention that reform is due. A reformed doctrine of political purposes should eschew the following ideas about charity: (A) charity is a tax expenditure concept, (B) charity is an economic concept and (C) charity is informed by the value of neutrality.

31. On its face, this formulation implies that it might not be political to oppose changes to the law. Other cases have, though, clarified that it is political to both seek and oppose proposed changes to the law. *See, e.g.*, In Re Koepler Will Trusts, [1984] c 243, 260 (Eng.); Re Hopkinson, [1949] 1 All ER 346, 350 (Eng.).

32. *See, e.g.*, Positive Action against Pornography v. Minister of National Revenue, [1988] 2 F.C. 340, ¶¶ 16-17 (Can.); Alliance for Life v. Minister of Nat'l Revenue, [1999] 3 F.C. 504, ¶¶ 36, 70 (Can.); Action by Christians for the Abolition of Torture (ACAT), [2002] F.C.A. 499, ¶ 68 (Can.); Human Life Int'l in Can. Inc. v. Minister of Nat'l Revenue, [1998] 3 F.C. 202, ¶¶ 12, 15 (Can.).

33. For a recent analysis of the extensive academic literature, see Joyce Chia et al., *Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation*, 35 MELB. U. L. REV. 353, 354 (2011).

### A. Charity As a Tax Expenditure Concept

It has been speculated that the distinction between charity and politics has been developed (not always transparently) as a policy instrument for rationing the tax benefits of charitable status.<sup>34</sup> In other words, the criterion drawn upon by authorities to determine whether a purpose is a political purpose is not so much that it is non-charitable in substance but rather that it is ill-suited for a tax subsidy. Conversely, the criterion drawn upon to determine whether a purpose is a charitable purpose is not that it is charitable in substance but rather that it is worthy of a tax subsidy. An example of this reasoning may be found in *Human Life International v. Minister of National Revenue*,<sup>35</sup> one of the leading Canadian decisions. In *Human Life*, Justice of Appeal Strayer telegraphed that he approached the charity-politics distinction from the vantage point of “public funding through tax exemptions.”<sup>36</sup>

This approach to assessing the charitableness of politics should be avoided to the extent possible. Tax subsidy or tax expenditure considerations have little to no useful role to play in making sense of either the charity versus politics distinction specifically or the meaning of charity generally. This is not to deny the intuitive appeal of tax subsidy/tax expenditure considerations. In a sense, non-charitable purposes (including political purposes) are by definition purposes not worthy of the tax subsidy meant for *charitable* purposes. One might even say that a tax subsidy perspective has particular appeal in the context of political purposes. Why should all taxpayers be forced to indirectly contribute (through a tax subsidy) to politically minded groups organizing themselves as charities? The citizenry should be free to participate in advocacy and to liberally exercise constitutionally protected freedom of expression. But why should this attract a tax subsidy?

Nevertheless, there is a strong case against deferring (formally or informally) to tax subsidy considerations in the administration of the doctrine of political purposes (and the common law meaning of charity more generally). The foremost question to ask of any given purpose is

34. For commentaries on the significance of income tax considerations to the doctrine of political purposes, see S. Swann, *Justifying the Ban on Politics in Charity*, in *THE VOLUNTARY SECTOR, THE STATE AND THE LAW* 166–67 (A. Dunn ed., 2000); A. Dunn, *Charity Law as a Political Option for the Poor*, in *FOUNDATIONS OF CHARITY* 75 (C. Mitchell & S. Moody eds., 2000); P. Luxton, *Charitable Status and Political Purpose*, N.L.J. ANNUAL CHARITIES REV. 24, 28 (1995); C.E.F. Rickett, *Charity and Politics*, 10 N.Z.U.L. REV. 169, 176 (1982); U.K., H.C., CHARITIES: FRAMEWORK FOR THE FUTURE ch.2, cmt 694 (1989).

35. *Supra* note 32.

36. *Human Life Int'l v. Minister of Nat'l Revenue*, [1999] 3 F.C. 504, para 18 (Can.).

not whether it should be subsidized but rather whether it has the character of a charitable purpose. Eligibility for a tax subsidy does not and cannot logically factor into this analysis. This is not to deny that there is a fiscal dimension to charitable status. It is merely to recognize that eligibility or ineligibility for a tax subsidy is simply a consequence of charitable status being granted or withheld. It is not the very characteristic qualifying a purpose as charitable in the first place.

The formal irrelevance of subsidy considerations is consistent with the legislature's likely intentions behind the income tax treatment of charity. When the unique income tax status for institutions qualifying as charitable was created, a deliberate decision was made not to legislatively define charity. That decision, which has been repeatedly affirmed through the legislature's failure ever since to adopt a legislative definition, has been understood as a decision to adopt the common law meaning of charity. Since the common law meaning of charity predates income tax, it seems unlikely that the legislature originally intended for tax subsidy considerations to factor into the interpretation of charity. Again, this is not to deny the fiscal dimension to charitable status. It is merely to recognize that the legislature made a decision to confer a tax subsidy on the basis of a preexisting common law understanding of charity, the meaning of which, at that point in time, had been determined independently of tax subsidy considerations.

