

**Charity Law Reform in Canada:
Moving from Patchwork to Substantive Reform**

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Abstract

This article explores the history of charity law reform in Canada, focusing on calls for a legislative definition of charitable purposes and changes to the political activity rules. It traces the trajectory of three periods of charity law reform advocacy in Canada since 1978, during which advocates have called not only for reform to the political activity rules but also more broadly for the modernization of Canadian charity law. Despite decades of charity law reform proposals, most charity law reform in Canada to date has constituted a patchwork of administrative and legal changes. Canadian charity law is at a crossroads after the broad recommendations of the 2017 Report of the Consultation Panel on the Political Activities of Charities and the 2018 legislative changes eliminating certain restrictions on charities' political activities. It is time for more substantive charity law reform, drawing from multiple law reform proposals presented over the last forty years, and from charity law reform in other jurisdictions.

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1 Advocacy for Charity Law Reform in Canada

On December 13, 2018, new rules came into force in Canada that removed many legislative restrictions limiting the non-partisan political activities that charities can carry out.² This legal change did not come about easily or quickly. It followed forty years after the political activity rules caused the first of many storms in the media and the legislature in 1978.³ These forty years contain three distinct periods of advocacy not only for law reform to the political activity rules but also for the greater modernization of Canadian charity law. Proposed law reform measures have included legislating an expanded definition of charitable purposes,⁴ reconsidering the role of the Canada Revenue Agency (CRA) as a charity regulator,⁵ and providing the Tax Court of Canada with the jurisdiction to hear charity law appeals.⁶

² Bill C-86, *Budget Implementation Act*, 2018, No. 2, 1st Sess, 42 Parl, 2018 (assented to 13 December, 2018).

³ See e.g. House of Commons Debates, 30th Parl, 3rd Sess, No 6 (31 May 1978) at 5930; House of Commons Debates, 30th Parl, 3rd Sess, No 5 (31 May 1978) at 5001-5003, 5923, 5930; Globe and Mail, “Ottawa intimidates charities, MPs say” *Globe and Mail* (May 2, 1978).

⁴ See e.g. Marlene Deboisbrand et al, Report of the Consultation Panel on the Political Activities of Charities (31 March 17) at 23-25; Institute for Media, Policy and Civil Society, *The Law of Advocacy by Charitable Organizations: Options for Change* (2001); Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector* (February 1999), [Broadbent Report] at 50-55; Ian Morrison, “Redefining ‘Charities’ in the Income Tax Act” (1983) 3:3 *Philanthropist* 10 at 11-12.

⁵ Adam Aptowitz, “Bringing the Provinces Back In: Creating a Federated Canadian Charities Council” *C.D. Howe Institute Commentary* No. 300 (November 2009); Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector* (February 1999) [Broadbent Report] at 89-90.

⁶ See e.g. Kathryn Chan, “The Function (or Malfunction) of Equity in the Charity Law of Canada’s Federal Courts” (2016) 2:1 *Canadian Journal of Comparative and Contemporary Law* 33 at 35; Kathryn Chan, “Written Submission to the Senate Special Committee on the Charitable Sector Submitted” (22 October 2018) at 3; Marlene Deboisbrand et al, Report of the Consultation Panel on the Political Activities of Charities (31 March 17) at 23-25; Patrick Monohan and Elie Roth, “Federal Regulation of Charities: A Critical Assessment of Recent

Despite decades of advocacy, to date, most charity law reform in Canada has been partial and reactive.⁷ From the perspective of charities, the CRA has been the main actor creating regulatory change through revised administrative policies, with the courts and the legislature playing a more limited role. With the recent statutory changes to the political activity rules, Canadian charity law is at a historical crossroads. The need for further charity law reform is clear, and administrative discretion cannot sufficiently respond to the substantive legal changes required. The sector continues to call for a modernized charity law framework, beyond reforming the political activities rules. The Consultation Panel on the Political Activities of Charities, appointed by the Minister of National Revenue in 2016, urgently recommended the modernization of the Canadian charity law framework.⁸ As this article will demonstrate, this call is far from new. The time is long overdue for the legislature to enact substantive charity law reform in Canada.

1.1 A Legal-Historical Study

This article undertakes a legal-historical study of the Canadian struggle with the rules limiting charities' political activities, to highlight the limited nature of charity law reform over the last forty years, and the long-stated need to modernize Canadian charity law. It traces the trajectory of three concentrated periods of public debate about whether to decrease or eliminate the limitations on charities engaging in non-partisan political activities.⁹ The article's focus is on repeated law reform advocacy efforts by the charity and non-profit sector, and the responses to that advocacy by the charity's regulator, the legislature, and the courts. Despite

Proposals for Legislative and Regulatory Reform" York University (2000) at 107; Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (February 1999), [Broadbent Report] at 55.

⁷ Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue" (2016) 91:3 *Chi-Kent L Rev* 1047 at 1048.

⁸ Marlene Deboisbrand et al, Report of the Consultation Panel on the Political Activities of Charities (31 March 17).

⁹ For more on the history and the legal basis of the political purposes doctrine, see the extensive work by Adam Parachin on the topic, including Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue" (2016) 91:3 *Chi-Kent L Rev* 1047; Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 *Canadian Tax Journal* 391-418; Adam Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mulé and Gloria DeSantis, eds., *The Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal, McGill University Press, 2017), 33-62. See also Rose Anne Devlin, "Policy Forum: Charities and Political Activities (A Tempest in a Teapot?)" 65:2 *Canadian Tax Journal* 367-78; Geoffrey Hale, "Charities and Politics: A Dubious Mix?" 65:2 *Canadian Tax Journal* 379-90.

extensive engagement by the non-profit and charity sector, scholars, charity law experts, legislative actors, and the attention of the courts, each period was ultimately quelled instead by limited, and ultimately unsatisfactory government action.

This article begins with the first law reform advocacy period, from 1978 – 1987, covering the early storm in response to restraints on charities’ political activities, and the resulting legal changes. The period began with controversy about the release of an administrative interpretation of the political purposes doctrine in 1978. It concluded with limited legislative reform in 1986,¹⁰ and the issuance of a new and more permissive administrative interpretation in 1987.¹¹

The second period, from 1994 – 2003, covers the concentrated non-profit and charity sector efforts to thaw the advocacy chill through law reform, and the government’s limited response. This article begins the discussion of this period with reference to the publication of a full-page ad in the *Globe and Mail* by Human Life International, defending itself from Revenue Canada’s revocation of its charitable status for excessive political activities.¹² Despite extensive efforts to reform not only the rules limiting political activities but also charity law more generally, this second period ended in 2003, again with the release of more permissive policy statements from the CRA. These revised policy interpretations were initially accepted as positive, albeit limited, change. Again, calls for reform of charity law and the political purposes doctrine returned as a central issue for the Canadian charity sector.

The third and most recent period, 2012 – 2019 (and ongoing), begins with political activities audits and leads into recent judicial and legislative action. The Conservative government’s 2012 federal budget implemented new rules for reporting on political activities and a sanction relating to unauthorized political activities.¹³ It also provided the CRA with funding to ensure charities were complying with the political activity limits, and the CRA launched a political activity audit program. There was much uproar about the audits and perceived targeting of certain groups critical of the government. During the 2015 election campaign, the Liberal Party of Canada presented reform of the political activity

¹⁰ *Income Tax Act, RSC 1985, c 1 (5th Supp)* at ss. 149(6.1) – ss. 149(6.2) [ITA].

¹¹ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987).

¹² James Phillips, “Crossing the Line from ‘Charitable’ to ‘Political’” (1995) 12:4 *Philanthropist* 33 at 33.

¹³ Department of Finance, “Jobs, Growth, and Prosperity: Economic Action Plan 2012” (29 March 2012) at 204-205, Annex 4 at “Charities – Enhancing Transparency and Accountability”.

rules as a key part of its platform. Once elected, the government promised legislative changes to increase the ability of charities to engage in advocacy activities.¹⁴ One organization that came under audit, Canada Without Poverty, successfully challenged the political activities provisions under the *Income Tax Act* as violating the *Charter*.¹⁵

The Liberal government has now implemented promised changes to the rules about charities' political activities. Adam Parachin describes the change in public policy discussions during the last period as a shift from "charity under siege to charity under rescue."¹⁶ Yet Canadian charity law has not quite been rescued. Much work is left to create a robust Canadian charity law framework suitable for the 21st century. This article concludes by calling for the legislature to further respond to decades of calls for substantive charity law reform.

1.2 Charities and the Canadian Tax System

Charities receive a hefty "double-barreled"¹⁷ tax subsidy, benefitting from both their tax-exempt status and from the tax incentive that taxpayers receive for their donations. To obtain and maintain access to this subsidy, charities must conform to legal obligations about their activities, governance, and financial management drawn primarily from the *Income Tax Act* and the Canadian common law. The CRA is the primary charity sector regulator in Canada, administering both the registration process and all oversight of activities related to maintaining charitable status.

While the common law is generally concerned with whether an entity's purposes are charitable, the *Income Tax Act* has no definition of charitable purposes. The *Income Tax Act* is more concerned with addressing the activities of charities, a focus that has caused some confusion in the case law, given that the common law has historically focused on the definition of charitable *purposes*.¹⁸ Nonetheless, in Canada, charities must be constituted for charitable purposes. The common law definition of charitable purposes draws on court interpretations of a statute enacted 400 years ago and subsequent case law.¹⁹ The basis of the common law's

¹⁴ Marlene Deboisbrand et al, Report of the Consultation Panel on the Political Activities of Charities (31 March 17).

¹⁵ *Canada Without Poverty v AG Canada*, 2018 ONSC 4147, [2018] 5 CTC 167.

¹⁶ Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue" (2016) 91:3 Chi-Kent L Rev 1047 at 1048.

¹⁷ Vern Krishna, *The Fundamentals of Canadian Income Tax*, (Toronto: Carswell, 2006) at chapter 15.

¹⁸ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at paras. 152-153.

¹⁹ *Charitable Uses Act, 1601* (Eng.), 43 Eliz. 1, c. 4 (*Statute of Elizabeth* or *Statute of Charitable Uses*), preamble.

interpretation of the four “heads” of charity is the application of the 1891 *Pemsel* test, and the requirement that the purposes be for a public rather than a private benefit.²⁰

1.2.1 The Doctrine of Political Purposes

Adam Parachin comments, “what is most striking about ... descriptions of the doctrine of political purposes is their historical inaccuracy”.²¹ Mindful of its potential gaps, this study provides both a general description of the doctrine of political purposes, and objections to it.

