

The Philanthropist Award 1993-94 Honourable Mention¹

The Political Purposes Doctrine in Canadian Charities Law

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I. Introduction

The law of charity allows a trust to benefit a purpose and is thus an exception to the general rule that a trust must benefit a person. However, the range of such purposes is circumscribed, since only those purposes deemed to offer benefit to the public, as opposed to purely private interests, are considered to be charitable. Moreover, there are further restrictions on charitable status, among which is that which states that "political" purposes are not "charitable" in Canada, so that a trust for political purposes will fail. Yet both the theoretical and practical bases for the prohibition of political purposes in the law of charities are suspect. In the past decade there have been several important cases in the Federal Court of Appeal relating to the political purposes doctrine and the time is therefore ripe for a re-examination of it.²

This examination is conducted in three parts. The first describes the origins and development of the current law governing the political purposes doctrine in England and in Canada. The second contrasts Anglo-Canadian law with its American counterpart since American courts have adopted a broader interpretation of public benefit as a central requirement for charitable status, recognizing purposes which would probably have been rejected in England or Canada.

The third section uses the lessons learned from the first two sections, along with some further considerations, to suggest that there is a need for reform of the Canadian law of charity in respect to political purposes.

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II. The Political Purposes Doctrine

(a) *Origins*

Many texts state that the traditional rule in English and Canadian law is that trusts for political purposes are not charitable and are thus invalid.³ While this may now be true, the political purposes doctrine does not have the ancient lineage often attributed to it. The oft-repeated assertion of Lord Parker in *Bowman v. Secular Society* that “a trust for the attainment of political objects has always been held invalid”, is inaccurate.⁴ The doctrine was developed only at the turn of the century in response to the general imposition of income tax and the consequent introduction of a tax exemption for contributions to charitable organizations. Previously, “political purposes” were regarded as charitable in English law.⁵ Indeed, several of the most famous English social reform organizations of the nineteenth century were charitable in law. The Anti-Slavery Society, the John Howard Society, anti-vivisection organizations, and the Lord’s Day Observance Society, among others, pursued purposes and activities which today could be considered grounds for revocation of their charitable status and some of these organizations continue to be regarded as valid charities today.⁶

The change came with the introduction of the general income tax. While early British income tax legislation provided an exemption for charities,⁷ it did not provide a separate definition of “charitable”. It was thus unclear whether the tax law definition of charity was synonymous with the trusts law definition. In 1888, the Court of Session showed the route which charities law might have followed. *Baird’s Trustees v. Lord Advocate*⁸ concerned a trust to mitigate the “spiritual destitution among the population of Scotland”. The trustees applied for an exemption under the *Income Tax Act*,⁹ but the Court of Session held that the tax law definition of charity was not the English trusts law definition but the narrower Scots law definition of “charity” as the “relief of poverty”. The importance of *Baird’s Trustees* lies in its distinction between the trusts and tax law definitions of charitable purposes. By adopting a narrow interpretation, the Court recognized that “charitable purposes” can have a different meaning depending upon the context in which the phrase is used. Specifically, the issues of essential validity and freedom from taxation were to be considered separately.

The House of Lords rejected *Baird’s Trustees* only three years later in *Commissioners for Special Purposes of the Income Tax v. Pemsel*.¹⁰ In *Pemsel*, a protestant Episcopal church was the beneficiary of a trust to support “missionary establishments in foreign nations”. The main issue was the definition of “trusts for charitable purposes” in the *Income Tax Act*,¹¹ the same issue raised in *Baird’s Trustees*. The Commissioners argued that although the trust might be charitable in English law, the maintenance of missionary establishments was

not a purpose solely for the relief of poverty and thus was neither charitable in Scots trusts law nor a valid “charitable purpose” qualifying for a tax exemption. The House of Lords disagreed, holding that the definition of “charitable purposes” in the *Income Tax Act* was identical to the English trusts law definition.¹² Lord Macnaghten observed that income tax legislation was continuously revised and that Parliament would have so indicated if it had desired a tax definition of charity distinct from the English trusts law definition. In dissent, both Halsbury L.C. and Lord Bramwell recognized that tax law required a separate definition of “charitable purposes”. Lord Bramwell noted that exemptions “add to the burden on taxpayers generally”, and Halsbury L.C. stated that “every exemption throws an additional burden on the rest of the community”, that “the state will be a subscriber of £17 a year to supporting, maintaining, and subsidizing” the church’s purpose, and that it was unclear whether this was the intention of the legislature in framing the tax legislation.

Pemsel was decided by judges whose principal experience with charities law came from disputes concerned with the essential validity of a trust. Against this background the House of Lords may have been predisposed to uphold purposes as charitable because they took a dim view of attempts by “greedy” relatives to invalidate them.¹³ However, after *Pemsel*, relatively few charities law cases concerned the essential validity of a trust. Increasingly, the law reports tell of organizations seeking favourable tax treatment. Many were successful since after *Pemsel* any purpose which was charitable in trusts law automatically qualified for tax benefits.¹⁴ Beneficiaries of the decision in *Pemsel* included a trust to build a club and reading room “for the furtherance of Conservative principles and religious and mental improvement”,¹⁵ a trust to promote the establishment of a Bishop’s see in Birmingham,¹⁶ and a trust for “food reform”.¹⁷

The more liberal approach in the years soon after *Pemsel* is also demonstrated by *Re Foveaux*,¹⁸ a case in which a trust for the suppression and abolition of vivisection was held valid. Chitty J. recognized that the issue involved competing moral and policy arguments and concluded that an objective determination of public benefit was not possible. He held that the Society need only intend to benefit the public: whether there actually was public benefit to be gained by abolition was considered irrelevant, as was the unpopularity or controversy surrounding anti-vivisectionism.¹⁹ This definition of public benefit represents the high-water mark of the liberal approach to political purposes. The water soon ebbed.

While the *Pemsel* definition of what charity means in the context of income tax exemptions has never been altered fundamentally, it was, presumably as a result of concerns about state subsidization of certain political activity, narrowed in 1917 with the introduction of the political purposes doctrine. *Bowman*

v. *Secular Society* concerned the validity of a bequest made to the Secular Society for a wide range of purposes, including the promotion of secular knowledge, freedom of enquiry, promotion of the secularization of the state, and abolition of church establishment. The issue in the case was whether these purposes were illegal, and the House of Lords held that they were not. It also held that there was an absolute gift to the Society. Thus, the political purposes doctrine sprang fully grown, like Athena from Zeus' forehead, from Lord Parker's majority opinion in which he held that the bequest was an absolute gift to the Society and thus there was no trust. He nonetheless went on to consider hypothetically whether the Society's objects were charitable and concluded that they were not because they were all "purely political objects" and because "[e]quity has always refused to recognize such objects as charitable". So, while an absolute gift for such purposes was valid, a trust for them was not:

...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, and therefore cannot say that a gift to secure the change is a charitable gift.²⁰

There is much to criticize about the authority for Lord Parker's decision that political purposes can never be charitable. The rationale he advanced to support it—that the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit—is inconsistent with courts' general assertion of their ability, indeed of their duty, to assess public benefit in the law of charities.²¹ In addition, he appears to have relied on *De Themmines v. De Bonneval*²² which involved a trust to promote the supremacy of the Pope in all ecclesiastical matters and thus stands for the entirely different proposition that such a trust is contrary to public policy in a state in which ecclesiastical authority is vested in the Church of England.²³ *De Themmines* was not a case about political purposes, yet it was erroneously cited in an 1888 text as authority for the proposition that "a trust to keep up a particular political opinion is not a charity."²⁴ Making a mistake to which many law students are still prone, Lord Parker may have read the text but not the case.²⁵

(b) *The Political Purposes Doctrine In the English Courts: From Bowman to McGovern*

After *Bowman* English courts generally refused to recognize political purposes as charitable. A review of the cases demonstrates, however, that there are a number of problems with the application of this doctrine.

The first difficulty is that of defining what makes a purpose "political". Trusts for the benefit of political parties have been invalidated,²⁶ as have trusts for the promotion of broader political ideals not tied to a particular political party.²⁷

Similarly, a trust to promote the adoption of “socialized medicine” was held not charitable because it sought to agitate for the establishment of a state health service which, at the time of the trust coming into effect, was still a matter of political debate.²⁸ Also, an organization formed to break strikes by enlisting volunteers to replace strikers in essential services was held to be not charitable.²⁹ The Court concluded that the group’s objects “are political, and not the less so because it disclaims partisanship in political or industrial controversy”.