Admittedly, common law concepts evolve, as do legislative intentions. However, it seems doubtful that the legislature has ever since formed the intention that charity should be interpreted by courts or the CRA specifically by asking which institutions are appropriate candidates for tax subsidies. It is one thing to defer to courts the interpretation of an intelligible concept—charity—carrying with it tax subsidy implications. It is something else entirely for the legislature to specifically intend for courts to interpret a concept like charity with a view to subsidy considerations. The difference (which is critical) is one of deferring decisions with spending implications (e.g., what are the precise boundaries of "charity"?) versus actually deferring the spending decisions (e.g., which institutions are plausible candidates for state subsidies?). Spending decisions are the exclusive jurisdiction of the legislature. It is respectful of this exclusive jurisdiction to confine the analysis of charity to its traditional common law meaning, that is, to interpret charity without treating (formally or informally) deservingness for a tax subsidy as a distinct criterion.

To be clear, the point is not that the legislature ever intended that charitable status be available to institutions which rank as poor candidates for a tax subsidy. We can take notice of the fact that a special charitable tax status was created for only those institutions deserving of that tax status. The question is therefore not whether deservingness is relevant (it clearly is) but rather how deservingness is assessed. The problem is that deservingness for a tax subsidy, at least when approached as a discrete requirement for charitable status, becomes a circular metric for assessing deservingness for a tax subsidy. Deservingness needs to be assessed against some independent metric. The private law meaning of charity was legislatively adopted as the *sole* measurement of an institution's deservingness for charity tax concessions. The statutory design is simple. Institutions qualifying as charitable *at common law* are deserving. Institutions not qualifying as charitable *at common law* are not. Deservingness for a tax subsidy does not factor into this assessment as a distinct consideration. Unless and until income tax statutes substitute the common law meaning of charity with something else, the sole resource for distinguishing charity from politics, at least in the common law provinces of Canada, should be the common law conception of charity.

### *B. Charity As an Economic Concept*

The distinction between charity and politics is not typically rationalized on the specific basis of economics. However, it is possible that ideas emanating from economic analyses of charity have influenced, though arguably not for the better, this area of law.

The standard economic account casts charity, and by extension charity law, as a response to government and market failures. One idea is that charities (and nonprofits more generally) arise to meet the residual demand for public goods and services that the government fails to supply or at least to adequately supply.<sup>37</sup> The problem, of course, is that the efforts of charities in this regard are thwarted by certain market realities. Charities are unattractive to "investors" because they cannot be established for the purpose of profit. Even if charities incidentally turn a profit, they must conform to a non-distribution constraint, which prohibits them from giving investors a return on investment. In addition, charities are vulnerable to free riding in that

37. See, e.g., Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY AND ECONOMIC THEORY (E.S. Phelps ed., 1975).



the kinds of goods and services they supply can often be consumed without payment. These market barriers mean charities are apt to attract suboptimal levels of funding. One of the central goals of charity law and policy, at least according to this perspective, is to ease these kinds of market barriers. On this view, the state's promotion of charity, especially through tax measures designed to facilitate fundraising, is a policy tool to overcome the market and government failures that would otherwise conspire together to ensure that charities are underfunded and that certain public goods and services are undersupplied.

A different account is needed in those contexts in which concerns over free riding are muted. In some instances, charities (and nonprofits more generally) are less vulnerable to free riding because services are provided on a fee-for-service basis. Here, the question for economists becomes why consumers might prefer to contract with a nonprofit as opposed to a for-profit providing a similar service. One line of reasoning suggests that, although the non-distribution constraint makes charities unattractive to investors, it might nevertheless make them preferable service providers, at least from the vantage of consumers. This is because the non-distribution constraint reduces the incentive for opportunistic behavior.<sup>38</sup> The central policy question then becomes why charities—when understood as mere alternative suppliers of tangible goods and services—should benefit from tax concessions and various other legal advantages.

Such an approach to the study of charity bodes implications (consciously or otherwise) for the charity-politics distinction (and indeed the meaning of charity more generally). Once it is accepted that a core goal of charity law is to remedy governmental failure, expectations of the goods and services governments should be supplying begin to shape expectations, consciously or otherwise, of the goods and services charities should be supplying. Even though political advocacy organizations may well be vulnerable to underfunding, they are unlikely to fare well under such an approach. While advocacy organizations might be said to share a concern for remedying governmental failures in the limited sense that they draw public attention to the shortcomings of governmental policy, advocacy is not itself a good or service that we would readily view as something that the government should have but failed to supply. Since advocacy organizations are not directly con-

38. See, e.g., H. Hansmann, *Economic Theories of Nonprofit Organization*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 27–42 (W.W. Powell ed., 1987).

cerned with supplying something that would be supplied by the ideal government, they are an uneasy fit with the view that charities are concerned with remedying failures of government. Likewise, if charities are appropriately understood from the perspective that the non-distribution constraint means charities are less likely to succumb to opportunistic behavior, then a central consideration becomes how advocacy factors into this reasoning. Is advocacy appropriately considered charitable because it is among the contracted services that is uniquely vulnerable to opportunistic behavior by for-profits?