Historically, the leading case on the political purposes doctrine is *Bowman v. Secular Society Ltd*,²² in which Lord Parker declared: “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.”²³ A large number of decisions have echoed Lord Parker’s confidence about the clear rejection of political objects in charity law: under the doctrine of political purposes, political objectives are never charitable.²⁴ These decisions emphasize that courts need to respect parliamentary supremacy and underscore that it is not the court’s role to decide whether laws should be changed.

Lord Parker’s statement has also received much criticism.²⁵ Paul Michell describes the assessment in *Bowman* as “inconsistent with courts general assertion of their ability- indeed of their duty- to assess public benefit in the law of charities”.²⁶ Michell also rejects Lord Parker’s claim in *Bowman* that all courts had refused to accept political purposes as charitable, citing a number of law reform-oriented organizations that obtained charitable status before *Bowman*, some of which continue to enjoy charitable status today. This includes the John Howard Society,

²⁰ *Commissioners for Special Purposes of Income Tax v Pemsel*, [1891] AC 531 [Pemsel].

²¹ Adam M. Parachin, *The Doctrine of Political Purposes in Charity Law: Its Troubled History and Problematic Rationales* (LL.M. Thesis, University of Toronto, 2004) [unpublished] at 11.

²² *Supra* note 16.

²³ *Ibid.* at paras. 442-443.

²⁴ *Bowman v Secular Society Ltd*, [1917] AC 406 [*Bowman*].

²⁵ See e.g. *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31 [*National Anti-Vivisection*]; *Re The Trusts of the Arthur McDougall Fund* [1957] 1 W.L.R. 81; *Re Co-operative College of Canada and Saskatchewan Human Rights Commission* (1975) 64 D.L.R. (3d) 531, 538.

²⁶ *Michell*, *supra* note 33 at 6.

an organization named after the famous prisoner reformer and dedicated to prison reform, prison rehabilitation and reintegration.²⁷

L.A. Sheridan described Lord Parker's understanding of the court's role as "a true pathos" and "a strain on credulity" as "there are few people better qualified than judges to assess whether a change in the law would be for the public benefit".²⁸ L.A. Sheridan similarly rejects *Bowman*'s catch-all assumption that political purposes can never be considered charitable, citing a number of cases that came both before and after *Bowman*.²⁹

2 Round One: Charity Law Reform Advocacy from 1978 – 1987

This legal-historical study begins at the end of the 1970s, during a period of increased government regulation of charities and exponential growth for the charity sector.³⁰ In 1978, the first period of public debate about the political purposes doctrine opened with the Department of National Revenue's release of an information circular for charities on political activities. The department's restrictive interpretation of charities' ability to engage in political activities infuriated the charity sector and led to demands for the circular's withdrawal in both Houses of Parliament. In the years after the circular's release, calls for law reform increased as the Department of National Revenue applied a stricter approach to regulating charities' political activities and denying charitable status to "borderline" organizations.

2.1 The 1978 Information Circular

The Department of National Revenue's information circular, "Registered Charities: Political Objects and Activities,"³¹ found an unfriendly reception in early 1978.³² Although the intention provided was to guide charities as to the current state of the law, the circular took an expansive approach to interpreting the political purposes doctrine, prohibiting many acts of advocacy.³³

²⁷ *Ibid.* See also John Howard Society of Canada, History of John Howard Societies in Canada, online: <<http://www.johnhoward.ca/about/>>.

²⁸ *Supra* note 34 at 12.

²⁹ *Sheridan, supra* note 21 at 16.

³⁰ See Canada, Department of Finance, The Tax Treatment of Charities (Discussion Paper) (Ottawa: June 1975); Ontario Law Reform Commission, Report on the Law of Charities (December 1996) at 304-305.

³¹ Canada, Department of National Revenue, Information Circular No. 78-3, "Registered Charities: Political Objects and Activities" (1978) [1978 information circular].

³² *Ibid.* See also Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law (Philanthropist Award 1993-94 Honourable Mention)" (1995) 12:4 *Philanthropist* 3 at 17.

³³ Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* at 36.

The information circular was released within the larger context of the government turning its attention to the charity sector.³⁴ A Green Paper, “The Tax Treatment of Charities” was prepared by the Department of Finance in 1975, after gathering input from the charity sector and charity law experts.³⁵ The Green Paper’s recommendations for legislative action followed two basic themes: a) create mechanisms to ensure that charities are more accountable to the public and b) adapt charity law to the realities of an evolving charity sector.³⁶

Most of the Green Paper’s recommendations are reflected in the subsequent legislative enactments of 1976 – 1977, laying down the framework for the regulatory regime that continues to exist today.³⁷ It was in this broader context, a building period for the charity law regulatory regime, that the information circular on political activities was released, only three years after the Green Paper and closely following the legislative changes in 1976 – 1977.

The information circular began by outlining that an organization whose primary purposes were political would never qualify for charitable status. Political objects were defined as any purpose to maintain, create or change any policy or law of government, and any purpose that supports a political party. The circular explained that under the *Income Tax Act*, charitable organizations must devote its resources to political activities.³⁸ It explained the ancillary and incidental rule, which establishes that an organization whose main purpose is charitable but has a related and subordinate political purpose can still be eligible for charitable status as long as it does not engage in any prohibited political activities.

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

³⁴ Canada, Department of Finance, *The Tax Treatment of Charities (Discussion Paper)* (Ottawa: June 1975) [Green Paper].

³⁵ *Ibid.* See also Ontario Law Reform Commission, *Report on the Law of Charities* (December 1996) at 304-305.

³⁶ Ontario Law Reform Commission, *Report on the Law of Charities* (December 1996) at 304.

³⁷ Ontario Law Reform Commission, *Report on the Law of Charities* (December 1996) at 307-308.

³⁸ Canada, Department of National Revenue, *Information Circular No. 78-3, “Registered Charities: Political Objects and Activities”* (1978) at paras. 2 - 3 [1978 information circular]. Note that the circular also stated that charitable foundations, unlike charitable organizations, could never engage in political activities because provisions of the *Income Tax Act* specified that their purposes need to be exclusively charitable.

- lobbying government, through “an organized campaign to influence members of a legislative body to vote or act according to the special interest of a group,”³⁹
- holding a demonstration, if its purposes are not merely to publicize the charity, but to “embarrass or apply pressure upon a government,”⁴⁰
- conducting a campaign where people send form letters to their elected representatives protesting a particular issue,⁴¹
- writing a letter to the editor, where the charity tries “to sway public opinion for or against a political issue,”⁴²
- publishing anything that presents only one side of an issue, rather than “impartial and objective coverage,”⁴³
- and presenting only one side of a political issue at a conference or a workshop.⁴⁴

The government repeatedly asserted that the information circular simply contained a restatement of the current law. Contemporaneous scholars and lawyers, however, did not consider the law easy to simply restate at that time. In 1977, L.A. Sheridan considered the rules around political activities for charities to be so contradictory that he designed the “The Charpol Family Quiz (a game of skill and luck played on the boundaries of charity and politics)” to highlight the lack of coherence by courts determining the difference between charitable and political purposes and whether charities could pursue political activities.⁴⁵ In 1984, Margot Young summarized the law around charities’ political activities as “complex and contradictory” where the “dividing line between ‘charity’ and ‘politics’ is fuzzy.”⁴⁶

³⁹ *Ibid.* at para 5(c).

⁴⁰ *Ibid.* at para 5(d).

⁴¹ *Ibid.* at para 5(e).

⁴² *Ibid.* at para 5(f).

⁴³ *Ibid.* at para 5(g).

⁴⁴ *Ibid.* at para 5(h).

⁴⁵ L.A. Sheridan, “The Charpol Family Quiz (a game of skill and luck played on the boundaries of charity and politics)” (1977) 2:1 *Philanthropist* 14.

⁴⁶ Young, Margaret, “Charities and Political Activities” Library of Parliament: Research Branch (Ottawa, 1984) at 5.

2.1.1 The Charity Sector Responds

For the charity sector, the information circular's articulation of the doctrine of political purposes was surprisingly restrictive. Reaction to the information circular was swift and strong. Leading charity law practitioner Arthur Drache described the aftermath of the 1978 information circular's release: "the screams were loud and long as it appeared effectively to forbid virtually any comment about public issues. Even writing a letter to the editor of a newspaper seemed to be forbidden."⁴⁷

Charities immediately began protesting to their Members of Parliament and Senators, explaining the chilling effect that the circular had on their efforts to improve the circumstances of their organizations and the communities they served. Some members of the charity sector interpreted the tone and limitations in the circular as expressing distrust of using tax dollars to fund lobbying against the government.⁴⁸ The growing role of charities in providing social and health services was cited extensively, and, as a functional aspect of their increasing responsibilities, charities spoke to the importance of being able to advocate on behalf of the communities they served. Charities and their allies situated their advocacy work as a vital contribution towards maintaining a vibrant and democratic civil society.⁴⁹

Charities communicated their outrage in such large numbers that the issue was raised in both the Senate and the House of Commons on several occasions in 1978, eventually leading to interventions by the Prime Minister himself.⁵⁰ In the House of Commons, Conservative Leader Joseph Clark and other Conservative Members of Parliament insisted that the circular be withdrawn, referring to it as "a highly intimidating document."⁵¹ The exchange became so heated that one Member of Parliament heckled Prime Minister Trudeau, calling the government "Big Brother,"⁵² insinuating that the state had stretched its regulatory role to Orwellian proportions. Declarations that the circular simply represented an interpretation of

⁴⁷ Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 *Philanthropist* 21 at 22.

⁴⁸ Peter Elson, *A Historical Institutional Analysis of Voluntary Sector/Government Relations in Canada* (PhD Thesis, Adult Education and Community Development, University of Toronto, 2008) [unpublished] at 89.

⁴⁹ Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* 35.

⁵⁰ Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 *Philanthropist* 21 at 22; Canada, House of Commons Debates, 30th Parl, 3rd Sess, No 5 (31 May 1978) at 5001-5003; See *Globe and Mail*, "Ottawa intimidates charities, MPs say" *Globe and Mail* (May 2, 1978); See e.g. Canada, Senate, *Debates of the Senate (Hansard)*, 30th Leg., 3rd sess., Vol. 5 (May 3, 1978) at 5116-5117, 5118-5119; See *Globe and Mail*, "Ottawa intimidates charities, MPs say" *Globe and Mail* (May 2, 1978); See e.g. Canada, Senate, *Debates of the Senate (Hansard)*, 30th Leg., 3rd sess., Vol. 5 (May 3, 1978) at 5116-5117, 5118-5119.

⁵¹ Canada, House of Commons Debates, 30th Parl, 3rd Sess, No 5 (31 May 1978) at 5002.