But the political purposes doctrine extends far beyond the world of direct political partisanship. It is triggered by any attempt to influence the political process. In *Commissioners of Inland Revenue v. Temperance Council*,³⁰ Rowlatt J. held that “[a]ny purpose of influencing legislation is a political purpose”. In *Re Hopkinson*, Vaisey J. stated both that a trust to seek a change in the law is not charitable and that “it would be equally true...[that] the advocating or promoting of the maintenance of the present law” would not be charitable. This approach to the question of what is a political purpose was reiterated at length in what is often cited as the leading authority in the area, *National Anti-Vivisection Society v. Inland Revenue Commissioners*.³¹ By a 4-1 decision the House of Lords refused to grant tax exemption to the Society’s investment income. Lord Simonds, with whom Viscount Simon concurred, held in part that as the Society’s purpose was to seek a change in the law, it was political and thus not charitable.

Not only have the courts decided that an attempt to change the law is a political purpose, they also appear to have generally, although not invariably, taken the view that organizations espousing this aim cannot invoke the ancillary purposes doctrine. That is, such organizations are unlikely to convince a court that changing the law is only a means to their principal end of pursuing a charitable purpose.

While there is authority for the ancillary purposes doctrine, it is rarely successful. In *Voluntary Workers* the Court stated that “[t]he political purpose is predominant, and it swallows up all the others”. In *Temperance Council*, a trust set up by a number of churches for “united action to secure legislative and other temperance reform” was refused charitable tax status. Rowlatt J. rejected the Council’s argument that legislative reform was only a noncharitable means to a charitable end—the promotion of temperance—stating that “[t]his Council was instituted mainly with the direct purpose to effect changes in the law”. Ironically, if the churches themselves had engaged in lobbying instead of setting up a separate Council in order to “secure legislative and other reform” the Court might have found that the political purposes were only ancillary to their ultimate charitable purpose. In *National Anti-Vivisection Society* Lord Simonds held that the means and ends of the Society were inseparable, rejecting a suggestion that to secure legislation was merely a means to the end of

abolition.³² While acknowledging that “[t]here is undoubtedly a paucity of judicial authority on this point”, he stated that, “the reason of the thing appears to me so clear that I neither expect nor require much authority” to assert that “a main object of the society is political and for that reason the society is not established for charitable purposes only.”³³

On some occasions the ancillary purposes doctrine has been invoked successfully. Two courts, for example, have held temperance organizations to be charitable, despite the fact that they sought changes in the law.³⁴ In *Inland Revenue Commissioners v. Yorkshire Agricultural Society*,³⁵ an organization devoted to the advancement of agriculture included among its purposes “watching and advising on legislation affecting the agricultural industry”. The Attorney-General alleged that this was not a charitable object but the Court held that it should not affect the Society’s charitable status; however, an association formed *solely* to watch and advise on legislation would not be charitable.

Perhaps the strongest advocacy of a liberal position on ancillary purposes comes from Lord Porter’s dissenting judgment in *National Anti-Vivisection Society*. He began by noting that “it is curious how scanty the authority is for the proposition that political objects are not charitable”.³⁶ He then held that the Society’s purpose was *prima facie* charitable and suggested that a purpose which is *prima facie* charitable should be recognized as such unless there were overwhelming reasons to withhold charitable status.³⁷ Lord Porter did not accept the distinction made by the other judges between seeking a purpose and seeking legislation promoting a purpose. He took a broad view of the Society’s purpose, namely that “the object of this society is the protection of animals from the sufferings believed to be involved in vivisection.”³⁸

Notwithstanding the cogency of Lord Porter’s dissent, an attempt to change the law has been used on a considerable number of occasions to hold that purposes are not charitable. An unlikely example is *Re Shaw*,³⁹ which concerned a bequest by George Bernard Shaw for research into the development of a new English alphabet; for the transliteration of one of his plays into the new alphabet; and persuasion of the public and government of the benefits of the scheme. Harman J. asserted that “alphabet trusts” were analogous to trusts for political purposes and, as the latter “have never been considered charitable”, neither should the former. The case demonstrates how far the political purposes doctrine had infiltrated the minds of the judiciary: it had become an established principle from which analogies could be drawn.

A second, and related, issue emerging from the cases is the evolution of the rationale for the political purposes doctrine. The common explanation derives from *Bowman* and from *National Anti-Vivisection Society*. As noted, in *Bowman*, Lord Parker said that political purposes are not charitable “because the

Court has no means of judging whether a purposed change in the law will or will not be for the public benefit". We find the same idea in *Re Hopkinson* and in *Re Shaw*. Similarly, in his judgment in *National Anti-Vivisection Society*, Lord Simonds stated that seeking a change in the law could not be charitable because "[e]ach court in deciding on the validity of a gift must decide on the principle that the law is right as it stands". He derived this notion from the same 1888 edition of the textbook that Lord Parker had erroneously relied on in *Bowman*.⁴⁰ In support of this position Lord Simonds argued that unless there was a strict rule against political activities by charities, the situation might arise where the Attorney-General would have to assist in the formulation of a scheme to execute a trust "the object of which is to alter the law in a manner highly prejudicial...to the welfare of the state."⁴¹

The problem with this dictum, of course, is that the question of whether a purpose does benefit the public lies at the heart of charities law. Courts determine benefit (or lack of it) in every charities law case, even if they often assume it.⁴² In *National Anti-Vivisection Society* we find Lord Simonds dealing with the issue of public benefit in an inconsistent manner. He stated both that the Court could not balance evidence of public benefit from any change in the law and that the Society's purposes were actually against the interests of the public.⁴³ This holding undermines the very foundation of the political purposes doctrine. If, as Lord Simonds held, courts are able to make objective determinations of the public benefit of a given purpose, why are political purposes different from any other purposes? Presumably, they must be examined on a case-by-case basis to determine. This approach had been suggested in *Re Hummeltenberg*,⁴⁴ where Russell J. rejected the subjective approach to the determination of public benefit which had been outlined in *Re Foveaux*.

In a concurring speech in *National Anti-Vivisection Society* Lord Wright appears to follow the same path as Lord Simonds. Citing *In Re Hummeltenberg*, he rejected the "subjective" test for benefit from *Re Foveaux* and held instead that "the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it". Having adopted this objective test of public benefit, Lord Wright stated that a ban on vivisection would be a "calamitous detriment of appalling magnitude".⁴⁵

Lord Porter dissented. He distinguished the subjective approach in *Re Foveaux* from the objective test adopted in *In Re Hummeltenberg*, preferring the latter. Having said that, he also held that the courts should lean towards a presumption of charitable status, noting that he did not look forward to the prospect of having to adjudicate on the basis of conflicting testimony as to whether a particular purpose was for the public benefit. He thus appears to have advocated a relatively deferential approach to public benefit, implicitly rejecting the

notion that the Court must take the view that the current law is good. He concluded that because the Society's purpose was *prima facie* for the public benefit, and because the Court had not been presented with compelling evidence otherwise, the Society was charitable. However, Lord Porter did not prevail. The majority position alternates precariously between adopting an objective test of public benefit and despairing of the ability of courts to determine the public benefit of a purpose.

A third problem is controversial. The manner in which the meaning and scope of the political purposes doctrine have been elucidated by the courts has resulted in many purposes generally considered laudable falling afoul of the rule. For example, trusts for the fostering of closer links between peoples or the maintenance of peaceful international relations have generally not fared well,⁴⁶ although one such trust did survive the doctrine.⁴⁷ Perhaps the most egregious example is provided by *McGovern v. Attorney-General*,⁴⁸ a relatively recent case which restates and refines the political purposes doctrine from *National Anti-Vivisection Society*.

McGovern decided that Amnesty International (AI) was not a valid charity even though it was founded in 1961 for the purpose of promoting the human rights standards set forth in the 1948 Universal Declaration of Human Rights, and specifically to ensure that these standards are applied to so-called "prisoners of conscience". In 1977 the organization was awarded the Nobel Peace Prize. AI was advised that certain of its purposes might be charitable in English law and a trust declaration was executed. Charitable registration was denied and the trustees appealed to the High Court.

Slade J. held that the AI trust purposes were *prima facie* charitable under the preamble to the *Statute of Charitable Uses*,⁴⁹ but asserted that "[t]here is now no doubt whatever that a trust of which a principal object is to alter the law of this country cannot be regarded as charitable."⁵⁰ In addition to the traditional rationale that "the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit", he also suggested that constitutional considerations prevented the judiciary from making such a determination.⁵¹

...even if the evidence suffices to enable [the Court] to form a *prima facie* opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.

The Court was not concerned that the vast majority of the AI trust's lobbying was to be directed towards foreign governments. The Court held that it had no means of determining whether a proposed change in a foreign law would be for the public benefit. Slade J. also put forward the same public policy argument

made 130 years earlier in *Habershon v. Vardon*,⁵² that to uphold the AI trust as charitable would endanger the United Kingdom's foreign relations policy, the conduct of which was better suited to political rather than legal decision-making.