It seems to me, however, that none of this is likely to be very helpful to resolving the charity-politics muddle. If anything, economic conceptions of the charitable sector will tend to misdirect policymakers in this area. Economic analyses tend to narrowly cast charities as suppliers of otherwise undersupplied tangible goods and services. The goal of these analyses is to account for why charities supply goods and services as opposed to (or in addition to) the government and/or why consumers purchase goods and services from charities rather than from alternative for-profit suppliers. There is the risk of this framework fostering an incomplete portrait of the institution of charity in which charities are only valued for their contributions to the material world. A framework so heavily focused on charities as mere suppliers of tangible goods and services seems poorly suited to understanding the legitimate role that charities have to play as community thought leaders and purveyors of ideals.

Also, economic accounts of charity tend to gloss over and/or conflate the distinction between charitable and governmental purposes. Economic analyses cast charities as suppliers of goods and services that the ideal government (i.e., a government not prone to governmental failure) would itself directly supply. From this perspective, charity is not itself an ideal but merely a remedy for imperfect government. Again, this perspective is incomplete and has the potential to be distorting when drawn upon as a referent for the legal meaning of charity. This perspective suggests that charitable purposes should be defined consistently with governmental purposes. But, as I argue below in Part IV(C), the definition of charity generally and the doctrine of political purposes specifically should be developed from the exact opposite perspective—that charity is and should remain distinct from government.

### *C. Charity and the Ideal of Neutrality*

The common law authorities distinguishing charity from politics attach great significance to the ideal of neutrality.<sup>39</sup> Little would be lost if we summarized the authorities as establishing that political purposes are by definition purposes in relation to which courts conclude they should remain neutral as to the presence or absence of public benefit. Political purposes fail to qualify as charitable at common law not because they are specifically found to lack the character of charitable purposes but rather because the assessment of one of the prerequisites for charitable status—public benefit—is intentionally left incomplete. This has more to do with maintaining a neutral stance in relation to political purposes than policing a substantive conception of what is charitable versus political. Indeed, the term “political” is used in the authorities primarily as a label for purposes in relation to which “no comment” is thought to be the appropriate response regarding the presence or absence of public benefit. Since “no comment” on the issue of public benefit is inadequate for charitable status, non-charitableness is less a substantive finding than a default stance necessitated by the common law test for charitable status being intentionally left incomplete.

The importance of a neutral stance has been justified on several bases, none of which are persuasive. One idea is that the law should not countenance the possibility that it—the law—could possibly be improved.<sup>40</sup> The concern here is that the law would undermine its own rationality—would “stultify” itself—if it recognized even the plausibility of public benefit in law reform. There is so little to commend this embarrassingly superficial reasoning that it is quite surprising it has managed to attract any support. The coherence of the law does not, and has never, required the law categorically deny that law reform might be of public benefit.

The desirability of neutrality has also been defended on the basis that there will frequently be absent an evidentiary basis to locate pub-

39. This argument is further developed in A. Parachin, *Charity, Politics and Neutrality*, CHARITY L. & PRAC. REV. 23–56 (2015).

40. See A. D. TYSSEN, THE LAW OF CHARITABLE REQUESTS: WITH AN ACCOUNT OF MORTMAIN AND CHARITABLE USES ACT 177 (Williams Clowes and Sons ed., 1888). This reasoning was endorsed, for example, in *Nat'l Anti-Vivisection Society v. Inland Revenue Comm'rs*, [1948] A.C. 31, 62 (Eng.) (Lord Simonds), 50 (Lord Wright).

lic benefit in any given law or policy reform agenda.<sup>41</sup> Again, though, little weight should be attached to this reasoning. This is because it has been explicitly established by high authority that a neutral stance remains apt even when there is no lack of evidence of public benefit.<sup>42</sup>

More frequently, the importance of neutrality is explained on the basis of deference. The idea is that courts should refrain from ruling on the presence or absence of public benefit in relation to purposes necessitating reform to law, policy or decisions of government so as to avoid inappropriately injecting themselves in any way into what is the exclusive domain of the legislature or the executive. The goal is to preserve the institutional neutrality of the judiciary vis-à-vis the legislative and executive branches of government. Once again, this reasoning lacks rigor and cannot inform a thoughtful understanding of the doctrine of political purposes. The appeal to institutional neutrality (in the sense of deference) is vulnerable to numerous compelling critiques, three of which will be mentioned here.