⁵² Canada, House of Commons Debates, 30th Parl, 3rd Sess, No 5 (31 May 1978) at 5002-5003.

the law as it currently stood, providing guidance that had been requested by charities, did little to quiet protest. Finally, Prime Minister Trudeau replied that the circular would be withdrawn.⁵³ A second circular was promised to replace the original one, but a replacement circular was not issued until 1987.⁵⁴

2.1.2 Increased Vigilance by the Regulator

Despite the withdrawal of the 1978 information circular concern about regulating the political activities of charities continued. On several accounts, the tax authorities continued to act as if the 1978 circular represented the correct interpretation of the law restricting charities' political activities.⁵⁵ Legal practitioners reported increased difficulties in obtaining charitable status for organizations that were perceived to be too advocacy-oriented, and several organizations found their charitable status challenged because the agency believed that the charities were violating the political purposes doctrine.⁵⁶

Unease also increased when Revenue Canada sent a number of warning letters to charities alerting them that the activities they were engaging in were of a political nature and posed a risk to the organization's ability to maintain charitable status.⁵⁷ Ian Morrison, Chairman of the National Voluntary Organizations, described the charity sector's response: "[c]harities are talking about harassment and intimidation [by Revenue Canada]. That may not be their intent, but it is the effect."⁵⁸ Other stories of struggles with the political activity rules continued to hit the press, and eventually, the courts.⁵⁹

⁵³ Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 *Philanthropist* 21 at 22.

⁵⁴ Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* 35 at 35.

⁵⁵ Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law (Philanthropist Award 1993-94 Honourable Mention)" (1995) 12:4 *Philanthropist* 3 at 17; Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 *Philanthropist* 21 at 22-24; Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* 35 at 36.

⁵⁶ *Ibid.*

⁵⁷ Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law (Philanthropist Award 1993-94 Honourable Mention)" (1995) 12:4 *Philanthropist* 3 at 17-18; Young, Margaret, and Library of Parliament: Research Branch. *Charities and Political Activities*. Ottawa, 1984 at 4.

⁵⁸ Ann Silverslides, "Charities' political activities threaten tax-exempt status" *The Globe and Mail* (Apr 4, 1984).

⁵⁹ See e.g. the Federated Anti-Poverty Groups of B.C., which struggled to obtain charitable status due to concerns it had political purposes, See Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law (Philanthropist Award 1993-94 Honourable Mention)" (1995) 12:4 *Philanthropist* 3 at 29.

2.1.3 The Court's Narrow Interpretation

In 1985 the Federal Court of Appeal dismissed an appeal by Scarborough Community Legal Services, a legal aid clinic denied charitable status because of its participation in political activities.⁶⁰ The political activities cited by the tax authorities included participation in a demonstration against proposed changes to a social benefits program, and involvement in a neighbourhood activist group, the Committee to Improve the Scarborough Property Standards By-laws.⁶¹

The Court rejected the clinic's argument that its political activities were merely ancillary and incidental to its charitable purposes, assessing rather that the clinic engaged in "sustained efforts to influence the policy-making process constitute an essential part of its action and are not only "incidental" to some other of its charitable activities."⁶² The Court recognized that there is distinction between primary and incidental purposes. On this basis, a charity may have "exceptional and sporadic" political activities that would not jeopardize an organization's charitable status. The legal clinic's engagement in political activities was minimal, through participating in a demonstration and sitting on a local activist committee were sufficient to exceed the allowable limit.⁶³ In response to *Scarborough*, an advocacy chill fell upon the non-profit and charity sector.

2.2 Law Reform Proposals: Round One

2.2.1 Proposals for Legislative Reform

Law reform proposals began immediately in the years after the information circular on political activities was released and continued steadily for several years. With the decision in *Scarborough*, the need for law reform became even more apparent.

By 1980, Drache was arguing for legislative amendments that clarified the rules on political activities and stopped Revenue Canada's interventions on the subject.⁶⁴ Two proposals responded to his call. Starting in 1981 and continuing steadily

⁶⁰ *Re Scarborough Community Legal Services and the Queen*, (1985), 17 DLR, (4th) 308 (FCA), [Scarborough].

⁶¹ *Re Scarborough Community Legal Services and the Queen*, (1985), 17 DLR, (4th) 308 (FCA), [Scarborough].at 2; Kernaghan Webb, "Cinderella's Slippers: The Role of Charitable Tax Status in Financing Canadian Interest Groups" (Vancouver: UBC-SFU Centre for the Study of Government and Business, 2000) at 48-49.

⁶² *Re Scarborough Community Legal Services and the Queen*, (1985), 17 DLR, (4th) 308 (FCA), [Scarborough] at para 16.

⁶³ See Kernaghan Webb, "Cinderella's Slippers: The Role of Charitable Tax Status in Financing Canadian Interest Groups" (Vancouver: UBC-SFU Centre for the Study of Government and Business, 2000) at 49.

⁶⁴ Arthur Drache, "Political Activities: A Charitable Dilemma" (1980) 2:4 Philanthropist 21 at 24.

through 1983, the Coalition of National Voluntary Organizations (Coalition), the primary national representative of the charity sector until 1989, began urging the federal government to redefine charities within income tax legislation. Executive Director Ian Morrison explained that his organization's proposal embraced the idea that a statutory definition should outline what charitable objects are, identify exactly which activities are prohibited by charities, and then all other activities could be presumed to be acceptable.⁶⁵ The proposal included a more detailed legislative definition of charitable purposes than the common law.⁶⁶ The proposed definition was the following:

1. (a) For the purposes of this Act charitable objects include:
 - (i) assistance to a disadvantaged person or group of persons;
 - (ii) advancement of religion;
 - (iii) advancement of education;
 - (iv) advancement of health;
 - (v) conservation of natural environment; and
 - (vi) other purposes beneficial to the community, including cultural or social development or improvement of the physical or mental well-being of the community.

- (b) In this section: the meaning of "disadvantaged" includes, but is not limited to, a lack of opportunity to participate fully in the life of the community due to geographical, environmental, economical, racial, health, sex, age or disability factors.

2. Charitable activities mean all activities carried on in Canada or the international community by a charitable organization in furtherance of its charitable objects except those activities set out in Section 3.

3. The following activities shall not be considered charitable:
 - a. incitement to sedition or violence;
 - b. the support or opposition, financial or otherwise, of a political party or candidate at any level of government;
 - c. or the acquisition or expenditure of money or anything of value for the benefit of any member of the charity.

⁶⁵ Ian Morrison, "Redefining 'Charities' in the Income Tax Act" (1983) 3:3 *Philanthropist* 10 at 11–12.

⁶⁶ See *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 [Vancouver Society].

This was in contrast to the existing statutory definition at the time, which provided that charitable organizations must devote their resources to charitable activities, and charitable foundations were established “exclusively for charitable purposes.”⁶⁷ The statute otherwise relies on common law interpretations of charitable purposes and activities, incorporating the common law definition of charity, and leaving the courts to continue to determine its margins.⁶⁸

Morrison explained that the aim of the proposal was not to expand the availability of charitable status to more groups but rather to outline as fully as possible which organizations were eligible for charitable status as the law stood. Charities would then know that if they registered under one of the purposes outlined they could engage in any charitable activities related to those purposes, as long as they were not in the excluded list. The Coalition also argued that this definition would ease the regulatory burden for revenue officials. It believed that a detailed legislated definition of charitable objects would increase the fairness of administrative decision-making by reducing the arbitrariness involved in applying the inconsistent common law on the subject. The Minister of Finance, in correspondence with Morrison, expressed his openness to considering the proposed amendments.⁶⁹

Lawyer Henry Intven offered the second charity law reform proposal in 1983. Intven suggested that instead of being concerned with the activities of a charity, an entity’s charitable objects should be most relevant.⁷⁰ As long as a group’s objects are charitable, it should be able to carry on any activities to pursue those objects (except illegal activities, which are already prohibited by law). Intven’s proposed legislative amendment was the following:

1. "Charitable objects" shall include:
 - (a) Assistance to economically or physically disadvantaged classes of persons;
 - (b) Advancement of religion;
 - (c) Advancement of education;
 - (d) Other purposes beneficial to the community, including social or cultural development or improvement of the physical or mental health of the community.

⁶⁷ Former 149.1 (1)(b), *Income Tax Act*. See also *supra* note 31 at para. 3.

⁶⁸ See *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para. 28.

⁶⁹ Ian Morrison, “Redefining ‘Charities’ in the Income Tax Act” (1983) 3:3 *Philanthropist* 10 at 11–12.

⁷⁰ Henry G. Intven, “Political Activity and Charitable Organizations” (1983) 3:3 *Philanthropist* 35 at 49-50.

2. "Charitable activities" means all activities carried on by a charity in furtherance of its charitable objects.⁷¹

Like Morrison's proposal, Intven sought to legislate a wider definition of charitable purposes to modernize Canadian charity law. Intven's proposal was not designed to simply allow certain political activities. He proposed to reform charity law by explicitly outlining charitable purposes in the *Income Tax Act*, rather than only relying on the common law.

Intven argued that his proposed amendment would essentially eliminate the need to continue addressing charities' activities as a regulatory issue. The focus point instead would be on which organizations qualified for charitable status. Once qualified, all activities would be acceptable if they pursued the appropriate charitable purposes. Like Morrison, Intven's proposed amendment would ease both the administrative burden of Revenue Canada and the burden on charities trying to comply in an unclear regulatory environment. Intven also urged organizations throughout the sector to get involved in a dialogue with the government about law reform possibilities.⁷²

2.3 The 1986 Legislative Amendments

After his successful election in 1984, Prime Minister Brian Mulroney expressed a desire to forge a stronger partnership between governments and charities.⁷³ The Mulroney government took several steps to calm the charity sector about the application of the political purposes doctrine. While the Mulroney government did not enact the law reforms proposed by the voluntary sector, it did introduce limited legislative amendments in 1986. The amendments were the former subsections 149.1(6.1) for foundations and 149.1(6.2) for organizations.⁷⁴ These provisions entrenched into the *Income Tax Act* that charities could engage in limited non-partisan political activities as long as substantially all of their activities were charitable. As the tax authorities generally interpret "substantially all" to mean

⁷¹ Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* 35 at 45.

⁷² Henry G. Intven, "Political Activity and Charitable Organizations" (1983) 3:3 *Philanthropist* 35 at 46.

⁷³ Neil Brooks, "The Role of the Voluntary Sector" in Jim Phillips, Bruce Chapman, and David Stevens, eds., *Between State and Market: Essay on Charities Law and Policy in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2001) at 171.