In one respect, *McGovern* went further than previous decisions. Much of the activity to be funded by the AI trust was aimed at securing the reversal of the policies of foreign governments and administrative decisions rather than actual changes in the law. Slade J. was no more sympathetic to this argument, asserting that the political purposes doctrine does not distinguish between seeking a change in the law and seeking a change in government policy or in an administrative decision.⁵³ While the possibility that a trust which seeks to change the law of a foreign state would harm the United Kingdom's foreign relations is an issue of concern, an absolute prohibition upon such trust purposes seems too extreme a measure. It has been suggested that the Foreign Office could seek an order enjoining a charity from foreign activities if it had concerns that those activities were harmful to the public interest of the United Kingdom.⁵⁴ Furthermore, the trust in question sought to uphold the Universal Declaration of Human Rights and one commentator has suggested that "perhaps a breach of such important principles ought to be reflected in diplomatic relations".⁵⁵

Slade J. also rejected the application of the ancillary purposes doctrine to the AI trust. He conceded that if the purposes of a trust are exclusively charitable (as they must be under trusts law) it may employ political means in carrying them out. He also acknowledged that this means-ends distinction is perhaps easier to conceptualize than to apply. Nonetheless, even accepting the general principle of benign construction in favour of charitable purpose,⁵⁶ he could not construe the AI trust as a trust to cultivate public opinion. The trust targeted governments, and could not be re-conceived as a trust to influence the public at large.⁵⁷ Similarly, Slade J. refused to allow any of the other purposes outlined in the trust deed, such as "procuring the abolition of torture or inhuman or degrading treatment or punishment", to stand on their own as valid charitable purposes, although he did suggest that if the deed had been limited to "procuring the abolition of torture" it might be charitable.⁵⁸ He concluded by stating that while Amnesty International was pursuing purposes which "many will regard as being of great value to humanity", they were not purposes which English law regards as charitable.⁵⁹

McGovern is the most recent comprehensive restatement of the political purposes doctrine in English law.⁶⁰ Its influence is evident in a 1989 British White Paper, the most recent statement of government policy of the political activities of charities.⁶¹ According to the White Paper, charities may not have political objects, but are permitted to engage in "reasonable advocacy of causes which directly further their non-political objects" and which are ancillary to their

main purposes. This reasonable advocacy does not include influencing government policy or advocacy of either changes or retention of the law. While “charities are free to present to government departments reasoned memoranda advocating changes in the law...political and charitable purposes should remain distinct”. The government position is that it would be “wrong” and “distorting [to] the democratic process” for tax subsidies to go to groups “whose true purpose [is] to campaign not so much for their beneficiaries as for some political end”.

The White Paper, in using language simultaneously emphatic and vague, is an unhelpful guide to the law, but as such it merely reflects the problems which are evident in the case law. For example, it is unclear at what point “reasoned memoranda” become political propaganda, or how one can distinguish “reasoned advocacy” from partisan political activity.

(c) *The Political Purposes Doctrine in Canadian Law*

The political purposes doctrine was imported into Canada along with other aspects of English trusts law. While the early case law is scanty, it appears that before *Bowman* Canadian courts were as willing as English courts to permit charitable trusts to pursue political purposes. In *Lewis v. Doerle*,⁶² for example, the Court upheld a trust “to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights”. Similarly, trusts to promote temperance and anti-vivisection, which were aimed at legislative change, were valid.⁶³ In the years after 1917, *Bowman* was cited and applied on a number of occasions,⁶⁴ although one scholar in the 1930s argued that Lord Parker’s holding was not well-grounded in authority.⁶⁵ But the courts have generally accepted the *Bowman*, *National Anti-Vivisection Society*, and *McGovern* line, applying it to both litigation about the essential validity of trusts and to arguments over qualification for tax exemption. Recently, the Ontario courts have taken a somewhat less strict line on political purposes, demonstrating a willingness to be innovative here as they have in other areas of charities law.⁶⁶ In *Ontario (Public Trustee) v. Toronto Humane Society*,⁶⁷ Anderson J. gave a relatively generous reading to the ancillary purposes doctrine, although he warned the directors of the Toronto Humane Society that their political activity against a statute permitting seizure of dogs for research should not become a “primary activity” of the Society.

The fact remains, however, that no Canadian provincial court has assessed the validity or usefulness of employing the political purposes doctrine in both trusts and tax law contexts. This is surprising, as in Canada’s federal structure the provinces have jurisdiction over the trusts aspects of charities and the federal government over most taxation aspects. Moreover, while Canada has no general system of separate federal and provincial courts, income tax cases are handled by a distinct federal court (the Exchequer Court before 1971 and the

Federal Court of Canada thereafter). Unfortunately, the split between tax and trusts law on federal-provincial lines has not led to clear thinking about the political purposes doctrine. The federal *Income Tax Act* nowhere defines “charity” or “charitable”, and the Federal Court of Appeal has relied upon the common law trusts definition of these terms rather than developing a separate tax definition. Only very recently has the Federal Court explicitly stated that there is a federal law of charities distinct from the provincial law,⁶⁸ and this was done for the purpose of that Court continuing to adhere to traditional trusts law. Any distinctions between federal and provincial law do not implicate the political purposes doctrine.

Nevertheless, in the last decade or so a significant number of decisions on the political purposes doctrine have been handed down by the Federal Court of Appeal. Since most Canadian political purposes cases now arise in the taxation context, these decisions are worth reviewing at some length. While one of these decisions contains indications that the Federal Court might develop a “distinctly Canadian” law of charities, there is little recent evidence of such a development. More significantly, it also has not questioned the political purposes doctrine, either as a whole or to highlight the distinction between trusts law and tax law. Indeed, the Federal Court has stuck rigidly to the English approach to the doctrine and has used it on many occasions to restrict the activities viewed as “charitable”.

The first of these cases was *Re Scarborough Community Legal Services and the Queen*,⁶⁹ in which a legal clinic funded by the Ontario Legal Aid Plan was refused charitable status by Revenue Canada. The Clinic was advised that the refusal to register stemmed from its participation in political activities, including a rally at the Ontario Legislature and involvement in a local political activist committee. In the Federal Court of Appeal, the Clinic put forward three arguments. First, it claimed that its activities constituted “partisan advocacy”, which was permissible, and not “political activity”, which was not. Marceau J.A. rejected this, claiming that no difference could be discerned between the two. Second, the Clinic suggested that it was pursuing political activities and not political purposes. Closely connected to this was a third argument that regardless of whether the activities were political, they were only ancillary to the Clinic’s main purpose.

The Court highlighted the difficulty which arises due to the difference between tax and trusts law. Paragraph 149.1(1)(b) of the *Income Tax Act* requires an organization to devote its resources exclusively to charitable activities. Trusts law requires that the resources of the trust be devoted exclusively to charitable purposes. Marceau J.A. felt that while it would be unfair to deprive an organization which had exclusively charitable purposes of its tax registration because of “some quite exceptional or sporadic activity”,⁷⁰ the Clinic’s political activi-

ties were not merely ancillary but were an essential part of its mandate. The appeal was dismissed.

The next significant case was *Native Communications Society of British Columbia v. Minister of National Revenue*.⁷¹ As in *Scarborough Community Legal Services*, the Society appealed the refusal of the Minister to register it as a charitable organization due to its “political” nature. The Society intended to develop radio and television programs for native people, train native people in communications and newspaper publishing, and proposed to “procure and deliver information on subjects relating to the social, educational, political and economic issues facing native people of British Columbia”. Stone J.A. held that the Society’s purposes fell under the fourth head of charity, i.e., “other purposes beneficial to the community”. He was strongly influenced by the “special legal position in Canadian society occupied by the Indian people” and an Australian case, *Re Mathew*,⁷² which had upheld a bequest “for the benefit of the Australian aborigines”. Stone J.A. felt that native people were analogous to those enumerated in the preamble of the *Statute of Elizabeth* and thus a proper object of charity.

While the decision was met with delight in some quarters on the grounds that it represented a “Canadian” definition of charity,⁷³ its significance for current purposes is that the Federal Court did not view the delivery of information “on subjects relating to the social, educational, political and economic issues facing native people” as political. While this may seem to represent a departure from English law, as the later cases reveal, the departure has proved to be specific to native people, and other kinds of involvement in the political process have been held to be political.

Thus, there is a substantial contrast between *Native Communications Society* and the next case, *Re Positive Action Against Pornography and Minister of National Revenue*.⁷⁴ Positive Action was incorporated for the following purposes:

- (1) to develop and distribute educational material concerning the issue of pornography;
- (2) to initiate and promote projects that develop self-esteem;
- (3) to respond to requests for information and recommendations from the federal, provincial, municipal governments, educational institutes, community organizations and the media.