First, this reasoning considerably overstates the need for deference. It proceeds from the dubious premise that a court merely commenting on the plausible benefit of a change to the law or policy has somehow inappropriately intruded into the domain of the legislature. It is not as though a court would be imposing any given reform on the legislature merely by recognizing its plausible public benefit. In any event, courts routinely comment on the desirability of law reform. Ironically, courts have even commented on the desirability of the legislature reforming the doctrine of political purposes itself.<sup>43</sup>

Second, the existence of a common law meaning of charity takes for granted that courts possess the normative resources and institutional legitimacy to make the kinds of value judgments necessitated by the process of determining what qualifies as charitable. The appeal to neutrality in the authorities is based on the exact opposite view—that courts lack the institutional legitimacy to comment on whether certain purposes possess or lack public benefit. This view should be given the most restrictive interpretation possible because it is irreconcilable with the very idea of a judicially interpreted common law meaning of

41. See *McGovern v Attorney General*, [1982] 1 c 321, 336–37 (Eng.). Slade J. observed that, “the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit.”

42. *Id.* at 337.

43. See *Human Life Int’l in Can. Inc. v. Minister of Nat’l Revenue*, [1998] 3 F.C. 202, ¶ 19 (Can.).

charity. If courts lack the legitimacy to rule on the public benefit of allegedly charitable purposes, then the very idea of a common law meaning of charity is problematic.

Third, basing the non-charitableness of politics on the idea of deference has by now proven itself to be incapable of sustaining a principled distinction between charity and politics. Rather than incentivize charities to avoid political advocacy, all that appealing to the importance of the institutional neutrality of the courts achieves is to reward charities for framing advocacy in ways that strategically sidestep the concerns over neutrality and deference described above. One obvious strategy is to frame advocacy as human rights claims. Whatever else may be said of neutrality, it would be difficult for any court to reason that this kind of advocacy is non-charitable on the basis that courts must be neutral in relation to the merit of any given human rights interpretation. In jurisdictions with entrenched charters of rights it is presupposed that courts have a legitimate role to play in the interpretation and enforcement of human rights.

This very issue came before the UK First-Tier Tribunal in *The Human Dignity v. The Charity Commission*.<sup>44</sup> At issue in this case was the charitableness of a trust—the Human Dignity Trust (“HDT”)—established and operated to engage in constitutional human rights litigation. Specifically, HDT brought constitutional challenges against laws criminalizing same-sex relationships. The Charity Commission took the position that HDT had a political purpose. The UK First-Tier Tribunal disagreed, concluding that HDT was charitable at law. The Tribunal reasoned as follows:

It seems to us that the constitutional process involved in *interpreting and/or enforcing* superior constitutional rights might, on one analysis, be seen as *upholding the law of the state* concerned rather than changing it. . . .<sup>45</sup>

The premise for this reasoning is that the usual concerns over preserving neutrality do not apply in the context of human rights-based advocacy because there is a “legitimate role for the court in interpreting and enforcing superior constitutional rights.”<sup>46</sup> This reasoning contemplates a sweeping exception to the doctrine of political purposes for human rights advocacy. While “enforcing” human rights confines this kind of advocacy to well-established understandings of

44. *Human Dignity Trust v. Charity Comm’r for Eng. and Wales*, [2014] UKFTT (Eng.).

45. *Id.* at 99.

46. *Id.* at 96.

rights (and thus has the potential to filter out political agitators), the same cannot be said of merely “interpreting” human rights. That the Tribunal accepted the charitableness of “interpreting” human rights contemplates that it is charitable to participate in the interpretive process through which the content of human rights is discovered. On this view, the particular interpretations of human rights advanced by applicants for charitable status are irrelevant. Such an “all comers” strategy for assessing the charitableness of human rights advocacy does not rationalize but rather undermines the idea that law reform is a political purpose. The breadth of reforms that could be advanced as exploratory rights interpretations is enormous.

But this does not dispose of the appeal to the value of neutrality in the authorities distinguishing charity from politics as there is an additional basis on which the authorities have defended the importance of a neutral stance. While the authorities have not explicitly said so, it is evident that the doctrine of political purposes rests on a principled belief in the importance of neutrality for its own sake (and not just as a means for institutional deference). For example, one of the factors sometimes qualifying a purpose as a political purpose is the lack of a neutral referent for public benefit. A neutral referent is an independent point of reference allowing a decision maker (court or regulator) to verify that public benefit is present without having to form and express a non-neutral value judgment about the worthiness of the purpose. Applicants for charitable status are in a superior position to avoid the political label if they can point to such a neutral referent. The reverse is true for applicants who cannot establish public benefit by pointing to a neutral referent.

But why would this be the case? The premium attached to neutral referents is consistent with the thesis that the charity-politics distinction is fundamentally concerned with preserving neutrality, not just for the sake of deference but also for the sake of neutrality. The primary reason a neutral referent would be desirable from the perspective of a court or regulator is that it relieves against having to make a non-neutral value judgment as to the public benefit (or lack thereof) inhering in a given cause. That is, it supplies a neutral basis upon which to reach the non-neutral conclusion that public benefit is present.

It is probably no coincidence then that advocacy causes resting on unprovable moral perspectives feature prominently in the authorities. The leading Canadian authorities deal with institutions advancing

moral positions on such topics as abortion,<sup>47</sup> pornography,<sup>48</sup> and torture.<sup>49</sup> It seems difficult to believe that concerns over neutrality in these cases were solely attributable to the ideal of deference. Concerns over neutrality in these cases were accentuated, if not animated, by the nature of the positions advocated by the institutions under review, all of which promoted highly particularized and controversial moral conceptions of “the good” for which there was no readily discernable neutral referent.