⁷⁴ *Income Tax Act*, supra note 10 at ss. 149(6.1) – ss. 149(6.2).

“more than 90%,”⁷⁵ the provisions were frequently called the 10% rule going forward.

The 1986 amendments were far from substantial law reform efforts that responded to the charity sector’s calls, as they sidestepped the heart of the problems with the political purposes doctrine – drawing the line between the political and the charitable. In the new provisions, the nature of “political” in contrast to “charitable” activities remained undefined. Parachin highlights how the lack of a legislative definition of “political activities” rendered subsections 149.1(6.1) and (6.2) deficient.⁷⁶ The 10% rules created the obligation to quantify the resources used on political activities and then differentiate those resources from the ones used on charitable activities. There was no statutory guidance as to how to distinguish different types of activities. From a compliance perspective with many organizations in the sector under-resourced and relying heavily on volunteer labour such a quantification exercise presented compliance difficulties. Nonetheless, some charities welcomed the amendments because they clearly established that some limited political activities were allowed.⁷⁷

2.4 The 1987 Information Circular

Following the legislative amendments in 1986, Revenue Canada released an information circular in 1987. The circular described the 1986 legislative amendments as relieving, and characterized them as the introduction of a new rule, even though the Scarborough decision had already recognized the ancillary purposes doctrine in Canada. Indeed, even before Scarborough and the addition of 149(6.1) and 149(6.2) to the Income Tax Act, the common law’s acceptance of the ancillary purposes doctrine was evident as early as 1948,⁷⁸ and in the widely cited English decision, *McGovern and Others v. Attorney General and Another* in 1982.⁷⁹ Even the restrictive 1978 information circular had acknowledged the existence of the ancillary purposes doctrine for charitable organizations, stating, “[i]t is equally well established that an organization, whose primary purpose is clearly charitable but has a secondary or ancillary purpose which is stated to be political, does not fail

⁷⁵ Canada Revenue Agency, CRA Views: Technical Interpretation 2002-0137767, “Meaning of substantially all” (2002).

⁷⁶ Adam Parachin, ‘How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act’ (2017) 65:2 Canadian Tax Journal 391 at 408-409.

⁷⁷ M.L. Dickson & Laurence C. Murray, “Recent Tax Developments” (1985) 5:2 Philanthropist 53 at 53.

⁷⁸ *National Anti-Vivisection Society v Inland Revenue Commissioners*, [1948] AC 31 at 61, 77.

⁷⁹ *McGovern and Others v. Attorney General and Another*, [1982] Ch. 321 (Ch. D.) at para 342.

to be recognized as charitable, in common law, because of its ancillary or secondary purpose.”⁸⁰

In an act of “law reform” by administrative policy, the 1987 information circular specifically allowed activities that were previously prohibited in the 1978 information circular. Again, as highlighted by Parachin, there was no legislative source for a definition of political activities under the then new provisions 149(6.1) and 149(6.2).⁸¹ For illustrative purposes, examples of the shift in prohibited activities from the 1978 administrative interpretation to the one issued nine years later in 1987 are illustrated in the table below.

Prohibited vs. Permissible Activities, 1978 and 1987

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
<p>“Letters to Editors-A letter-to-the-editor campaign may be used by a registered charity to explain its purposes and programmes, recruit members and raise funds but may not be used to air political views or attempt to sway public opinion for or against a political issue.”⁸²</p>	<p>“The provision of information and the expression of non-partisan views to the media... as long as the devotion of resources ... is intended to inform and educate by providing information and views designed primarily to allow full and reasoned consideration of an issue rather than to influence public opinion or to generate controversy.”⁸³</p>	<p>1978 circular: Letters to the editor expressing political views or trying to influence the public are prohibited.</p> <p>1987 circular: Letters to the editor and any other representation to the media are now acceptable, as long as the intention is to inform rather than influence. These activities are not subject to expenditure limits.</p>

⁸⁰ Canada, Department of National Revenue, Information Circular No. 78-3, “Registered Charities: Political Objects and Activities” (1978) at para 2(b).

⁸¹ Adam Parachin, ‘How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act’ (2017) 65:2 Canadian Tax Journal 391 at 408-409.

⁸² Canada, Department of National Revenue, Information Circular No. 78-3, “Registered Charities: Political Objects and Activities” (1978) at para 5(f).

⁸³ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987) [1987 information circular] at para 9(c).

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
<p>“Publications- A registered charity may publish a magazine, a review or a news- paper, etc. on a political subject provided that an impartial and objective coverage is given to all facets of the subject matter. Coverage of only one viewpoint is a political activity since it represents the political principles of one faction in particular. The same comment applies to newspaper advertisements.”⁸⁴</p>	<p>The following activities become acceptable but must respect limitations:</p> <p>“Publications, conferences, workshops and other forms of communication which are produced, published, presented or distributed by a charity primarily in order to sway public opinion on political issues and matters of public policy”.⁸⁵</p> <p>“Advertisements in newspapers, magazines or on television or radio to the extent that they are designed to attract interest in, or gain support for, a charity's position on political issues and matters of public policy”.⁸⁶</p>	<p>1978 circular: Publications and advertisements that provided one perspective on an issue were not allowed.</p> <p>1987 circular: Publications, advertisements (and other forms of communication) that try to influence public opinion are allowed but subject to expenditure limits.</p>

⁸⁴ Canada, Department of National Revenue, Information Circular No. 78-3, “Registered Charities: Political Objects and Activities” (1978) at para 5(g).

⁸⁵ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987) at para 12(a).

⁸⁶ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987) at para 12(b).

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
<p>“Public Demonstrations- The holding of public events to attract public support, recruit new members, raise funds, explain purposes and programmes, and generally publicize the organization and its charitable activities is an acceptable activity of a registered charity, but if the purpose of the demonstration is to embarrass or apply pressure upon a government it is considered a political activity.”⁸⁷</p>	<p>The following activities become acceptable but must respect limitations:</p> <p>“Public meetings or lawful demonstrations that are organized to publicize and gain support for a charity's point of view on matters of public policy and political issues.”⁸⁸</p>	<p>1978 circular: Any event or demonstration that focused on government action or inaction was likely prohibited.</p> <p>1987 circular: Demonstrations and events on political matters are now allowed, subject to expenditure limits.</p>
<p>“Form Letters-A registered charity may carry on a mail campaign to attract public support, recruit members, raise funds, and explain its charitable objectives and proposals but it may not use this device for a non-charitable purpose, for example, to solicit the public to write letters of</p>	<p>The following activities become acceptable but must respect limitations:</p> <p>“Mail campaign -- a request by a charity to its members or the public to forward letters or other written communications to the media and government expressing support for the charity's views on political issues</p>	<p>1978 circular: Organizing a mail campaign about a political issue was prohibited.</p> <p>1987 circular: Organizing a letter campaign is acceptable but subject to expenditure limitations.</p>

⁸⁷ Canada, Department of National Revenue, Information Circular No. 78-3, “Registered Charities: Political Objects and Activities” (1978) at para 5(d).

⁸⁸ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987) at para 12(c).

1978 Information Circular– Prohibited Activities	1987 Information Circular	Comments on Changes
protest to their elected representatives.” ⁸⁹	and matters of public policy.” ⁹⁰	

For charities looking to their regulator for guidance, the 1987 information circular expanded their ability to participate in political activities. These administrative policy changes may have constituted the most tangible law reform that occurred in 1986 – 1987. Administrative discretion turned activities that were prohibited in 1978 into acceptable activities in 1987. Nothing in the legislative amendments addressed what types of activities were deemed “political activities” and subject to expenditure limits. Administrative interpretations created these limited “law reforms.”

A period of relative calm followed without extensive charity law reform lobbying, despite a few cases arising on the issue of political activities.⁹¹ Soon enough, however, frustration returned as did new calls to modernize Canadian charity law.

3 Round Two: Charity Law Reform Advocacy from 1994 – 2003

3.1 To the Courts First

Throughout the forty-year history of charity law reform advocacy, the question continued to arise as to the best instrument choice to reform charity law: the legislature or the courts. In the 1980s, the Coalition of National Voluntary Organizations and Henry Intven focused on legislative action, with little attention to the courts’ potential role as a vehicle for reforming charity law. By the late 1990s, as frustration again grew about the political activities rule and the state of charity law in Canada, the charity sector’s eyes turned to the judiciary. The courts faced the opportunity to reform charity law and to reframe or overhaul the political purposes doctrine. Each time, the courts emphasized that in a parliamentary democracy, substantive law reform decisions about eligibility for charitable status and the definition of charitable activities are best left to the legislature. The Courts refused to do more than create incremental change, adhering to the style of the

⁸⁹ Canada, Department of National Revenue, Information Circular No. 78-3, “Registered Charities: Political Objects and Activities” (1978) at para 5(e).

⁹⁰ Canada, Department of National Revenue, Information Circular No. 87-1, “Registered Charities: Ancillary and Incidental Political Activities” (February 27, 1987) at para 12(d).

⁹¹ See *Notre Dame de Grâce Neighbourhood Assn v MNR*, [1988] 3 FC D-39, 85 NR 73 (C.A.); *Positive Action Against Pornography v. MNR*, [1988] 2 FC 340 (CA); *Everywoman’s Health Centre Society v. Canada*, [1991] 2 CTC 320, 92 DTC 6001 (FCA).

common law. The Courts were also demonstrating their reluctance to engage in public spending by judicial intervention, as any decision to modernize charity law was also a decision to increase access to a taxpayer subsidy.

3.1.1 Human Life International (1994)

The second period of charity law reform advocacy began around 1994. A key marker was the publication of a full-page ad in the *Globe and Mail* by Human Life International, a group advocating against abortion.⁹² The organization used the ad to fundraise for its legal defence from Revenue Canada's imminent revocation of the organization's charitable status on the basis of its political activities.

Human Life International appealed to the Federal Court of Appeal, to persuade the Court that activities "designed essentially to sway public opinion on a controversial social issue" are not necessarily political.⁹³ One of Human Life International's co-legal defenses was that it was engaged in activities for charitable purposes, either fitting under the charitable head, advancement of education, or "other purposes of benefit to the community." The organization also argued that its political activities were within expenditure limits and that the *Income Tax Act* provisions relating to charitable status should be "void for vagueness."⁹⁴

The Court rejected Human Life International's appeal, agreeing with Revenue Canada's assessment that the activities the organization engaged in were political and exceeded expenditure limits. A 1988 precedent, *Positive Action Against Pornography v. M.N.R.*, had established that an organization that presents one-sided information about a controversial issue is not engaged in activities that fit under the advancement of education head, and the Court determined that Human Life International activities were analogous to that case.⁹⁵

The Court identified many problems with complying with and administering the political purposes doctrine, noting the subjectivity involved in differentiating

⁹² Jim Phillips, "Case Comments: Human Life International v. Minister of National Revenue" *The Philanthropist* (1 January 1999).