Stone J.A. rejected the group’s claim that its purposes were charitable as being for the advancement of education or in line with the fourth head of charity.⁷⁵ While acknowledging that the law under the fourth head is “somewhat elastic, the courts being willing to recognize any relevant change in societal conditions

or other special circumstances”,⁷⁶ there were limits to how far he was willing to go. The group had suggested that pornography was an issue of public debate and concern and that the public would benefit from examination and informed discussion of the issue. The Court, however, held that it was not adopting a neutral attitude towards pornography and providing information in the interests of fostering debate on the issue: even the group’s name clearly indicated otherwise. Rather, its purposes clearly included law reform and influence of government policy, and, under *McGovern*, these were political and could not be “classed as beneficial in the sense understood by this branch of the law”. An intriguing alternative argument was also put forward: that eliminating or reducing pornography had the effect of protecting women and children from violence and degradation. This, it was suggested, was a purpose within the spirit and intention of the preamble of the *Statute of Elizabeth*. The Court hastily dismissed this argument, quoting Lord Parker’s reasoning in *Bowman*.

Positive Action was soon followed by *Toronto Volgograd Committee v. Minister of National Revenue*.⁷⁷ The Committee sought to promote “educational exchanges” between Toronto and Volgograd. It argued that its purposes were charitable because they represented the advancement of education but Stone J.A. rejected this. The Committee also argued that its purposes were charitable under Lord Macnaghten’s fourth head, denying that it was involved in the promotion of “a particular viewpoint with respect to an issue or cause”, but this argument was quickly dismissed with the same reference to the Committee’s essentially political purposes.

Toronto Volgograd Committee is noteworthy for containing the only sustained discussion of the distinction between a trusts law and a tax law meaning of “charitable”. In a judgment concurring in dismissal of the Committee’s appeal, Marceau J.A. first examined the distinction between charitable activities and charitable purposes. The *Income Tax Act* provides separate definitions for “charitable foundation” and “charitable organization”. The former is “a corporation or trust constituted and operated exclusively for charitable purposes”; the latter is “an organization...all the resources of which are devoted to charitable activities”. Whenever the *Income Tax Act* speaks of a charitable foundation, it speaks of purposes; whenever it speaks of a charitable organization, it speaks of activities. This distinction, Marceau J.A. concluded, was an important one. A foundation does not undertake activities but merely dispenses funding for certain purposes. An organization, on the other hand, undertakes activities with a view to achieving a specific purpose. He concluded that when dealing with charitable organizations, the Court must examine not only their stated purposes, but must also determine “what its members actually do”.

Building on this activities/purposes distinction, Marceau J.A. indicated that the Court must be aware that there are, in effect, two definitions of “charitable”—

one for tax law and one for trusts law. The problem with applying the trusts law definition to the tax law context is that trusts law does not provide adequate guidelines for determining whether a particular activity is charitable: it is only effective in determining whether a particular purpose is charitable. In order to apply the common law of trusts definition in the tax law context, he stated, "some adaptation will undoubtedly be required".⁷⁸ Specifically, when looking at an activity carried out by an organization, the Court must look to the immediate result or effect of the activity and not some possible eventual consequence. Given this framework, Marceau J.A. determined that while the Committee's stated purposes might be considered charitable, the actual activities carried out by its members were not so under the *Income Tax Act*.

The most recent political purposes case is *Canada UNI Association v. M.N.R.*⁷⁹ A non-profit organization sought to promote Canadian unity through the following objects:

- (i) to inform Canadians concerning the unique geographic, social, cultural and linguistic nature of Canada;
- (ii) to establish direct personal communications between citizens of Canada's distinct groups and regions especially, though not exclusively, between Canadians whose first language is English and those whose first language is French;
- (iii) to enhance appreciation and tolerance of linguistic and cultural differences through knowledge and understanding.

The Association asserted that its purposes were charitable under either the third or fourth head of the *Pemsel* test. It argued that *Native Communications Society* had broadened the scope of the third head, the advancement of education, to include interchanges between cultures. As the Association's purposes were to promote inter-cultural understanding and harmony, it claimed that it should be registered as a charitable organization. Marceau J.A., for the Court, rejected this claim. He held that the objects and activities of the Association were "virtually indistinguishable" from those of the appellant in *Toronto Volgograd Committee*. He distinguished *Native Communications Society* on the basis that that case concerned a society for the benefit of native persons, "who hold a special place in Canadian society".

Marceau J.A. also held that regardless of any public benefit derived from the activities and purposes of the Association, which he conceded could be substantial, it was engaged in activities which were political and thus not charitable. But a close analysis of the Association's purposes reveals that they are not political in the *McGovern* sense. There was no attempt to change the law or to alter the direction of government policy; rather the Association looked to support and operate under the law, albeit on an issue of some controversy. But

controversy does not make a charitable purpose political, as was made very clear in another Federal Court decision dealing with a legal abortion clinic.⁸⁰ It is also difficult to understand how an organization promoting national unity through the fostering of mutual understanding is not for the public benefit. A long line of cases has held that certain patriotic purposes are charitable.⁸¹

The cases reviewed here, and others,⁸² demonstrate that the Federal Court of Appeal has generally resisted attempts to broaden the range of purposes which will be considered charitable for the purposes of the *Income Tax Act*. It has done so in part by adopting, with little criticism or comment, the English political purposes doctrine as set out in *Bowman*, *National Anti-Vivisection Society*, and *McGovern*. Setting aside the exception made for an organization for the benefit of aboriginal people, the Court had adopted a very restrictive approach, largely indistinguishable from its English counterparts. The decision in *Canada UNI Association* eliminated any remaining hope that *Native Communications Society* had broadened the narrow confines of the political purposes doctrine in Canada.

Given the significance of the income tax context and the fact that cases usually go to court only after Revenue Canada has refused registration, it is important to conclude this discussion of the political purposes doctrine in Canadian law with an examination of the administrative dimension—the rules which govern Revenue Canada's registration policies.

Revenue Canada released an *Information Circular* in 1978 which provided guidelines outlining which activities and purposes registered charities could engage in without endangering their favourable tax status.⁸³ The *Circular* contained a relatively restrictive definition of permissible activity: any activity which aims to influence government policy was deemed to be political in nature and thus not permitted. A public outcry resulted,⁸⁴ and the Minister indicated that the policy did not constitute a blanket prohibition of political activity but that registered charities would be permitted to make "limited attempts to promote...[their] interests...at the political level".⁸⁵ The government argued that the *Circular* merely restated the existing law and did not impose new restrictions upon registered charities' political activities. Nevertheless, public pressure continued and the government withdrew the *Information Circular*.

The restrictive approach outlined in the *Circular* was nonetheless manifest in Revenue Canada's registration decisions. All of the cases discussed above arose from the Minister's refusal to register. In addition, in 1980 the Department refused the application for registration of the Manitoba Foundation for Canadian Studies, the publisher of *Canadian Dimension*, a leftist political magazine.⁸⁶ It also sent warning letters to at least 16 registered charities, including Oxfam Canada and the Canadian Mental Health Association, warn-

ing them that they were engaged in activities which it considered to be political in nature and that their status as registered charities was at risk.⁸⁷ In 1981 Revenue Canada revoked the registration of Renaissance International, an evangelical organization based in Ontario, on the grounds that it was engaged in political activities. Although Renaissance International appealed successfully to the Federal Court of Appeal,⁸⁸ the case indicates that Revenue Canada had adopted a less tolerant approach to registered charities undertaking political activities.⁸⁹

The current income tax regime, introduced in 1985, enables registered charities to engage in a limited amount of political activity as long as a substantial portion of the resources of the charity are spent on charitable purposes.⁹⁰ The political purposes pursued by the charitable organization must remain ancillary to the main charitable purposes or activities carried out by the organization. The legislation contains two limitations on political activity expenditures. Since 1977, registered charities have faced a disbursement quota which requires them to spend approximately 80 per cent of the amount for which they have issued donation receipts in the previous taxation year.⁹¹ Expenditures upon political activities such as lobbying are not included in the disbursement quota, so the quota requirement presents a *de facto* limitation upon the amount of money which a charitable organization may expend on political purposes or activities.⁹²

The second limitation on political expenditures by registered charities is more direct. The *Act* provides that a charitable organization or foundation may devote part of its resources to pursuing political activities, as long as they are ancillary and “do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.”⁹³ These provisions are rather vague: it is not known exactly what percentage of resources may be devoted to ancillary political activities.

A sense of how Revenue Canada applies these rules may be gleaned from its most recent statement on the political purposes doctrine, *Information Circular* 87-1 of February 1987, which indicates the kinds of limited political activity in which charitable organizations may engage. Certain activities, such as oral and written representations to federal, provincial and local politicians, legislative committees, and “the expression of non-partisan views to the media” are not considered to be political activities, as long as they are undertaken with a view to informing and educating the recipients of the information. At all times, such activity must be “reasonable in the circumstances”. Conversely, certain other forms of activity, such as engaging in partisan politics or illegal activity, are strictly forbidden. In between these two extremes are political activities, expenditures on which are counted against the organization’s spending limits. The *Information Circular* outlines several examples of such activities, including

publications, workshops, mail campaigns, public meetings, advertisements, and conferences. Such activity must be ancillary to the main purposes of the organization, which must themselves be charitable.