The resort to neutral referents is evident in numerous other ways as well. Consider the published guidance of the CRA on the doctrine of political purposes.<sup>50</sup> The CRA takes the position that communications, either to the public at large or to government officials, can be charitable provided those communications are (among other things) “well-reasoned.”<sup>51</sup> The guidance defines well-reasoned to mean:

A position based on factual information that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present/address serious arguments and relevant facts to the contrary.<sup>52</sup>

The requirement for “factual information” serves the obvious goal of supplying a neutral referent for public benefit. Advocacy resting on factual information has a readily discernable neutral referent—the facts. This is not to deny that facts can be controversial. But there is a difference: disputes over facts do not directly play out, as do competing moral claims, as a competition between differing conceptions of the good.

A similar point applies to the CRA’s stipulation that well-reasoned positions acknowledge and address relevant counterarguments. This requirement distances public benefit analysis from non-neutral normative analysis. Consciously or otherwise, it uses methodological rigor as a neutral proxy for public benefit so that benefit need not be located, or at least not solely located, in the ideals and values implicit in the specific position being advocated.

47. See, e.g., *Alliance for Life v. Minister of Nat’l Revenue*, [1999] 3 F.C. 504 (Can.); *Human Life Int’l in Can. Inc. v. Minister of Nat’l Revenue*, [1998] 3 F.C. 202 (Can.).

48. *Positive Action Against Pornography v. Minister of Nat’l Revenue*, [1988] 2 F.C. 340, ¶ 4 (Can.).

49. *Action by Christians for the Abolition of Torture (ACAT)*, [2002] F.C.A. 499, ¶ 2 (Can.).

50. CAN. REVENUE AGENCY, POLICY STATEMENT CPS-022, POLITICAL ACTIVITIES (2003), <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>.

51. *Id.* §§ 7.1, 7.3.

52. *Id.* app. I.

The problem with this reasoning is not necessarily that a neutral conception of public benefit (understood broadly as a requirement that charities operate consistently with some conception of “the good”) is impossible. I take no philosophical position here (for or against) the plausibility of a neutral conception of public benefit. The problem is that such an approach to assessing public benefit analysis works at cross purposes with the non-neutral orientation of most common law authorities in this area. The strong stance on neutrality evident in some of the cases distinguishing charity from politics is nowhere to be found in others.

For example, in one of the leading cases dealing with political purposes, *Southwood v. A.G.*,<sup>53</sup> charitable status was denied to a pacifist trust on the basis that its educational curriculum went too far in taking for granted that disarmament was the ideal path to world peace. It was reasoned that a curriculum can be charitable notwithstanding that it proceeds from the premise that peace is preferable to war but not if it accepts as its starting point any particular conception of how best to achieve peace. A neutrality imperative so demanding that it prohibits the law of charity from going any further than acceding to the trite proposition that peace is preferable to war risks confining charities to excessively benign charitable missions. But it turns out the law does not consistently enforce such a strong version of the neutrality principle. Notwithstanding the position on pacifist trusts in *Southwood*, trusts for the promotion of the armed forces,<sup>54</sup> including trusts for teaching shooting,<sup>55</sup> have been upheld as charitable. It is difficult to reconcile these cases with the suggestion that charity law must maintain total neutrality on the issue of how best to attain peace.

A similar point applies in relation to the non-committal stance of the authorities in relation to whether abolishing human torture is of public benefit. Anti-torture institutions have been characterized as political on the basis that the common law must remain neutral on the merits of abolishing torture.<sup>56</sup> Nonetheless, trusts against cruelty to animals have been upheld as charitable.<sup>57</sup> There is a perverse irony in

53. *Southwood v A.G.* [2000] EWCA (Civ) 204 (Eng.).

54. See H. PICARDA, *THE LAW AND PRACTICE RELATING TO CHARITIES* 199–201 (4th ed., 2010).

55. *Re Stephens, Giles v Stephens* [1892] 8 T.L.R. 792 (Eng.).

56. *McGovern v Attorney General*, [1982] 1 c 321, 354 (Eng.); *Action by Christians for the Abolition of Torture (ACAT)*, [2002] F.C.A. 499, ¶ 60 (Can.).

57. See *Re Herrick, Colohan v A-G* [1918] 52 I.L.T. 213 (Ir.), upholding as charitable a trust rewarding police for bringing justice to perpetrators of cruelty to animals, and *Swifte v A-G for Ir.*



charity law having found benefit in protecting animals from cruelty but not humans from torture.

Critiques of inconsistency admittedly have their limits. Coherence is always a work in progress rather than an attained reality. Perhaps all that these inconsistencies reveal is that courts have not been especially effective in their attempts to discover neutral justifications for charitable status. But that strikes me as being an excessively optimistic explanation. There seems to be a bigger problem here—a fundamental incompatibility between the ideal of neutrality and the ideal of charity.