⁹³ *Human Life International in Canada Inc v MNR*, [1998] 3 FC 202, 1998 CanLII 9053 at para 5 (FCA).

⁹⁴ *Ibid* at para 19.

⁹⁵ One year later, the Federal Court of Appeal came to a similar decision in *Alliance for Life v. M.N.R.*, 1999 FCA, [1999] 3 F.C. 504, although relying less on the controversial nature of Alliance for Life's activities, which the court felt could be acceptable as long as they were sufficiently related and subsidiary to the organization's charitable purposes. In *Alliance for Life*, Stone J.A. decided that because the organization's political activities presented but one point of view, they did not fit under the advancement of education head, and therefore, were not activities that were ancillary and incidental to a charitable purpose.

between political and charitable activities and determining what resources were allocated to those activities.⁹⁶ Despite the Court's acknowledgement that rules limiting political activities and the common law definition of charitable purposes were ill-defined and badly in need of clarification, it deferred to the legislature as the appropriate law reform vehicle.⁹⁷

The Court also commented on the state of the definition of charity in Canada. It described the definition of charitable purposes and the fourth charitable head, "other purposes of benefit to the community" as "...an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts."⁹⁸

3.1.2 To the Supreme Court: *Vancouver Society* (1999)

In 1999, just one year following *Human Life International*, the Supreme Court of Canada had the opportunity to guide the law of charitable purposes in Canada when it reviewed the denial of charitable status in *Vancouver Society of Immigrant and Visible Minority Women*.⁹⁹ The majority upheld the decision that the Vancouver Society of Immigrant and Visible Minority Women did not qualify for charitable status, but took the opportunity to comment on the current state of charity law in Canada.

The Canadian Centre for Philanthropy intervened in the case, with charity law expert Arthur Drache acting as one of its lawyers. The appellant and the intervener laid out roadmaps and options, arguing for revising the definition of charity in Canada, echoing the law reform proposals that came forward during the 1980s, as well as the ones that followed. The Court declined to undertake such a reform initiative, pointing to Parliament as the appropriate venue for such substantive charity law reform. It did, however, provide detailed comments on the state of charity law in Canada.

The Court agreed that the definition of charity law in Canada and its legislative framework were inadequate, echoing the cry for legislative action in the area to adapt to a changing society. Justice Iacobucci, writing for the majority, explained that the Court's hands were tied because of "limits to the law reform that may be

⁹⁶ *Human Life International in Canada Inc v MNR*, [1998] 3 FC 202 (FCA) at para 14.

⁹⁷ *Human Life International in Canada Inc v MNR*, [1998] 3 FC 202, 1998 CanLII 9053 (FCA) at para 19.

⁹⁸ *Human Life International in Canada Inc v MNR*, [1998] 3 FC 202 (FCA) at para 8.

⁹⁹ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC).

undertaken by the judiciary.”¹⁰⁰ Nevertheless, the Court made it clear that charity law needed modernization and guidance by legislative intervention, stating:

[179] ...I agree that the law in this area is in need of reform but there are limits to the degree of change that the common law can accommodate. It is one thing to change the law by legislative amendment and quite another to alter the existing jurisprudence by a fundamental turning in direction.

[201] ...[I]t is difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded.

[203] ... I reiterate that, even though some substantial change in the law of charity would be desirable and welcome at this time, any such change must be left to Parliament.¹⁰¹

The Court explained that the judiciary must follow the common law pattern of incremental change and that judicial action was not the appropriate way to expand the definition of charity and in the process, enlarge what is already a hefty tax expenditure.¹⁰² In dissent, Justice Gonthier agreed with the majority that legislative action was desirable, given the limited possibility of law reform under the common law.¹⁰³

Although the Court repeatedly deferred to Parliament on the process for undertaking charity law reform, Justice Iacobucci recommended that the legislature consider the Canadian Centre for Philanthropy’s outline of a revised test for determining charitable status:

[202] [...] Although it is not necessary for me to comment on proposals for change, particularly since aspects of the Centre’s proposals may themselves need further clarifications and refinements, I would commend for serious consideration the general framework suggested by the Centre as potentially a useful guide for the legislator.

¹⁰⁰ *Vancouver Society of Immigrant and Visible Minority Women v. MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para 150.

¹⁰¹ *Ibid.* at para 203.

¹⁰² *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at paras. 179, 200, 201, 203.

¹⁰³ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at 124.

This three-step process would include the first three *Pemsel* heads of charity but also offer a method of expanding the fourth head, “other purposes beneficial to the community.”¹⁰⁴

The decision of the Court to include a summary of an intervenor’s charity law reform proposal and recommend it for consideration is striking. Many interveners never see mention of their arguments in a Supreme Court of Canada decision, let alone find their submissions explicitly recommended for potential consideration by Parliament. The Court strongly signaled that Parliament should intervene to modernize charity law and the definition of charitable purposes via legislative intervention.

3.1.3 Reform Instrument Choice after *Vancouver Society*

For legal scholars, practitioners, and the charity sector debating the best approach to reforming charity law, the *Vancouver Society of Immigrant and Visible Minority Women* provided a clear message from the Supreme Court: the judiciary cannot engage in this type of substantive charity law reform.

Drache heard that message loud and clear. Following the Supreme Court of Canada decision, Drache wrote a strong article in favour of a legislative amendment, stating, “[A]s it is abundantly clear that the Courts will not undertake a 're-writing' of the law in Canada, the need for legislative action, which is the thesis of this paper, becomes more pressing.”¹⁰⁵

Similarly, the year following the *Vancouver Society* decision, legal practitioner Wolfe D. Goodman called for a legislative amendment to keep up with the modern Canadian context. Goodman wrote, “a movement is on foot at the present time to achieve this reform.”¹⁰⁶ The next three years saw a flurry of lobbying activity to “modernize” the definition of charity law, including a concentrated focus on decreasing the scope of the doctrine of political purposes, if not eliminating it entirely.

Not all charity law scholars and practitioners shared the conviction that legislative reform needed to redefine charity and the law of political purposes in Canada. Blake Bromley questioned the necessity of turning to Parliament to modernize the

¹⁰⁴ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para. 42 [*Vancouver Society*].

¹⁰⁵ Arthur Drache, with Frances K. Boyle, *Charities, Public Benefit And the Canadian Income Tax System: A Proposal For Reform* (1999) at 2.

¹⁰⁶ Wolfe D. Goodman, “A Personal View of the Vancouver Society Decision” (2000) 15:2 *Philanthropist* 20 at 22.

definition of charity law, arguing that the common law effectively and incrementally modernized charity law for hundreds of years, and would continue to do so.¹⁰⁷ Patrick Monohan and Elie Roth agreed, believing that, when provided with the opportunity, courts show consistent flexibility in adapting the definition of charity in the common law to changing times.¹⁰⁸

Parachin noted that “[o]n balance, the common-law meaning of “charity,” though it has attracted sustained criticism, works rather well”, although he emphasized the need for more precise rules in situations where line-drawing guidance is required, such as the rules about political activities.¹⁰⁹ Monohan and Roth argued that it is the dearth of charity law decisions in Canada that is responsible for the lack of clarity in the area; the courts simply have not been given sufficient opportunity to create a robust body of jurisprudence clarifying the doctrine of political purposes and the definition of charity due to the inaccessibility of appeals.¹¹⁰

Between 1985 and 2000, Monohan and Roth found that despite an average of 4000 applications for charitable status per year, the Federal Court of Appeal only heard twenty cases, and the Supreme Court of Canada heard just one.¹¹¹ Monohan and Roth recommended changing the appeals process, and supported the Tax Court of Canada as an appropriate venue, given its reputation for fairness, the availability of an informal procedure, and its expertise in tax matters.¹¹²

In 2016, Kathryn Chan studied the reasons for the failure of charity law to develop in the Federal Court of Appeal.¹¹³ Sixteen years following Monohan and Roth’s study in 2000, she concluded that entities seeking charitable status or facing revocation found little success in the Federal Court of Appeal, noting “there have

¹⁰⁷ Blake Bromley, “Answering the Broadbent Question: The Case for a Common Law Definition of Charity” (1999-2000) 19 *Est. Tr. & Pensions J.* 21 at 28-30.

¹⁰⁸ Patrick Monohan and Elie Roth, “Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform” York University (2000) at 61, 63.

¹⁰⁹ Adam Parachin, “How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act” (2017) 65:2 *Canadian Tax Journal* 391 at 401, 403.

¹¹⁰ Patrick Monohan and Elie Roth, “Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform” York University (2000) at 61, 63.

¹¹¹ Patrick Monohan and Elie Roth, “Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform” York University (2000) at 65.

¹¹² Patrick Monohan and Elie Roth, “Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform” York University (2000) at 107.

¹¹³ Kathryn Chan, “The Function (or Malfunction) of Equity in the Charity Law of Canada’s Federal Courts” (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 33; Kathryn Chan, “The Role of the Attorney General in charity proceedings in Canada and in England and Wales” (2011) 89:2 *Canadian Bar Review* 373; Kathryn Chan, “Written Submission to the Senate Special Committee on the Charitable Sector Submitted” (22 October 2018).

been at least nineteen unsuccessful, and no successful judicial appeals of decisions by the Canada Revenue Agency (CRA) to decline to register or to deregister a charity under the federal *Income Tax Act*.”¹¹⁴

The questions about the proper venue for charitable status appeals are important, and a recurring theme in Canadian charity law reform advocacy. Still, even if the Federal Court of Appeal or an alternative venue played a more significant role in developing charity law, any expansion of the definition of charity law by courts is likely to be incremental, within the constraints of the common law as described by the Supreme Court in *Vancouver Society*. For those seeking more substantive charity law reform in Canada, the judiciary appears not to be the right instrument choice.

3.2 Law Reform Proposals: Round Two

After *Vancouver Society*, the non-profit and charity sector largely turned to self-organizing and lobbying to seek change from elected representatives. The sector began by initiating a consultation process, called the Panel on Accountability and Governance in the Voluntary Sector (the Broadbent Report), to build consensus about the leading issues facing the sector.¹¹⁵ The effort successfully raised the profile of the third sector’s needs with government, and subsequently led to the Voluntary Sector Initiative, a dialogue between the sector and government. Charity law reform proposals emerged from both projects. The momentum for law reform grew, with coalition groups chiming in to lobby the government to reform both the political purposes doctrine and to expand access to the benefits of charitable status.