3. Political Purposes and American Charities Law

A brief examination of the treatment of political purposes in the American law of charities shows a possible alternative to the way in which the law in Britain and Canada has developed.⁹⁴ American courts have generally given a broader interpretation to the definition of “charitable” for the purposes of trusts law than have their British and Canadian counterparts: the U.S. Supreme Court has defined the term as encompassing any purpose which “tends to promote the well-doing and well-being of social man”.⁹⁵ Thus American courts have upheld the validity of trusts for each of following purposes: political education,⁹⁶ promotion of the works of a particular author,⁹⁷ promotion of law reform,⁹⁸ anti-vivisectionism,⁹⁹ civil rights,¹⁰⁰ temperance,¹⁰¹ and international co-operation and goodwill.¹⁰² Trusts for political parties are held to be against public policy.¹⁰³

In the United States, the narrowing of the scope of purposes deemed to be charitable has taken place at the level of tax law, so that discussion of the political purposes doctrine focuses on the federal *Internal Revenue Code*. The modern law on the subject stems from 1934 legislation which limited the political activities of charitable organizations.¹⁰⁴ A remarkable amount of jurisprudence defining the boundaries of the tax law limitations on political activities by charities has since developed. But even before the enactment of legislative limitations, the courts had placed limitations on political purposes as part of their interpretation of the *Internal Revenue Code*. The most important case in this regard is *Slee v. Commissioner*,¹⁰⁵ which concerned the charitable status of a trust for the American Birth Control League. Learned Hand J. found that the purposes of the League were not exclusively charitable and thus that the trust was not charitable as a whole. The case thus stands for the principle that while a trust may be held to be charitable for purposes of validity in trust law, it will not necessarily receive tax exemption.

Limitations upon the ability of charitable organizations to participate in political activities are contained in the *Internal Revenue Code*. Under Section 501(c)(3), “no substantial part” of the activities of a charitable organization may consist of lobbying or other political activity. Moreover, charities face an absolute prohibition upon involvement in political campaigning, either for or against a particular candidate.¹⁰⁶ While the current taxation regime for charities is controversial,¹⁰⁷ it may be that the American model is an attractive one for Canada to follow. The lesson which Canadians should draw from the American experience is that the separation of tax and trusts law is a helpful way to think about charities law. The American system allows a broad range of purposes to

be charitable in trusts law, but narrows the range of purposes which are charitable in tax law.

4. Reforming the Political Purposes Doctrine

The preceding sections have demonstrated that the political purposes doctrine as currently formulated and applied in Anglo-Canadian charities law is a doctrine invented without reference to authoritative precedent or persuasive rationale and that it has been applied in an inconsistent manner. In addition, it is really a tax-exemption doctrine masquerading as a rule of charitable trusts law. Before making suggestions for reform of the law, it is useful to consider a few further problems.

First, one often cannot distinguish between prohibited political purposes and activities and valid charitable purposes. This is true in the field of education, and increasingly so in religion. Many religious groups have long been politically active,¹⁰⁸ and, as a distinguished commentator noted some years ago, if “the most diverse and antagonistic doctrines” are held to be charitable purposes under the head of advancement of religion, why are these same doctrines prohibited when they lack a religious colour?¹⁰⁹ Church organizations are among the most vocal and active social groups agitating for political change on a variety of issues. The United Church of Canada, the largest Protestant denomination in Canada, has been involved in overtly political activities for many years, including support for unilateral nuclear disarmament, campaigns against poverty, and even financial support of the African National Congress. The Roman Catholic Church is well-known for its support of conservative political causes, most notably anti-abortion groups in Canada and the United States. The issue is not the wisdom of any of these political activities, rather, why do such activities not violate the political purposes doctrine?

A second problem is that old, established charities—those charities which came into being before the rise of the political purposes doctrine—are often able to pursue political purposes or engage in political activities, whereas their more modern counterparts are either denied registration or else severely constrained in the activities and purposes which they may pursue. In Canada, the John Howard Society for Penal Reform provides a good example. The long history of such groups makes it extremely unlikely that they would be deregistered by Revenue Canada. Unfairness arises because the current threshold for charitable status is carefully regulated, whereas few resources are expended upon regulation of the purposes and activities of existing charitable organizations. The result is that once an organization becomes a member of the charitable club, deregistration is highly unlikely, even if organizations engage in some degree of political activity.

A third problem is that one response to the rigidity of the doctrine increasingly made by organizations is to establish a charitable foundation whose purposes can be categorized as exclusively charitable and to perform non-charitable activities under a separate umbrella.¹¹⁰ For example, Earthroots, a Canadian environmental group based in Toronto, consists of two associated groups: the Earthroots Fund, which engages in research and educational activities and is charitable; and the Earthroots Coalition, a more activist, political organization which engages in advocacy, lobbying and “non-violent direct action”, and is a not-for-profit corporation. In England, the National Council of Civil Liberties is not charitable, whereas the Cobden Trust, an educational charity which promotes “research into civil liberties and an understanding of the civil rights, liberties, and duties of citizens and public servants”, is.¹¹¹

The two resulting organizations are often bound together so closely that the distinction is largely illusory. For example, they may share the same office space, employees, and facilities, so that much of the administrative cost of the noncharitable foundation may in fact be borne by the charitable organization so it is thus, in effect, subsidized and protected by the government. But this “splitting” brings problems of governance and possible conflicts of interest. Unless the two resulting groups are controlled by the same board of trustees, co-ordination of their activities may prove difficult. But having one board of trustees for the two groups, while an advantage for the purposes of co-ordination, may raise conflict-of-interest concerns. However, there is no law which prohibits trustees or officers from serving both a charitable organization and its related, non-charitable “political” organization.

For these reasons, the law is in need of reform. Reform should bear in mind the two major themes developed in this article. First, that the jurisprudence on political purposes is confused and often less than coherent, both as to what is “political” at all and as to the distinction between political activities as an end and political activities as merely a means to a charitable end. Second, that the courts have not adopted a purposive approach which considers, as between trust validity and tax benefits, why we might hold some purposes to be charitable and some not.

With these two themes as a guide, three possible legal regimes may be constructed. One regime would hold that trusts or organizations pursuing political purposes with little or no charitable component would simply not be considered charitable either for the purpose of trust validity or for tax exemptions. The obvious examples are trusts for the benefit of political parties, and trusts which violate public policy.¹¹²

A second would hold that all of those purposes which fit under charity’s traditional expansive umbrella should still be considered charitable for the purposes of trusts law, whether or not organizations devoted to them were

pursuing political purposes as well or were employing political means to their charitable ends. The third would suggest that we should designate organizations as charitable and exempt from tax, even if they do engage in political activity, only if they provide what might be termed “incontrovertible public benefit”. That is, we should narrow the range of purposes which would be considered charitable in taxation law, while allowing organizations pursuing these purpose to engage in a limited amount of ancillary activities to promote these purposes. As already noted, this proposal draws much of its force from the current difficulties of making distinctions between the political and non-political, and the invidiousness of doing so in some instances. It would have the advantage of forcing legislators to think purposively about why tax benefits are afforded.¹¹³

These second and third legal regimes require some further elucidation, beginning with the second, the question of charitability for the purposes of trust validity only. Given the increasing irrelevance of the rule against noncharitable purpose trusts,¹¹⁴ objections to allowing charitable purpose trusts which are to some degree political to enjoy the benefits of charitable status have largely faded in importance. Moreover, there will always be cases where attempts to distinguish between charitable activities and charitable purposes are futile.¹¹⁵ Yet this may be of little importance if no tax benefits are at stake. The sole requirement for charitable status should be a demonstrated element of public benefit. There would still be a need for a “political purposes doctrine” in trusts law, but it would be a very narrow one: trusts for or against a particular political party or candidate would be invalid, as would trusts against public policy. But in general Canada should follow the American example of allowing a broad range of purposes to be valid in trust law.

It may be argued that this approach ignores the cost. Extending trusts law privileges to noncharitable purpose trusts would probably require increased expenditures upon regulatory agencies. But more importantly, there would be the social cost of removing assets which would be devoted to public purposes from the discipline of the market.¹¹⁶ While it is extremely difficult to determine with any accuracy what these costs might be, they could be considerable.¹¹⁷ Against these arguments we can note that, first, one of the traditional justifications for charitable status—that the state subsidizes activity which it would otherwise have to undertake or finance itself—still has some force. Second, the charitable sector is often more effective and imaginative at providing some services to the public. Third, the concern with tying up assets in purpose trusts can be met with a broad *cy-près* power to ensure that resources devoted to purposes which have become impracticable or impossible could be diverted to some similar public use.