#### IV. REIMAGINING THE CHARITY-POLITICS DISTINCTION: GUIDING CONSIDERATIONS

Having found fault in some of the ideas that have influenced the distinction between charity and politics, it behooves me to identify some alternative concepts on which reformers may draw. The ultimate goal of the doctrine of political purposes is to restrict charitable status to institutions with truly charitable purposes. This goal cannot be achieved without recourse to the defining characteristics of charitable purposes. Therefore, in this part, I identify three relevant characteristics of charity that should inform the modernization of the doctrine of political purposes: (1) the innovative capacity of charities as thought leaders, (2) the pervasiveness of “messaging” in charitable programming and (3) the distinctiveness of charity relative to government.

##### *A. Charities As Thought Leaders*

The process of reform should begin with the recognition that charities are uniquely equipped to contribute normative perspectives to the public discourse of a wide range of issues. Whereas the marketplace relies upon economic self-interest to unite people who otherwise lack a basis for collective action, idealism is the organizing principle behind the charitable sector. The sector brings together people who share in common a concern over, and core values surrounding, matters of collective interest. Since the basis for action in the charitable sector is entirely civic, one might say that charities are where principled conviction and community experience come together to form a vibrant and proficient source for thought leadership. In addition, charities fre-

(No 2) [1912] AC 276 (Eng.), upholding as charitable a trust to protect “starving and forsaken cats.”

quently have valuable insights into the unique and varying experiences of marginalized constituencies. Ideally, the law would find ways to regulate political activism by charities without squandering this tremendous capacity to enrich public discourse.

### *B. The Pervasiveness of Messaging in Charitable Programming*

A reimagined doctrine of political purposes should acknowledge the pervasiveness of messaging in charitable programming. Since practically all charitable programming unavoidably communicates value-laden messages to the public, the bright line that might be assumed to exist between charity and promoting a point of view, attitude of mind, or climate of opinion is arguably illusory. Some decisions overtly recognize the charitableness of issue specific thought leadership. For example, in *Jackson v. Phillip*, the court upheld as charitable a trust established to “create a public sentiment that will put an end to negro slavery” through a variety of means including books, newspapers, speeches, and lectures.<sup>58</sup> Although messaging is not always this overt, it tends to inhere in practically all charitable programming.

For example, the very act of relieving poverty through some specific poverty relief strategy deliberately endorses to the public a view about poverty. Identifying a given population as “poor” communicates a potentially controversial message about the basic standards of living below which no one should be left to languish. Indeed, it is impossible to engage in the act of relieving poverty without necessarily communicating a value-laden message about which wealth disparities are too extreme to leave unaddressed. Likewise, even something as seemingly uncontentious as a scholarship fund promotes potentially controversial ideas about the sorts of criteria that should be used to identify meritorious scholarship candidates (e.g., gender, religion, financial need, geographic residence, disadvantaged ancestry, military service, etc.), the sorts of athletic and academic pursuits worthy of financial support and so on. Charities established to grapple with the issue of impaired driving are transparent in their goal to shape public attitudes on the issue of impaired driving. Human rights charities unavoidably shape public values in relation to a wide array of contentious socio-legal issues. Environmental charities instill a sense of environmental stewardship and cognizance of environmental impact. Religious charities, especially in the context of proselytizing religions, necessarily

58. *Jackson v. Phillip*, 96 Mass. 539, 547 (14 Allen) (1867).

provide non-neutral instruction on the most controversial issues imaginable. In fact, churches—because they commend to parishioners comprehensive religious belief systems—do far more to shape attitudes and opinions than the sorts of single issue advocacy organizations that are sometimes thought of as political.

There does not seem to be any escaping the conclusion that messaging is often implicit (if not explicit) in charitable programming. The question to consider is what, if anything, this reveals about the charitableness of public messaging and advocacy. One view is that this aspect of charitable programming is not itself charitable but is merely an incidental or ancillary consequence of charitable programming. On this view, the fact that programming can qualify as charitable notwithstanding the fact that it entails a form of implicit messaging is simply because the doctrine of incidental and ancillary purposes allows for this kind of non-charitableness to coexist with charitable programming. From this perspective, it does not follow that messaging can *itself* form the basis of charitable programming. To the contrary, according to this view, messaging is non-charitable. It is a tolerated rather than celebrated aspect of charitable programming. Admittedly, this is a plausible view of the law. It is not, though, the better view.