3.2.1 The Voluntary Sector Initiative (2002)

In 1999, following the release of the Broadbent Report, representatives of the government of Canada and the voluntary sector came together in the Voluntary Sector Initiative with three goals: “building a new relationship, strengthening capacity, and improving the regulatory framework.”¹¹⁶

The Joint Tables Report recommended legislative amendments that created more certainty as to which political activities were permissible. Highlighting the

¹¹⁴ Kathryn Chan, "The Role of the Attorney General in charity proceedings in Canada and in England and Wales" (2011) 89:2 *Canadian Bar Review* 373 at 374.

¹¹⁵ Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector* (February 1999) [Broadbent Report].

¹¹⁶ “Working Together: A Government of Canada/Voluntary Sector Initiative” Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative < http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf>.

recurring nature of the calls for law reform to the political purposes doctrine, the Joint Tables Report took a similar approach to the legislative amendment proposed by the Coalition of National Voluntary Organization in the early 1980s. Instead of spelling out what activities were allowed, the report proposed a legislative amendment that outlined those activities that were prohibited, with the presumption that other political activities were acceptable, as follows:

- a) the activities relate to the charity's objects, and there is a reasonable expectation that they will contribute to the achievement of those objects;
- b) the activities:
 - i) are non-partisan;
 - ii) do not constitute illegal speech or involve other illegal acts;
 - iii) are within the powers of the organization's directors;
 - iv) are not based on information that the group knows, or ought to know, is inaccurate or misleading;
 - v) are based on fact and reasoned argument.¹¹⁷

This list of prohibited activities summarized the main themes emerging from the case law and relevant legislation while taking a more permissive approach to allowing organizations with charitable status to engage in non-partisan political activities that are related to their charitable objects. The Joint Tables Report advocated for the elimination of the quantification rule, or at least a raise in the allowable percentage, replacing it with the rule that an organization's political activities should not overwhelm its charitable work.¹¹⁸

Finally, addressing the barriers that advocacy non-profits experienced in obtaining charitable status, the report proposed the creation of a new category of "public-benefit organizations." If certain requirements were met, these organizations could have access to all the tax privileges of charities even if the organization's purposes did not fit under the four charitable heads.¹¹⁹ The basis of this proposal was the Joint Table's conclusion that some organizations working to build a stronger civil society may not be eligible for charitable status but nonetheless deserve additional support from the tax system. Proposed eligibility requirements included non-profit

¹¹⁷ "Working Together: A Government of Canada/Voluntary Sector Initiative" Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative <http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf> at 51-52.

¹¹⁸ "Working Together: A Government of Canada/Voluntary Sector Initiative" Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative <http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf> at 51.

¹¹⁹ "Working Together: A Government of Canada/Voluntary Sector Initiative" Voluntary Sector Initiative (September 2002), online: Voluntary Sector Initiative <http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf>. at 52-53.

status, not working primarily for the interests of the organization's members, and engaging in activities deemed to be of public benefit including activities that:

- “promote tolerance and understanding within the community of groups enumerated in the Canadian Human Rights Code;
- promote the provisions of international conventions to which Canada has subscribed;
- promote tolerance and understanding between peoples of various nations;
- promote the culture, language and heritage of Canadians with origins in other countries; and
- disseminate information about environmental issues and promote sustainable development.”¹²⁰

This new category of public-benefit organizations represented a different approach to modernizing the law of charities. Instead of proposing a broader legislative definition of charity or turning to the courts for an expansion of the interpretation of the original charitable heads, the Joint Tables Report proposed skipping the issue of the definition of charitable purposes by creating another category of organizations with the regulatory obligations and tax benefits of charitable status.

The Joint Table Report's proposals represent a peak in the second period of calls for law reform. Both the charity and non-profit sector and government officials agreed with the need for significant law reform. The 2002 report forwarded concrete proposals that, if accepted, could have significantly altered the doctrine of political purposes and the availability of the tax benefits of charitable status for a number of non-profits in Canada. It took sixteen more years and a successful Charter challenge for further legislative action to come about.

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

In the early 2000s, the Institute for Media Policy and Civil Society (IMPACS) became one of the most prominent voices calling for charity law reform. In several reports, toolkits, and research papers designed for a general audience, IMPACS explained the problems faced by community groups because of the political activity rules. IMPACS focused both on the inability of some organizations to register for charitable status, and the restraints experienced by some registered charities with their limited ability to speak out on public policy issues.¹²¹

¹²⁰ *Ibid.*

¹²¹ See Institute for Media, Policy and Civil Society, *The Law of Advocacy by Charitable Organizations: Options for Change* (2001); Institute for Media, Policy and Civil Society, *Let Charities Speak: Report of the Charities and Advocacy Dialogue* (March 2002); Institute for

IMPACS put forward a number of concrete law reform proposals. The first option was to remove the restriction on advocacy activities in the *Income Tax Act*, leaving only a clear identification of the partisan activities a charity cannot organize or participate in.¹²² Charities could then engage in as much advocacy as they desire, so long as those activities were non-partisan and connected to their charitable purpose. The second proposal was to “broaden the definition of education” to “expressly include public policy input or strong, reasoned arguments on public policy issues.”¹²³ IMPACS suggested that the amount of public policy input a charity could engage in either be unlimited or limited to a “quantifiable amount, e.g. half of a charity’s educational activity.”¹²⁴ This change would allow registered charities to participate more freely in advocacy work and increase access to charitable status.

IMPACS’ third option was to “create a new category of tax-exempt organizations,”¹²⁵ based on Professor Kernaghan Webb’s proposal for organizations that are neither charities nor simple non-profits, but somewhere in between.: “registered interest organizations” that, like charities, would also be able to provide tax receipts for donations, but would not be restrained from providing input on public policy. This proposal echoes the Joint Tables Report recommendation issued in 2002, to allow advocacy organizations not eligible for charitable status due to the political purposes doctrine to access similar tax benefits, without redefining charity law.

3.2.2.1 A Legislative Definition of Charity

IMPACS’ fourth option was the introduction of a legislative definition of charity, moving away from the definition of charitable purposes in the 1891 *Pemsel* decision towards a more “modern and comprehensive definition of charity for the *Income Tax Act*.”¹²⁶ IMPACS noted the enormity of such a task, although it also highlighted the benefits of a wide public debate on what constitutes charitable activity and the modernization of charity law. This recommendation for a legislative definition of charity was similar to the one proposed in 1983 by the National Voluntary Organizations but included more flexibility for adding new charitable purposes.

Media, Policy and Civil Society, *Charities: Enhancing Democracy in Canada*, 2nd ed. (2003); Institute for Media, Policy and Civil Society, *Tax Policy, Charities and Democracy in Canada: A Summary of the Problem and Remedy* (2004); Institute for Media, Policy and Civil Society, *Charities and Democracy Project Election Kit* (November 2005).

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Options for Change* (2001), *supra* note 121.

IMPACS' proposal for a legislative definition of charitable purposes was mirrored even more closely by the recent recommendation of the 2018 Consultation Panel on the Political Activities of Charities. The Consultation Panel urgently recommended a new legislative framework for charities with an “inclusive list of charitable purposes reflecting contemporary social and environmental issues and values.” Tracing from the 1983 proposal by the National Voluntary Organizations, to the options articulated in by IMPACs in 2001 and by the Voluntary Sector Initiative in 2002, and through to the most recent recommendations by the Consultation Panel in 2018, the results are clear. There is a long history of calls for legislative action on the definition of charitable purposes and access to the benefits of registering as a charity.

3.3 The 2003 Policy Statement

In 2003, the CRA released a newly revised “Political Activities” policy statement, responding directly to the Joint Tables Report and other calls for law reform.¹²⁷ There were no legislative changes or major court decisions that led the agency to issue a new view on political activities. Much like the information circulars released in 1978 and 1987, the 2003 policy statement relied heavily on administrative (re)interpretations of the law to articulate different rules relating to political activities.

The CRA introduced a sliding scale rule so that charities with less annual income could spend more of their budget (up to 20%) on political activities.¹²⁸ It announced that it was prepared to make an exception for charities that use more than the maximum resources allowed on political activities.¹²⁹ If the organization did not use up all of their allowed percentages in the last two years, the agency might allow the organization to use the amount it did not spend to cover the excess spending for the exceptional year in question.

The 2003 policy statement also made a fairly significant concession in expanding the type of advocacy activities that can be considered charitable and not political, based on its interpretation of the case law, including *Vancouver Society*. The agency expanded the list of activities that were formally considered political and subject to expenditure limitations. These newly relabelled activities would now be considered strictly charitable in nature, as long as certain rules were respected. Activities listed

¹²⁷ Canada Revenue Agency, Policy Statement CPS-022, “Political Activities” (September 2, 2003).

¹²⁸ *Ibid.* at 9.

¹²⁹ *Ibid.* at 9.1.

in the 2003 policy statement that were newly considered charitable and not political activities include:

i) Public awareness campaigns that fall within the organization’s mandate, if specific criteria were met. This included the requirement that a campaign presents a well-reasoned position” and not be overly “emotional.”¹³⁰ If there was no space or time in an advertisement to provide sufficient information, a method to obtain more information on the subject had to be included. Charities could not use most of their resources on awareness campaigns.

ii) Speaking to government and elected politicians, regardless of whether the charity was invited, was not considered a political activity, even if the organization was talking about changing, keeping, or stopping a law, government policy or decision.¹³¹ Again, the information presented had to be “well-reasoned” and within the charity’s mandate. If the charity was not given enough time to give a full, well-reasoned presentation, this information had to be provided as soon as possible after the meeting. Publishing or distributing the information given to the government or elected politicians was not considered political activity as long as there was no request to contact the government or elected representative and demand the change or maintenance of a law or policy.¹³²

The CRA’s responsiveness to the sector is also captured by its release of additional policies that same year and in the years immediately following. There were, for example, a number of new policy statements directed at ethnocultural organizations and groups advocating against racism.¹³³ One of the new policy statements on ethnocultural organization explained in detail the agency’s policy on registering ethnocultural groups and appears to respond directly to criticism from groups like OCASI about the inability of groups working with ethnocultural and racialized communities to obtain charitable status.¹³⁴

¹³⁰ *Ibid.* at 7.1, 8.

¹³¹ *Ibid.* at 7.3.

¹³² *Ibid.* at 7.3.1.