The third legal regime represents a proposal for a separate jurisprudence of charitability under taxing statutes to that which operates in the general law of trusts. That is, the minds of legislators and judges should be turned to the question of tax exemption specifically, and not simply rely on a wooden application of a general doctrine. As a matter of tax policy, the present system is unsatisfactory. It conflates the tax and trusts definition of charity so that a finding of charitable status in trusts law results in an automatic granting of tax benefits to the organization.¹¹⁸ Substantial tax benefits, at the public expense, are granted to organizations which may be of limited social utility. This is unwise policy at a time when all government expenditure is being analyzed for its cost-effectiveness. Moreover, it is extremely difficult to exercise control over tax expenditures to subsidize charitable activity, given that it is private donors who drive the system. By constructing a narrower definition of “charity” for tax purposes,¹¹⁹ tax concessions would be reserved for organizations which pursue purposes which are generally agreed to merit such treatment.

The best approach might well be to return to the *Baird's Trustees* definition and limit tax benefits to trusts or organizations pursuing the relief of poverty in a strict sense. Other purposes from the *Pemsel* categorization, such as the advancement of education, could be included here as well, but they should be narrowly defined.¹²⁰ As there is no longer a social consensus as to whether the advancement of religion is for the public benefit, perhaps it would not be a qualifying purpose. Given that each extension of the tax exemption results in the tax burden being redistributed to other parties, perhaps the only activities which the state should subsidize through the charitable tax exemption and deductions are those which serve the relief of poverty and those which, but for the charitable organization, would have to be financed by the state.

In any event, under this regime, organizations would be permitted to engage in a limited amount of “political” activity. The sole requirement would be that any activity ancillary to the main object of the organization (either political or non-political) would have to be demonstrably for the furtherance of the charitable purpose. There could also be a percentage limit (10-20) on the amount of revenue which could be spent on ancillary activities. This approach recognizes that there is nothing about political purposes which should make them inherently noncharitable. The overriding consideration should be one of the public benefit, combined with a new categorization of those purposes which are charitable, as outlined above.

This does, of course, mean that there will still be some tax benefits going to organizations which engage in the political process. Some would argue that if this would be the result, no charity should receive tax benefits. Yet there are advantages to charitable exemptions, and it would be unwise to throw out the baby with the bath water. A system of tax benefit allocations assists purposes

which the general public might find to be too controversial to get a hearing. This is because individuals, not governments, determine which organizations and which purposes are funded. Arguably, the present system also permits the preferences of individuals to be subsidized, and in an economically efficient and politically desirable manner. This represents a radically democratic and participatory approach to the funding of social causes.¹²¹

But not all purposes that can invoke the traditional meaning of charity should receive these benefits, even if they, and others that have previously been deemed too political, will get status as charitable trusts. The key is to distinguish trusts law from tax considerations. This is not a new idea,¹²² nor is it an easy one to put into practice. The very complexity and incoherence of the existing political purposes jurisprudence is that too often the political/non-political distinction is in the eye of the beholder. All too often the beholder is a judge who is reluctant automatically to extend tax benefits to an organization pursuing controversial purposes. Indeed, the very process of definition is “political”,¹²³ and thus, while the separation of the trusts and tax definitions of charity would not eliminate difficult assessments of social benefit, it would have the advantage of these decisions being made matters of taxation policy.¹²⁴ And that is where they belong.

FOOTNOTES

1. The author wishes to express his gratitude to John Gregory and Lara Friedlander for their astute comments, and is particularly indebted to Professor James Phillips, who read and commented upon numerous drafts and was generous with his time and advice.
2. There has been no recent comprehensive study of the political purposes doctrine in Canadian charities law. Earlier articles include: A.B.C. Drache, “Political Activities: A Charitable Dilemma” (1980), 2 *Philanthrop.* No. 4, p. 21; H.G. Intven, “Political Activity and Charitable Organizations” (1982-83), 3 *Philanthrop.* No. 3, p. 35; I. Morrison, “Redefining ‘Charities’ in the *Income Tax Act*” (1982-83), 3 *Philanthrop.* No. 3, p. 10; L.A. Sheridan “The Charpol Family Quiz” (1977), 2 *Philanthrop.* No. 1, p. 14, and “Charitable Causes, Political Causes and Involvement” (1980), 2 *Philanthrop.* No. 4, p. 5. The most comprehensive work in the area is N. Brooks, *Charities: The Legal Framework* (Ottawa: Secretary of State, Policy Coordination Directorate, 1983).
3. A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (Toronto: Carswell, 1992) at 813; D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 586; E. Cairns, *Charities: Law and Practice* (London: Sweet & Maxwell, 1988) at 21.
4. [1917] A.C. 406 (H.L.) at 442. (Hereinafter *Bowman*).
5. An early decision, *Habershon v. Vardon* (1851), 4 De G. & Sm. 467, 64 E.R. 916, is often cited as a political purposes case. It concerned a trust for “the political

restoration of the Jews to Jerusalem”, which was held not to be charitable. The Court based its decision upon public policy considerations, namely that if the trust were upheld, foreign relations between Britain and the Ottoman Empire would be harmed. So the case stands for the proposition that public policy considerations may be invoked to preempt a finding of a valid charitable trust, not that political purposes are not charitable.

6. See. D. Owen, *English Philanthropy 1660-1960* (Cambridge, Mass.: Belknap Press, 19964), at 98-100; F. Gladstone, *Charity, Law and Social Justice* (London: Bedford Square Press/NCVO, 1982) at 98-100. R.D. French, *Antivivisection and Medical Science in Victorian England* (Princeton: University Press, 1975); B. Nightingale, *Charities* (London: Allen Lane, 1973) at 45-54.
7. *Income Tax Act 1799*, 39 Geo. III, c.13, s.5.
8. (1888), 15 S.C. (4th) 682.
9. *Income Tax Act 1842*, 5 & 6 Vict.
10. [1891] A.C. 531 (H.L.).
11. (1842), 5 & 6 Vict. c. 35, s. 61, No. VI, Sched. A. (U.K.).
12. This reasoning was followed in *Inland Revenue v. Glasgow Musical Festival Association*, [1926] S.C. 920; *Inland Revenue v. Scottish Woollen Technical College*, [1926] S.C. 934.
13. N.P. Gravells, “Public Purpose Trusts” (1977), 40 Mod. L. Rev 397 at 400-401; G. Cross, “Developments in the Law of Charities” (1956), 72 L.Q.R. 187 at 204-205.
14. See the comment in the *Report of the Colwyn Commission* that *Pemsel* expanded the range of purposes which could qualify for the exemption under the *Income Tax Act*: U.K., H.C., *Report of the Royal Commission on The Income Tax* [Colwyn Commission] Cmd. 615 (London: HMSO, 1920) at 67-68.
15. *In re Scowcroft; Ormrod v. Wilkinson* , [1898] 2 Ch. 638.
16. *Re Villers-Wilkes; Bower v. Goodman* (1895), 72 L.T. 323 (Ch.D.).
17. *In Re Slatter; Howard v. Lewis* (1905), 21 T.L.R. 295 (Ch.D.).
18. [1895] 2 Ch. 501.
19. A similar subjective test for public benefit was employed in *In re Cranston, dec'd; Webb v. Oldfield*, [1898] 1 I.R. 431 (C.A.), which involved a trust for the “intellectual and moral improvement of men” through the advocacy of vegetarianism. The Court found the purpose of the trust analogous to anti-vivisectionism and felt bound by *Re Foveaux*, as well as *Armstrong v. Reeves*, 25 L.R. Ir. 325. A strong dissent in *Cranston* criticized the subjective approach to public benefit. Holmes L.J. noted that if intention of the settlor was to guide the Court in determining whether a particular purpose was for the public benefit, then “every project not actually immoral or illegal must be held a charity” (at 457).
20. *Bowman*, *supra* footnote 4.