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

The first of these—a means to charitable ends—arises where charities engage in activities that, when viewed in isolation, appear to lack the hallmarks of “charity.” An example sometimes given is that the employment practices of charities are often indistinct from those of for-profit entities.<sup>59</sup> Though charities must themselves lack a profit

59. See PICARDA, *supra* note 54, at 339.

motive, they nonetheless use pecuniary incentives to recruit and retain employees and contractors. A literal application of the exclusive charitableness requirement would mean that the profit accruing to the employees and contractors of a charity undermine its exclusive charitableness. If *somebody* is profiting, then obviously there is absent an *exclusively* nonprofit operation. The incidental doctrine precludes this reasoning. It enables the conclusion that the profit inuring to employees and contractors is purely incidental in the sense that compensating employees and contractors is merely the “means to the attainment” of charitable purposes.<sup>60</sup>

The second of these—non-charitable consequences of charitable programming—recognizes that the consequences of charitable programming can sometimes seem irreconcilable with the exclusive charitableness requirement. The incidental doctrine enables the conclusion that seemingly non-charitable consequences do not necessarily violate the exclusive charitableness requirement. For example, at issue in *Incorporated Council of Law Reporting for England and Wales v. A-G*<sup>61</sup> was the charitableness of a nonprofit institution publishing law reports. One of the objections to the charitableness of the program was that, though the institution in question lacked a profit motive, the consequence of publishing law reports was to enhance the profitability of law firms. A literal application of the exclusive charitableness requirement would result in the denial of charitable status in such circumstances. Programming is arguably not exclusively charitable when one of its obvious and predictable consequences is to enhance the profitability of those consuming that programming. The court concluded, however, that the profit in these circumstances was merely “incidental to or consequential on” the institution’s charitable purpose of disseminating knowledge.<sup>62</sup>

With that background in mind the question to consider is whether the messaging implicit in charitable programming is appropriately viewed from the vantage of the doctrine of incidental and ancillary purposes. If it is, then it becomes difficult to sustain the argument that messaging—because it goes hand-in-hand with charitable programming—can itself be charitable. If the doctrine of ancillary and inci-

60. The “means to ends” interpretation of the incidental doctrine was adopted by a majority of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women*, [1999] 1 S.C.R. 10, para. 156-57 (Can.).

61. *Incorporated Council of Law Reporting for England and Wales v A-G* [1971] EWCA (Civ) c 73 (Eng.).

62. *Id.* at 103.

dental purposes applies, it follows that this kind of messaging is a non-charitable consequence that we tolerate.

It is doubtful that the messaging inhering in charitable programming is best viewed as a mere incidental consequence of "doing charity." The incidental doctrine only applies where seemingly non-charitable means or non-charitable consequences frustrate an institution's ability to meet the exclusive charitableness standard. *Before* the incidental doctrine is resorted to in relation to any given means or consequences, it must *first* be determined those means or consequences are in fact non-charitable. If non-charitable means or consequences are absent, there is no role for the incidental doctrine to square apparent non-charitableness with the exclusive charitableness requirement.

How is it determined whether any given means to or consequences of charitable programming are non-charitable such that they need to be justified via the incidental doctrine? The authorities are not especially clear on how to make this assessment. To the contrary, the assessment is somewhat impressionistic. The more aberrant or irregular the consequences of charitable programming, the greater will be the perceived need to justify those consequences via the incidental doctrine. But—and this is important—the logic apparently also works in reverse. That is, the more endemic is a particular consequence to charitable programming, the lesser will be the perceived need to think of it as a non-charitable consequence requiring justification via the incidental doctrine. To the contrary, if a particular consequence is a routine widespread result of charitable programming, it is possible to conclude that that consequence is itself an essential aspect of (rather than departure from) charitable programming.

So where does messaging fall in this schema? There is no obviously right (or wrong) answer. However, it is difficult to simply accept that the messaging embedded in charitable programming is something the law at most tolerates as a non-charitable incidence of such programming. Messaging is not an irregular or aberrant consequence of charitable programming. To the contrary, it is pervasive in practically all charitable programming. That alone makes it difficult to draw too stark a contrast between charity and messaging. Charitable programming not only changes the way people think about issues but does so deliberately and unavoidably.

### C. *The Distinctiveness of Charity and Government*

Emphasizing the distinctiveness of charity relative to government enables some useful insights as to the proper scope of the doctrine of political purposes. Government and charity, though they sometimes pursue similar goals, are properly thought of as distinct from one another. It is true that some charitable purposes overlap with aspects of the welfare state. This does not, however, disprove that charity and government are distinct. Charity is as much about how charitable ends are pursued as it is with the ends themselves. Charity is a private (in the sense of nongovernmental) voluntary institution. On this view, charity is not simply concerned with the attainment of ends qualifying as charitable. It is concerned with attaining those ends *other than via government*.

Admittedly, the state promotion of charity through tax concessions and various other exemptions from general rules of law clouds the neat boundary between charity and government. But the state promotion of charity does not disprove the private voluntary nature of charity or compromise its normative separateness from government. Charitable donation tax incentives are only activated where a taxpayer forms the voluntary choice to share. Likewise, exemptions from the rule against perpetual trusts and the rule that trusts must be for persons rather than purposes only apply where a settlor voluntarily chooses to settle a charitable purpose trust. In all of these (and other) contexts where the state promotes and advantages charity we can understand the state as merely promoting a desirable form of private and voluntary action. In none of these contexts does charity ever arise or sustain itself but for the voluntary choice of private citizens to autonomously pursue charitable ends.