¹³³ Canada Revenue Agency, Policy Statement CPS-023, “Applicants Assisting Ethnocultural Communities” (June 30, 2005); see also Canada Revenue Agency, Policy Statement CSP - E11, “Charitable Work and Ethnocultural Groups - Information on Registering as a Charity” (June 30, 2005); Canada Revenue Agency, Policy Statement CPS-021, “Registering Charities that Promote Racial Equality” (September 2, 2003).

¹³⁴ *Assisting Ethnocultural Communities, ibid.*; For more on OCASI’s criticism of charity law, see Tendai Musodzi Marowa, “How the Law of Charities and Advocacy Can Be Changed to Better Serve Immigrants and Refugees” Ontario Council of Agencies Serving Immigrants (September 2001).

Here, the power of administrative discretion is evident. It took significant pressure from the charity sector for a new policy to be issued on charities that promote racial equality. This significant shift did not come from the courts. Indeed, the CRA notes that the Supreme Court of Canada as recently as 1999 did not choose to expand the definition of charity.¹³⁵ Instead, the CRA used reinterpretation to move the law forward. But do these policies count as long-lasting law reform?

Regulatory reform by administrative discretion is not legally binding. Just as the policies of the CRA reflect a changing attitude towards the charity sector and an evolving style of regulation, another shift in the relationship between the regulator and the sector could substantially set back these steps accomplished solely through administrative discretion.

3.4 Calls for Law Reform Continue

The CRA's new policy statements issued between 2003 – 2005 improved the ability of certain organizations to register for charitable status substantive law reform or participate in advocacy work. Calls for law reform continued, although the volume lowered for a few years.¹³⁶ Canadian legal scholars also continued to write about the incoherency in the jurisprudence about the political purposes doctrine and call for judicial intervention, along with the repeal of subsections 149.1(6.1) and 149(6.2) of the *Income Tax Act*.¹³⁷ Still, the years following the release of the 2003 policy statement through 2011 were a period of relative calm. By 2012, however, the issues of charity law regulation and the need for reform returned to the forefront once again.

¹³⁵ *Ibid.* at 3.

¹³⁶ See e.g. Rob Rainer, "An Affront to Freedom and Democracy: Canada's Control on Advocacy by Canadian Charities and the Need for Charity Law Reform by Parliament" (Paper presented to the Inaugural Conference of the Canadian Constitutional Foundation, 13 October 2007) online: Canadian Constitutional Foundation

<<http://www.canadianconstitutionfoundation.ca/files/pdf/An%20Affront%20to%20Freedom%20and%20Democracy%20-%20Rob%20Rainer.pdf>> at 7; Judy Mcleod, "Will Suzuki Foundation go the Greenpeace route in Losing Charitable Status?" Canada Free Press (June 18, 2007); Pieta Woolley, "Charities Muzzled in Election" Straight.com (September 11, 2008), online: Straight <<http://www.straight.com/node/161071>>.

¹³⁷ See Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 *Alta L Rev* 871; Adam M. Parachin, *The Doctrine of Political Purposes in Charity Law: Its Troubled History and Problematic Rationales* (LL.M. Thesis, University of Toronto, 2004) [unpublished 138 – 139. See also Parachin's concern about the fiscal rationale informing the Supreme Court of Canada's decision in *A.Y.S.A. Amateur Youth Soccer Association v Canada* (Revenue Agency), 2007 SCC 42, [2007] 3 SCR 217, described in Adam Parachin, "Unraveling the definition of charity: Fiscal objectives shouldn't govern the granting of charitable status" *The Lawyers Weekly* (March 6, 2009).

4 Round Three: Charity Law Reform Advocacy: 2012 – 2019

4.1 2012 Legislative Changes

After a period of relative quiet, the third period of concern about Canada’s charity law framework and the political activities of charities began in 2012, when the Conservative government introduced several legislative and administrative changes to further regulate the political activities of charities.¹³⁸ These initiatives were perceived to be in response to environmental charities’ activism against the oil and gas industry in Canada.¹³⁹

The 2012 budget provided the CRA with funds to address compliance issues with the political activities rules, which were used for a political activity audit program.¹⁴⁰ New rules were added, requiring charities to report on their political activities in more details and explicitly define political activities to include transferring money to other charitable entities to carry out political activities.¹⁴¹ A specific penalty was also added to sanction charities engaging in partisan political activities or exceeding the threshold of non-partisan allowable political activities.¹⁴²

4.2 Political Activity Audits

There was considerable controversy surrounding the political activity audits, which were perceived as attacks on environmental charities that were advocating against the Conservative government’s priorities for natural resources development. A report by the Broadbent Institute in 2014 concluded that the CRA was targeting charities that criticized government policies through the political activity audits.¹⁴³ The tax authorities strongly denied such allegations. The report also argued that certain right-leaning organizations were underreporting their political activities.

Charity law lawyer Mark Blumberg has stressed that very little information is known about the audits, stating:

¹³⁸ Department of Finance, “Jobs, Growth, and Prosperity: Economic Action Plan 2012” (29 March 2012) at 204-205, Annex 4 at “Charities – Enhancing Transparency and Accountability”; Adam Parachin, “Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue” (2016) 91:3 Chi-Kent L Rev 1047 at 1050-1057.

¹³⁹ *Ibid.*

¹⁴⁰ Department of Finance, *supra* note 138.

¹⁴¹ Department of Finance, *supra* note 138. See also Adam Parachin, “Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue” (2016) 91:3 Chi-Kent L Rev 1047 at 1051; ss. 149.1(1), “charitable purpose” and “political activities”, ITA.

¹⁴² See former paragraphs 188.2(2)(e) and (f) of the ITA.

¹⁴³ Broadbent Institute, “Stephen Harper’s CRA: Selective Audits, “Political” Activity, and Right-Leaning Charities” (October 2014).

Let us be clear that we know very little about which charities were audited under the program because of secrecy provisions in the Income Tax Act which survive today. Only about 1/3 of the 52 charities have come forward to say they were audited and NONE of those registered charities have been prepared to publicly provide copies of the letters from CRA to the charity outlining non-compliance.¹⁴⁴

Blumberg has since called for more information to be released when charities are found to be in serious non-compliance.¹⁴⁵ Parachin also notes that there was no concrete evidence of bias on the part of the CRA (in part, perhaps, due to a lack of publicly available information).¹⁴⁶ Nonetheless, the non-profit and charity sector's concern about the CRA's role as a regulator grew.

4.3 *Canada Without Poverty v. AG Canada*

Canada Without Poverty (CWP) was one of the organizations audited under the CRA political activity audit program. CWP is an anti-poverty organization located in Ottawa, Ontario. The CRA determined in its audit report issued in January 2015 that 98.5% of the organization's activities constituted political activities.¹⁴⁷ CWP's political activities included:

- “[h]osting a dinner where people living in poverty could communicate with members of parliament and other decision-makers constituted political activity because recommendations for changes to laws and policies were discussed.”
- “Organizing and hosting policy summits with social policy experts was political activity because recommendations for changes to laws and policies were formulated and disseminated.”

¹⁴⁴ Mark Blumberg, “Canada Without Poverty vs. Attorney General of Canada – a pyrrhic victory for CWP and a disaster for the charity sector” (30 July 2018), online <https://www.globalphilanthropy.ca/blog/canada_without_poverty_vs._ag_a_pyrrhic_victory_for_cwp_a_disaster_for_the>.

¹⁴⁵ Mark Blumberg, “Special Senate Committee on the Charity Sector and Mark Blumberg’s testimony November 19, 2018” (30 July 2018), online <https://www.globalphilanthropy.ca/blog/special_senate_committee_on_the_charity_sector_and_mark_blumbergs_testimony>.

¹⁴⁶ Adam Parachin, “Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue” (2016) 91:3 Chi-Kent L Rev 1047 at 1053-1054.

¹⁴⁷ Amended Notice of Application (August 25, 2016) in *Canada Without Poverty v AG Canada*, 2018 ONSC 4147 at para 10. There is no indication that the CRA found the CWP’s political activities to be partisan.

- “Offering an online course on international human rights was found to be political because it created an atmosphere conducive to advocating for changes to laws and policies.”
- “Publishing links on a website to newspaper articles and other materials which recommended changes to laws and policies was political activity.”¹⁴⁸

On August 15, 2016, CWP filed a charter challenge in the Superior Court of Ontario, seeking a declaration that the *Income Tax Act*'s rules on political activities violated the organization's charter rights. The Court agreed, declaring on July 16, 2018, that ss. 149.1(6.2), originally added to the *Income Tax Act* in 1986, violated CWP's right to freedom of expression, by placing quantum limitations on activities necessary to carry out its charitable purposes.¹⁴⁹ The Canadian government initially appealed the case, while simultaneously moving forward with legislative amendments to the political activity rules, but it ultimately dropped the appeal.¹⁵⁰

4.4 Law Reform Proposals: Round Three

With a new Liberal federal government in 2015 came electoral platform promises of charity law reform, both of the political activity rules specifically, and modernization of the non-profit and charity regulatory framework.¹⁵¹ Prime Minister Justin Trudeau's November 2015 mandate letters to the Minister of Finance and the Minister of Justice instructed the Ministers to work together with the Minister of National Revenue “to develop a modernized regulatory and legal framework governing the Charitable and Not-for-Profit sectors.”¹⁵² The mandate letter to the Minister of National Revenue was more specific. It called on the Minister to modernize the non-profit and charitable framework to “strengthen the sector,” including by reforming the political activity rules and working to encourage social enterprise and social finance.¹⁵³

The Minister of National Revenue appointed the Consultation Panel on the Political Activities of Charities in 2016, and following a consultation process, issued its

¹⁴⁸ *Ibid.*

¹⁴⁹ *Canada Without Poverty v AG Canada*, 2018 ONSC 4147 [*Canada Without Poverty*].

¹⁵⁰ Dean Beeby, “Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare” *CBC News* (31 January 2019), online <<https://www.cbc.ca/news/politics/cra-revenue-charities-freedom-expression-lebouthillier-appeal-political-activities-court-1.5001087>>.

¹⁵¹ Liberal Party of Canada, “A New Plan for a Strong Middle Class” (2015) at 34.

¹⁵² Prime Minister Justin Trudeau, “Minister of Justice and Attorney General of Canada Mandate Letter (November 12, 2015)”; Prime Minister Justin Trudeau, “Minister of Finance Mandate Letter (November 12, 2015)”.