21. Simon Gardner deems Lord Parker's explanation to be "implausible": *An Introduction to the Law of Trusts* (Oxford: Clarendon Press, 1990) at 107; L.A. Sheridan calls it "A strain on credulity": 'Charitable Causes', *supra* footnote 2 at 12. See also I. Williams, *The Alms Trade: Charities, Past, Present and Future* (London: Unwin Hyman, 1989).
22. (1828), 5 Russ. 288, 38 E.R. 1035.
23. "It is against the policy of this country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope in ecclesiastical matters over the sovereignty of the state": *ibid.*, at 292.
24. A.D. Tyssen, *The Law of Charitable Bequests* (London: Wm. Clowes & Sons, 1888) at 125. Michael Chesterman claims that the origin of the political purposes doctrine is Tyssen's statement of it here: M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld & Nicholson, 1979) at 182.
25. Ironically in the second edition of Tyssen, the authors deleted the assertion that "a trust to keep up a particular political opinion is not a charity" and quoted extensively from Lord Parker's judgment in *Bowman*: *ibid.*, 2nd edn. eds. C.E. Shebbeare & C.P. Sanger (1921) at 116-117.
26. See *In Re Jones; Public Trustee v. Earl of Clarendon* (1929), 45 T.L.R. 259. (Ch.D.) (a trust for the Primrose League, a Conservative club); *Bonar Law Memorial Trust v. Inland Revenue Commissioners* (1933), 49 T.L.R. 220 (K.B.) (trust to create a Conservative Party educational centre).
27. *In re Ogden*, [1933] Ch. 678 (liberalism); *Re Hopkinson*, [1949] 1 All E.R. 346 (Ch.D) (trust for the advancement of education along the lines of a Labour party memorandum).
28. *In re Bushnell, dec'd; Lloyds Bank Ltd. v. Murray*, [1975] 1 All E.R. 721 (Ch.D.).
29. *Trustees for the Roll of Voluntary Workers v. Commissioners of Inland Revenue*, [1942] S.C. 47.
30. *Inland Revenue Commissioners v. Temperance Council of Christian Churches of England and Wales* (1926), 43 T.L.R. 48.
31. [1948] A.C. 31 (H.L.).
32. This argument had been made in a lower court by the Master of the Rolls who had held that seeking legislation to prohibit vivisection was ancillary to the main purpose of the Society, which was charitable.
33. *Supra*, footnote 31, at 63. Lord Wright said much the same thing on this point.
34. As in *Inland Revenue Commissioners v. Falkirk Temperance Cafe Trust* (1927), S.C. 261; *In re Hood*, [1931] 1 Ch. 240. But see *Knowles v. Commissioner of Stamp Duties*, [1945] N.Z.L.R. 522 (bequest to the New Zealand Alliance for the Abolition of the Liquor Traffic not charitable because the "dominant object" of the Alliance was to secure legislative change and was thus political).
35. [1928] 1 K.B. 611 (C.A.).

36. *Supra*, footnote 31, at 54.
37. Following Swinfen Eady L.J. in *In re Wedgwood*, [1915] 1 Ch. 113 at 122.
38. *Supra*, footnote 31 at 60.
39. [1957] 1 All E.R. (Ch.D.).
40. Tyssen, *supra*, footnote 24, at 176.
41. *Supra*, footnote 31, at 63.
42. For a sample of difficult cases see, *inter alia*, *Re Delius*, [1957] Ch. 299; *Re Hopkins' Will Trusts*, [1965] Ch. 669.
43. *Supra*, footnote 31 at 66. Relying upon *In re Grove-Grady*, [1929] 1 Ch. 557, and *In re Cranston*, [1898] 1 I.R. 431, Lord Simonds stated that “[i]f and so far as there is any judicial decision to the contrary, it must, in my opinion, be regarded as inconsistent with principle and be overruled”.
44. Sub nom. *Beatty v. London Spiritualistic Alliance Ltd.*, [1923] 1 Ch. 237 (trust to establish a college to train spiritual mediums held invalid). Russell J.’s reasoning was followed in *In re Grove-Grady*.
45. *Supra*, footnote 31, at 49.
46. See *Anglo-Swedish Society v. Commissioners of Inland Revenue* (1931), 47 T.L.R. 295 (K.B. Div.) (a trust to promote a “closer and more sympathetic understanding” between England and Sweden through a journalists’ exchange program); *Buxton v. Public Trustee* (1962), 41 T.C. 235 (Ch.D.) (trust for “improvement of international relations and intercourse”); *Re Wilkinson*, [1941] N.Z.L.R. 1065 (a trust for the League of Nations Union).
47. *Re Harwood*, [1936] Ch. 285 (a trust for the promotion of “peace”).
48. [1982] 1 Ch. 321.
49. The preamble refers to the “relief or redemption of prisoners or captives”, and an 1833 case had held that a trust for “the redemption of British slaves in Turkey or Barbary” was a valid charitable purpose: *Attorney-General v. The Ironmongers’ Co.* (1833), 2 Myl. & K. 576, 39 E.R. 1064.
50. *McGovern*, *supra* footnote 48, at 335.
51. *Ibid.*, at 337.
52. *Supra*, footnote 5.
53. *Supra*, footnote 48, at 339.
54. Goodman Committee, *Charity Law and Voluntary Organizations* (London: Bedford Square Press/NCVO, 1976) at para. 88.
55. C.J. Forder, “Too Political to be Charitable?” (1984), 48 *Conveyancer* 263 at 269.
56. As expressed by Lord Hailsham of St. Marylebone in *Inland Revenue Commissioners v. McMullan*, [1981] A.C. 1 at 14 (H.L.).

57. This was done in *In re Koeppler Will Trusts*, [1986] 1 Ch. 423 (C.A.), which involved a trust to support conferences to develop informed public opinion on international issues and promote greater international co-operation. The Court held its purposes to be charitable under the head of advancement of education and not political as it was aimed at individuals, not governments.
58. *McGovern, supra*, footnote 48, at 351.
59. *Ibid.*, at 354.
60. It was followed in *Webb v. O'Doherty*, (February 11, 1991) T.L.R. 68. (Ch.D). A student union used funds to mobilize public opinion against the Persian Gulf War in January 1991. Hoffman J. granted an interlocutory injunction enjoining the payments. He held that while a student union (an educational charity) was permitted to discuss political issues, "there was a clear distinction between discussion of political matters...and a campaign on a political issue". The expenditure of charitable funds on political campaigning would be permitted only if it were "a mere incidental effect of expenditure for proper educational purposes".
61. United Kingdom, Secretary of State for the Home Department, *Charities: A Framework for the Future*, Cmnd 694 (London: HMSO, 1989). [See also "The Charities White Paper" (1991), 10 *Philanthrop.*, No. 4, pp. 29-57.]
62. (1898), 25 O.A.R. 206 (C.A.).
63. On temperance see *Farewell v. Farewell* (1892), 22 O.R. 573 (Ch.D.). The trust advocated "the adoption by the Parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of Canada of intoxicating liquor to be used as a beverage". It was also intended to aid in enforcement of the resulting legislation, and to educate the public. For anti-vivisection see *Re Gwynne Estate* (1912), 5 D.L.R. 713 (Ont H.C.).
64. See *In re Loney Estate* (1953), 9 W.W.R. 366 (Man. Q.B.) (trust to promote socialism); *Re Patriotic Acre Fund*, [1951] 2 D.L.R. 624 (Sask. C.A.). The latter case involved the charitability of the Saskatchewan Farmers' Union, among whose purposes was the promotion of legislation and law reform beneficial to its membership. The Court cited both *Bowman* and *National Anti-Vivisection Society*, concluding that the "main objects" of the Union were "political and commercial", and thus not charitable.
65. C.A. Wright, "Case and Comment" (1937), 15 *Can. Bar Rev.* 566 at 568: "The doctrine of political purposes is not one which is established with any certainty by high authority in England".
66. See *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549, D.L.R. (4th) 491 (Ont. Div. Ct.) (fourth head of charity has broader meaning than it does under English law); *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 O.R (2d) 481, 69 D.L.R. (4th) 321 (Ont. C.A.) (educational trust containing discriminatory conditions offends public policy).
67. (1987), 40 D.L.R. (4th) 111 (Ont. H.C.).

68. *Canada UNI Society v. Minister of National Revenue*, [1993] 1 C.T.C. 46 (F.C.A.). See J. Phillips, "Recent Legal Developments" (1993), 11 *Philanthrop.*, No. 4, pp. 69-70.
69. (1985), 17 D.L.R. (4th) 308 (F.C.A.).
70. *Ibid.*, at 326.
71. (1986), 23 E.T.R. 210. (F.C.A.).
72. [1951] V.L.R. 226.
73. E.B. Zweibel, "A Truly Canadian Definition of Charity and A Lesson in Drafting Charitable Purposes: A Comment on *Native Communications Society of B.C. v. M.N.R.*" (1987), 7 *Philanthrop.* No. 1, pp. 4-11.
74. (1988), 49 D.L.R. (4th) 74 (F.C.A.).
75. "Other purposes beneficial to the community", *supra*, footnote 10.
76. *Supra*, footnote 74, at 81.
77. (1988), 29 E.T.R. 159 (F.C.A.).
78. *Ibid.*, at 181.
79. [1993] 1 C.T.C. 46 (F.C.A.).
80. *Everywoman's Health Centre Society v. M.N.R.*, [1991] 2 C.T.C. 320, (F.C.A.). See J. Phillips, "Case Comment" (1992), 11 *Philanthrop.*, No. 1, pp. 3-14.
81. Including *Re Stratheden*, [1895] 3 Ch. 265 (trust for defence of the realm); *Re Corbyn*, [1941] Ch. 400.
82. See *N.D.G. Neighbourhood Association v. Revenue Canada* (1988), 30 E.T.R. 99 (F.C.A.).
83. Revenue Canada, *Information Circular 78-3* (27 February 1978).
84. *Globe & Mail*, 2 May 1978.
85. House of Commons, *Debates*, 1 May 1978, p. 5001.
86. A.B.C. Drache, "Political Activities: A Charitable Dilemma", *supra*, footnote 2.
87. *Globe & Mail*, 4 April 1984.
88. *Re Renaissance International and M.N.R.* (1982), 142 D.L.R. (3d) 539 (F.C.A.). The case was decided on other grounds: that the decision of the Minister had violated the administrative law principles of natural justice.
89. Revenue Canada denied the application of the Federated Anti-Poverty Groups of B.C. to the registered as a charitable organization in 1983, claiming that its purposes were political and not charitable. The organization appealed to the Federal Court of Appeal but Revenue Canada relented and registered it as a charitable organization before the appeal was heard. See, M.L. Dickson and L.C. Murray, "Recent Tax Developments" (1985), 5 *Philanthrop.* No. 2, pp. 52-53 and *Globe & Mail*, 13 September 1984.