The distinctiveness of charity from government finds support in the scholarly literature. It draws on Evelyn Brody's conceptualization of the charitable sector as a separate sovereign.<sup>63</sup> It also draws on Matthew Harding's contention that voluntarism, as in private autonomous choice, makes charity distinct from government.<sup>64</sup> The distinctiveness of charity and government also helps to explain why trusts established for the purpose of carrying out governmental policy have not been

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

64. M. Harding, *Distinguishing Government from Charity in Australian Law*, SYDNEY L. REV. 559, 578 (2009).

recognized as charitable.<sup>65</sup> In addition, it explains the U.K. Charity Commission's position that charitable trusts must be independent from government.<sup>66</sup> In the view of the Charity Commission, if the purpose of a trust is ultimately to implement the policies of government, or if the trust operates such that it merely carries out the directions of government, then it will not qualify as charitable.

The Charity Commission's position is particularly instructive. It supports the idea that governments cannot "do government" through charities. The only exception is if the goal of government in supporting charity is to "do charity." Of course, this is not really an exception to the rule since it merely reveals that governments are just like everybody else in the sense that they are able to support (though neither direct nor control) the work of charities. The doctrine of political purposes can be understood as simply applying this principle in reverse. When we say that purposes necessitating electioneering and lobbying for law and policy reform are non-charitable we can understand this as meaning the following:

*Just like governments cannot "do government" through charities, charities cannot "do charity" through governments. Since government and charity are separate and distinct, government cannot be the means for charitable ends any more than charity can be the means for governmental ends.*

The doctrine of political purposes is therefore perhaps misnamed as it is arguably less concerned with the non-charitableness of politics than it is with the non-charitableness of government.

Viewing the doctrine of political purposes from this vantage point reveals that the doctrine may have a role to play in restricting charities from electioneering and direct lobbying for law/policy reform. Institutions pursuing their missions solely through electioneering and/or law reform use government as the means for the fulfillment of their putatively charitable ends. Even accepting that electing a particular government or enacting a particular law reform would contribute to some end qualifying as charitable, these only indirectly contribute to that goal. The most proximate cause is governmental action and not the actions contributing to the government action. Electioneering and law

65. *Id.* at 561–63.

66. CHARITY COMM'N FOR ENGLAND & WALES, THE INDEPENDENCE OF CHARITIES FROM THE STATE – RR7 (2001), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358888/rr7text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358888/rr7text.pdf).

reform do not therefore meet the requirement that the direct effect of charitable programming be the attainment of charitable purposes. Regardless, the distinctiveness of charity relative to government reminds us that charity is not simply concerned with the attainment of ends qualifying as charitable. It is concerned with attaining those ends other than via government. Purposes pursued solely through electioneering and direct lobbying for law and policy reform are perhaps appropriately non-charitable because they are directed at determining who forms the government or shaping the outputs of government.

Importantly, the same concerns do not, however, arise (either at all or at least with the same immediacy) in relation to public awareness campaigns. These pursuits are not directly concerned with either preserving an existing or securing a new governmental response to some social ill. True, the cultivation of certain values or perspectives might tend to influence the demands that people make of government. However, since this is also true of, say, education and religion, it cannot in and of itself supply a basis for concluding against the charitableness of public information campaigns. To the contrary, as I suggested above, the pervasiveness of messaging in charitable programming ensures that charities inevitably shape public opinion. Thought leadership is therefore less a departure from the ideal conception of “charity” than a necessary manifestation of it.

## V. CONCLUSION

Charity regulation has attracted an unusual amount of attention in Canada lately. The attention was initially unwelcome by the charitable sector as it grew out of a surprise multiyear audit program for political activities by charities announced in the federal budget of 2012. But the attention garnered by the audit program contributed to charity law becoming an election issue in the recent federal election. Given the new Liberal government’s pledge to modernize the doctrine of political purposes, the prospect for needed reform now looms on the horizon. In this paper, I have attempted to frame reform discussions by identifying three distorting ideas about charity that should be curbed in reform discussions and three instructive ideas about charity that should be drawn upon to help reimagine the doctrine of political purposes.

The discussion reveals that there arguably exist legitimate reasons to continue distinguishing charity from politics. For example, the distinction between government and charity supplies a principled basis for preventing charities from achieving their charitable missions solely



through electioneering and/or direct lobbying for law and policy reform. However, the distinction between charity and politics is currently drawn too restrictively and for misguided reasons. Policy concerns over rationing the tax concessions for charities—although superficially appealing—are ultimately a distraction from the essential issue, which in all cases is whether a given pursuit is charitable in substance. To the extent that economic conceptions of charity would tend to confine charitable status to institutions supplying tangible goods and services, they too should be checked. Likewise, distinguishing charity from politics based on an appeal to the ideal of neutrality has revealed itself to be a failed strategy.

The pervasiveness of messaging in charitable programming and the capacity for charities to enrich discussion provides the case for change. The idealism inspiring charitable works necessarily brings ideals with it. Allowing charities to enrich public discourse by contributing these ideals to the marketplace of ideas is not a deviation from what charities ought to be doing but rather a fulfillment of it. Reform should at the very least clarify and liberalize the scope for public awareness campaigns by charities.