¹⁵³ Prime Minister Justin Trudeau, “Minister of National Revenue Mandate Letter (November 12, 2015)”.

report in 2017.¹⁵⁴ The report had four general recommendations. The first two were immediate interim measures, recommending that the CRA revise its administrative policies to allow charities to take full part in public policy dialogue, and a change to the CRA’s approach to regulating charities, including by ending all open political activity audits as soon as possible, and suspending decisions on those audits pending the enactment of the Consultation Report’s recommendations. On the same day that the Panel released the Consultation Report to the public, the Minister of National Revenue suspended all CRA activities relating to the political activity audits.¹⁵⁵

The other two recommendations in the Consultation Report involved legislative reform. The Panel advised that the legislative limits on non-partisan political activities should be eliminated, allowing charities to carry on “public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.”¹⁵⁶ The Panel also went much further, recommending the modernization of the statutory framework for charities by legislating a modern, inclusive definition of charitable purposes.

4.5 2018 Legislative Amendments

The legislative amendments that came into force in December 2018 followed through on the Consultation Report’s third recommendation to amend the political activity rules. While many in the charity and non-profit sector have celebrated both the *Canada Without Poverty* decision and the amendments to the political activity rules as a victory, there is some concern from scholars and practitioners.

Blumberg has described the *Canada Without Poverty* victory as a disaster for the charity sector, expressing his view that allowing charities to undertake unlimited political activities may lead to the use of charities as political vehicles, and to unsustainable growth in the cost of the charitable tax expenditures.¹⁵⁷ Before the

¹⁵⁴ Marlene Deboisbrand et al, Report of the Consultation Panel on the Political Activities of Charities (31 March 17).

¹⁵⁵ Canada Revenue Agency, “Minister Lebovillier welcomes the Panel Report on the public consultations on charities and political activities” (4 May 2017); Dean Beeby, “Political activity audits of charities suspended by Liberals” *CBC News* (4 May 2017).

¹⁵⁶ Mark Blumberg, “Canada Without Poverty vs. Attorney General of Canada – a pyrrhic victory for CWP and a disaster for the charity sector” (30 July 2018), online <https://www.globalphilanthropy.ca/blog/canada_without_poverty_vs._ag_a_pyrrhic_victory_for_cwp_a_disaster_for_the>.

¹⁵⁷ Mark Blumberg, “Canada Without Poverty vs. Attorney General of Canada – a pyrrhic victory for CWP and a disaster for the charity sector” (30 July 2018), online <https://www.globalphilanthropy.ca/blog/canada_without_poverty_vs._ag_a_pyrrhic_victory_for_cwp_a_disaster_for_the>.

Special Senate Committee on the Charity Sector, Blumberg called for a revision to the legislative amendments to political activity rules which (now in force) allow unlimited public policy dialogue and development activities.¹⁵⁸ This amendment would require that such public policy dialogue and development activities represent less than 50% of a charity's activities.

Parachin has expressed similar concerns about the potential for "single methodology charities," advocating for a more incremental approach, with political activities continuing to be supplemental rather than a charity's primary activity.¹⁵⁹ At the same time, Peter Broder, Executive Director of the Pemsel Foundation in Canada, dismissed concerns about the potential of charities being used mainly for political activities, describing the wariness of lobbying charities as coming from a misunderstanding of the circumstances of the American case, *Citizens United v. Federal Election Commission*, which changed the rules about the funding of groups under election laws.¹⁶⁰

Perhaps more disconcerting is a technical concern about the new legislative amendments on political activity rules. Parachin has emphasized that the lack of a definition of public policy dialogue and development activities is likely to create confusion going forward about the application of the law, particularly as it gets defined by the CRA in policy statements.¹⁶¹ This replicates the challenges posed by a lack of definition of "political activities" and may pose administrative and compliance issues going forward.

As of December 13, 2018, however, the new rules are in force. Charities can carry out unlimited public policy dialogue and development activities that meet their charitable purposes.¹⁶² It remains to be seen whether these new rules are sufficient to wrap up this particular charity law reform topic, or if this is just further patchwork that will ultimately lead to a further need for law reform. As discussed above, the 1986 legislative amendments were first introduced after *Scarborough Community*

¹⁵⁸ Mark Blumberg, "Special Senate Committee on the Charity Sector and Mark Blumberg's testimony November 19, 2018" (30 July 2018), online <https://www.globalphilanthropy.ca/blog/special_senate_committee_on_the_charity_sector_and_mark_blumbergs_testimony>.

¹⁵⁹ Adam Parachin, "Submission to the Senate of Canada Special Committee on the Charitable Sector" (28 November 2018); Canada Revenue Agency, "Public policy dialogue and development activities by charities" (Draft- 21 January 2019).

¹⁶⁰ Peter Broder, "Supplementary submission on Regulation of Political Activities to the Senate Special Committee on the Charitable Sector" (27 November 2018).

¹⁶¹ Adam Parachin, "Submission to the Senate of Canada Special Committee on the Charitable Sector" (28 November 2018).

¹⁶² Bill C-86, *Budget Implementation Act*, 2018, No. 2 (December 13, 2018).

Legal Services as a relieving provision. Within eight years, the charity and non-profit sector called for further reforms.

5 Reimagining Canadian Charity Law in the 21st Century

5.1 Models from Other Jurisdictions

As the federal government looks to carry out the final recommendation of the Consultation Panel to modernize the definition of charity law, it can turn to recent models in other jurisdictions. The United Kingdom legislated a definition of charity in 2006 that included thirteen (rather than four) charitable heads and made space for the creation of future analogous charitable purposes not listed in the legislation.¹⁶³ Two years later, the United Kingdom's Charity Commission released a detailed guide, *Speaking Out: Guidance on Campaigning and Political Activity by Charities*, emphasizing charities' ability to participate in political activities as long as these activities did not become the main work of an organization and the activities are related to the organization's charitable purposes.¹⁶⁴

Australia legislated a similar definition of charity in 2013, outlining twelve charitable purposes, with the last category similarly adaptable to societal changes.¹⁶⁵ In the year prior, Australia established the Australian Charities and Not-for-profits Commission as the country's charities regulator.¹⁶⁶ This is not to say that a legislative definition of charitable is the panacea for charity law. It is responsive to the Canadian non-profit and charity sector's repeated calls for a statutory definition of charity and to other jurisdictions who have taken legislative action. At the very least, a statutory definition of charitable purposes would increase the accessibility of charity law, providing a legislative statement as to what is charitable, as well as the requirements that must be met to fall under an analogous category of charity law as society evolves.

5.2 Roadmaps for Law Reform

There is no lack of roadmaps for the next steps in Canadian charity law reform. In an open letter written to Prime Minister Trudeau after the 2015 election, and published in the non-profit and charity journal, *The Philanthropist*, Patrick Johnston, former president and CEO of the Canadian Centre for Philanthropy stated "[t]he good news with respect to your promise regarding charities ... is that your

¹⁶³ *Charities Act 2006*, 2006 c. 50, s.2.

¹⁶⁴ United Kingdom, Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activity by Charities* (Liverpool: 2008).

¹⁶⁵ *Charities Act 2013*, NO. 100, 2013.

¹⁶⁶ Australian Charities and Not-for-Profits Commission, "About Us", online: <<https://www.acnc.gov.au/about>>.

government doesn't have to start from scratch; far from it."¹⁶⁷ Indeed, for over thirty-five years, consultation reports and charity sector groups in Canada have recommended legislative action to modernize charity law in Canada. Other jurisdictions have also modeled a way forward.

There is much on the substantive law reform agenda for charities. The role of the CRA as a regulator should be reassessed, particularly given the model of the Charity Commissions in other jurisdictions. The question of how much provinces should participate in the regulation of charities also requires study, with provincial statutes adding some regulation of charities that currently supplements federal regulation, and provinces potentially seeking a larger regulatory role.¹⁶⁸ Canada has also seen a recent wave of corporate non-profit law reform both federally and provincially, adding both much-needed modernization and some added regulatory complexity for non-profits with charitable status.

The workability of the new political activity rules will need to be reviewed over time, particularly the issues around a lack of a definition of "public policy dialogue and development activities," and the ability of charities to exclusively engage in such activities.¹⁶⁹ As the rules stand, it seems unlikely that the story of charities and the regulation of their political activities has concluded in Canada – particularly given the possibility of a growing number of charities dedicating their resources to public policy dialogue and development. Canadian taxpayers may not have the fiscal appetite for public funding of a significant number of advocacy charities, particularly if they begin to alter the political and advocacy landscape in Canada.

With the growth of donor-advised funds and increasing concerns about income inequality, the disbursement quota may need to be revisited, including the rules applicable to the growing market of donor-advised funds.¹⁷⁰ The legislative

¹⁶⁷ Patrick Johnston, "Charities, Public Policy and Advocacy – Take #2" (2015) *Philanthropist* 1.

¹⁶⁸ See Adam Aptowitz, "Bringing the Provinces Back In: Creating a Federated Canadian Charities Council" (2009) C.D. Howe Institute Commentary No. 300; Kathryn Chan, "Premier Kenney appears to have tasked the Chair of the Calgary Economics Dvlpt Bd w/ making recommendations on eligibility for charitable status in AB. The federal division of powers over charities may have just becomes a more pressing issue" (5 July 2019 at 22:49), online: *Twitter* <<https://twitter.com/kmchanovic/status/1147382085050609664>> [perma.cc/4UYU-UXGZ].

¹⁶⁹ Canada Revenue Agency, Guidance CG-027, "Public policy dialogue and development activities by charities" (21 January 2019).

¹⁷⁰ Ray D. Madoff, "Written Submission to the Senate Special Committee on the Charitable Sector" (October 26, 2018); Mark Blumberg, "Special Senate Committee on the Charity Sector and Mark Blumberg's testimony November 19, 2018" (24 November 2018), online

framework for charities and non-profits should also consider how to better facilitate social enterprise models and the use of social finance.

Despite a lengthy list of charity law reform tasks, two of the key legislative reforms on the table are far from new. They have been repeated over decades of Canadian charity law reform advocacy. First, Parliament should assign jurisdiction of charity appeals to the Tax Court of Canada, as recommended by Monahan and Roth in 2000, and endorsed by the 2018 Consultation Panel on the Political Activities of Charities. Second, Parliament should legislate an expanded and inclusive definition of charity law, as called for during the last forty years of charity law reform advocacy in Canada, including the 1983 proposal by the National Voluntary Organizations, the 2002 proposal by the Voluntary Sector Initiative, and the 2018 recommendation by the Consultation Panel on the Political Activities of Charities.

Canadian charity law is now at another crossroads. Will this period of charity law reform advocacy conclude once again with law reform patchwork, or will the legislature take up the task of more substantive law reform? For stakeholders in the non-profit and charity sector, the hope is that more substantive charity law reform is finally near.

<https://www.globalphilanthropy.ca/blog/special_senate_committee_on_the_charity_sector_and_mark_blumbers_testimony>.