90. *Income Tax Act*, s. 85 (2), s. 149.1(6.1)-(6.2). See generally C.H. Medland, "Limitations on Charities Under the Income Tax Act" (1992), 44 E.T.R. 111; F.L. Woodman, "The Tax Treatment of Charities and Charitable Donations Since the Carter Commission: Past Reforms and Present Problems" (1988), 26 *Osgoode Hall L.J.* 537.
91. *Income Tax Act*, s. 149.1(1)(e). The exact quota depends upon the type of charity concerned.
92. *Ibid.*, (1.1)(b).
93. *Ibid.*, (6.1)-(6.2).
94. This discussion of the American law of charities, and of the role of political purposes, is taken from, *inter alia*, G.T. Bogert, *Trusts*, 6th ed (St. Paul: West, 1987) at ch. 6; A.W. Scott & W.F. Fratcher, *The Law of Trusts* (Boston: Little, Brown, 1989) ch. 11; C. Zollman, "The Development of the Law of Charity in the United States" (1919), 19 *Columbia L.Rev.* 91, (1919), 19 *Columbia L. Rev* 286; Note, "Developments in the Law: Nonprofit Corporations" (1992), 105 *Harv. L. Rev.* 1578; L.B. Chisholm "Politics and Charity: A Proposal for Peaceful Coexistence" (1990), 58 *Geo. Wash. L. Rev.* 308; J.M. Clear, "Political Speech of Charitable Organizations Under the Internal Revenue Code" (1974), 41 *U. Chic. L. Rev.* 352; Note, "Regulating the Political Activity of Foundations" (1970), 83 *Harv. L. Rev.* 1843; Note, "The Sierra Club, Political Activity and Tax Exempt Charitable Status" (1967), 55 *Geo. L.J.* 1128; Note, "The Revenue Code and a Charity's Politics" (1964), 73 *Yale L.J.* 661; E. Clark, "The Limitation on Political Activities: A Discordant Note in the Law of Charities" (1960), 46 *U. Va. L. Rev.* 439.
95. *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303 (1877) at 311, per Swayne J.
96. *In re Estate of Breeden* 208 Cal. App. 3d 981 (1989); *Peth v. Spear*, 115 P.164 (S.C. Wash., 1911).
97. *George v. Braddock*, 18 A. 881 (N.J. Ct. of Errors and Appeals, 1889).
98. *Taylor v. Hoag*, 116 A. 826 (S.C. Penn., 1922); *Collier v. Lindley*, 266 P.526 (S.C. Calif., 1928); *Dulles v. Johnson*, 273 F.2d 363 (1959).
99. *Old Colony Trust Co. v. Welch*, 25 F.Supp. 45 (1938).
100. *Garrison v. Little*, 75 Ill. App. 402; *In re Robbins' Estate*, 21 Cal. Rptr. 797, (S.C. Calif., 1962); *In re Lewis' Estate*, 25 A.878 (S.C. Penn., 1893). But see *Bowditch v. Attorney General*, 241 Mass. 168, 134 N.E. 796 (1922).
101. *Harrington v. Pier*, 82 N.W.345 (S.C. Wisc., 1900); *International Reform Federation v. District Unemployment Compensation Board*, 131 F.2d 337 (1942). But see *Gaston County United Dry Forces, Inc. v. Wilkens*, 191 S.E. 8 (S.C.N.C., 1937).
102. *Peck Estate*, 168 Cal. App. 2d 25, (1959); *Parkhurst v. Burrill*, 117 N.E. 39 (S.C. Mass., 1917).

103. *Boorse Trust*, 64 D. & C. 447 (Penn., 1948).
104. 48 Stat. 680, 690, 700, 755, 760 (1934).
105. 42 F.2d 184 (2d Cir., 1930).
106. *Christian Echoes National Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972).
107. J.S. Ganther, "The Political Activity Restrictions of I.R.C. Section 501(c)(3) and Why They Must Go" (1989) 4 *Notre Dame J. of Law, Ethics & Public Policy* 193.
108. A. Ware, "Religion, Charities and the State" in Ware, ed., *Charities and Government* (Manchester and New York: Manchester University Press, 1989) 222 at 241.
109. C.A. Wright, "Case and Comment" (1937), 15 *Can. Bar Rev.* 566 at 567.
110. An approach advocated in J. Warburton, *Unincorporated Associations: Law and Practice*, 2d ed. (London: Sweet & Maxwell, 1992) at 8. Apparently Revenue Canada itself encourages the practice: A.B.C. Drache, *Canadian Taxations of Charities and Donations* (Toronto: Carswell, 1990) at 9-15 to 9-16.
111. P.H. Pettit, *Equity and the Law of Trusts*, 6th ed. (London: Butterworths, 1989) at 223. The Canadian Civil Liberties Association, a non-charitable organization, also maintains a charitable educational foundation.
112. Such as discriminatory trusts: *Re Canada Trust Co and Ontario Human Rights Commission* (1990), 69 D.L.R. (4th) 321 (Ont C.A.).
113. The Radcliffe Commission made a similar suggestion, arguing that organizations with purposes under the fourth head of charity—other purposes beneficial to the community—be excluded from receiving tax benefits: U.K., *Royal Commission on the Taxation of Profits and Income, Final Report*, Cmnd 9474 (London: HMSO, 1955) at 57.
114. *Re Denley's Trust Deed*, [1969] 1 Ch. 373; Law Reform Commission of British Columbia, *Report on Non-Charitable Purpose Trusts* (Vancouver: 1992); Manitoba Law Reform Commission, *Non-Charitable Purpose Trusts* (Winnipeg: 1992).
115. M.C. Cullity, "The Myth of Charitable Activities" (1990), 10 *Estates & Trusts J.* 7.
116. J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities*, 2d ed. (London: Stevens & Sons, 1962) at 326.
117. S. Gardner, *An Introduction to the Law of Trusts* (Oxford: Clarendon Press, 1990) at 99.
118. The Public Trustee for Ontario has suggested that the blanket prohibition on political activity instituted by *Bowman* is inappropriate. The suggested approach is to examine whether the activities in question are ends in themselves, in which case they would be forbidden to charitable organizations, or whether they are means to furthering charitable purposes, in which case they would be permitted. The governing principle is "the sufficiency of the connection between the

political activity and the charitable object”: Public Trustee of Ontario, “Submissions to the Ontario Law Reform Commission Project on the Law of Charities” (1990), 9 *Philanthrop.* No. 4, 12 at 24. A similar approach was taken in England: see U.K., H.C. *Tenth Report from the Expenditure Committee, 1974-75: Charity Commissioners and their Accountability* (London: HMSO, 1975), paras. 35-44. See also United Kingdom, *Royal Commission on the Taxation of Profits and Income, Final Report* Cmnd 9474 [Radcliffe Commission] (London: HMSO, 1955) at 55-57.

119. In 1920 the Colwyn Commission proposed that “for the purposes of Income Tax charities should be specifically re-defined by Parliament”: U.K., H.C., *Report of the Royal Commission on The Income Tax*, Cmd. 615 (London: HMSO, 1920) at 68.
120. In the case of the advancement of education, the overly-broad approach taken in *Incorporated Council of Law Reporting for England and Wales v. Attorney General*, [1972] Ch. 73 (C.A.) should be avoided.
121. Goodman Committee, *Charity Law and Voluntary Organizations* (London: Bedford Square Press/NCVO, 1976).
122. *Dingle v. Turner*, [1972] A.C. 601 at 624 (H.L.), per Lord Cross; G. Cross, “Developments in the Law of Charities” (1956), 72 *L.Q.R.* 187; U.K., *Royal Commission on the Taxation of Profits and Income, Final Report*, Cmnd 9474 (London: HMSO, 1955) at 57.
123. M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) at 368.
124. Gardner, *supra*, footnote 21, at 111. But Gardner recognizes (at 112) that decisions about the allocation of state tax subsidies might best be left to tax policy: “At least in societies which employ the democratic system, questions of social priorities are regarded as matters in which there is no objective truth...they are ultimately determined by the people, and in practice by the elected legislature, and by the executive under its supervision”.