CANADIAN TAX JOURNAL / REVUE FISCALE CANADIENNE (2017) 65:2, 391-418

Policy Forum: How and Why To Legislate the Charity-Politics Distinction Under the Income Tax Act

Adam Parachin*

PRÉCIS

La common law régit directement les fins mais non les activités des organismes de bienfaisance. Tout compte fait, la méthode « axée sur la fin » d'un organisme de bienfaisance privilégiée par la common law donne étonnamment de bons résultats. Sa force, c'est-à-dire sa flexibilité, peut toutefois représenter un handicap dans les contextes où des normes plus astreignantes sont souhaitables. Les activités politiques des organismes de bienfaisance représentent l'un de ces contextes. Dans cet article, il est expliqué 1) pourquoi les activités politiques des organismes de bienfaisance devraient être régies directement; 2) pourquoi la common law est encore mal adaptée à cette tâche; 3) comment les dispositions actuelles de la Loi de l'impôt sur le revenu — les paragraphes 149.1(6.1) et (6.2) — n'y parviennent pas; et 4) comment mieux régir par la voie législative les activités politiques des organismes de bienfaisance.

ABSTRACT

The common law directly regulates the purposes but not the activities of charities. On balance, the "purpose-focused" methodology of the common law of charity works surprisingly well. However, its strength—flexibility—can be a liability in contexts where more exacting standards are desirable. Political activities of charities represent one of these contexts. This article explains (1) why political activities of charities should be directly regulated, (2) why the common law is ill-suited to this task, (3) how the current provisions of the Income Tax Act—subsections 149.1(6.1) and (6.2)—fall short, and (4) how to better legislatively regulate the political activities of charities.

KEYWORDS: CHARITIES ■ POLITICAL ■ ADVOCACY ■ REGULATIONS ■ ACTIVITY ■ PURPOSE

CONTENTS

* Associate professor, Faculty of Law, Western University (e-mail: aparachi@uwo.ca).

INTRODUCTION

The Liberal government is currently reviewing the rules that restrict political activities of registered charities. This follows from a Liberal Party campaign pledge[1] and Prime Minister Trudeau's ministerial mandate letters to the minister of finance and minister of national revenue.[2] In this article, I recommend a legislative solution under the Income Tax Act[3] to the charity-politics muddle. Specifically, I recommend that subsections 149.1(6.1) and (6.2) be repealed and replaced with a new legislative supplement to the common law of charity, and I set out the specifics of this reform proposal, which include new statutory definitions of "political activity" and "prohibited political activity." The proposal is a response to four questions:

1 See Liberal Party of Canada, *Real Change: A New Plan for a Strong Middle Class* (Ottawa: Liberal Party of Canada, 2015), at 34 (www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf).

2 The campaign pledge was effectively repeated in these ministerial mandate letters (http://pm.gc.ca/eng/ministerial-mandate-letters).

3 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

1. Why regulate the political activities of charities?
2. Why regulate the political activities of charities through legislative provisions in the Act?
3. What is wrong with the current legislative treatment of charities' political activities under subsections 149.1(6.1) and (6.2) of the Act?
4. What new legislative measures should replace subsections 149.1(6.1) and (6.2)?

Admittedly, the reform proposal put forward in this article would not radically change practical outcomes. I conclude that charities should be legislatively permitted to engage in political activities within limits. These limits would include a rule against engaging in prohibited political activities. "Prohibited political activity" would be legislatively defined to mean partisan electoral activities. "Political activity" would be legislatively defined to mean an activity whose direct and principal purpose is to secure or oppose a change on any basis to any law (domestic or foreign) or to the policy or administrative practices of any government (domestic or foreign). This is not significantly different from the Canada Revenue Agency's (CRA's) current administrative practices.[4] So why bother with this reform?

The fundamental problem with the current approach to registered charities' political activities is not that the wrong conclusions are consistently being reached but that the conclusions being reached, even when defensible in principle, cannot be easily reconciled with either the common law or the text of the Act. New legislative provisions distinguishing the political activities that are prohibited to charities from those that are permitted to them (within limits) are necessary for the following reasons. First, if the political activities of charities are to be restricted (as I believe that they should be, for the reasons noted below), it will be necessary to suspend the Act's usual reliance on the common law of charity. This is because, as we shall see, the reasons that the courts have offered for the non-charitableness of political purposes do not explain the non-charitableness of political activities. Also (as I explain below), because the common law directly regulates the purposes but not the activities of charities, the only way to directly regulate the specific activities of charities is via the Act's legislative overrides of the common law. Second, the current provisions of the Act that are relevant in this regard (subsections 149.1(6.1) and (6.2)) fall short in many significant respects. A plain reading of these provisions reveals that they establish a rather modest proposition—namely, that charities will not jeopardize their charitable registration under the Act if they engage in political activities that meet certain criteria. The problem is that these provisions do not define the phrase "political activities," they establish uncertain criteria for "safe" political activities, and they do not address what happens if the criteria of subsections 149.1(6.1) and (6.2) are not met.

4 See Canada Revenue Agency, *Charities Policy Statement* CPS-022, "Political Activities," September 2, 2003.

Before proceeding, I offer the following disclaimer, which some might regard as a heresy. Policy makers inevitably approach the charity-politics topic with a view to rationalizing the government's economic subsidization of charities through tax concessions. From this revenue-oriented perspective, the relevant question to ask is not whether political activity is "charitable" per se but rather the extent to which, if at all, it should be subsidized through the tax concessions enjoyed by charities. However, the reform proposal developed in this article does not rest on such revenue-oriented considerations. This is not to deny the fundamental relevance of tax-subsidy considerations to this area of law. The Act's limits on the political activities of charities ultimately matter because they determine the scope of the activities that are subsidized through tax concessions to charities. But an aspiration to provide economic justification for these tax concessions does not help determine the meaning of "charity" generally and the ideal regulatory regime for the political activities of charities specifically.[5] Such an approach provides no principled conclusions about which political activities should be restricted or even whether political activities should be more restricted than other activities of charities. Therefore, in the balance of this article, I look to the common law of charity (on which tax concessions to charities have long been based) to discover principles relevant to designing a rational, effective, and principled regulatory regime for the political activities of charities.

WHY REGULATE THE POLITICAL ACTIVITIES OF CHARITIES?

General

The law of charity distinguishes between purposes and activities. "Purposes" are the ends being pursued. "Activities" are the means through which those ends are pursued. Since charities must have exclusively charitable purposes, they cannot have political purposes.[6] They are, however, permitted to use political activities to achieve charitable purposes. But the permissibility of political activities is restricted.[7] Before considering how the restrictions on political activities could be improved, one should first consider why restrictions on the political activities of charities are justifiable in the first place.

5 See, for example, Adam Parachin, "The Role of Fiscal Considerations in the Judicial Interpretation of Charity," in Matthew Harding, Ann O'Connell, and Miranda Stewart, eds., *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York: Cambridge University Press, 2014), 113-33.

6 For a digest of the Canadian and foreign authorities, see the appendix to Adam Parachin, "Charity Versus Politics: Law, Policy and Reform" Canadian Bar Association National Charity Law Symposium, May 27, 2016, Toronto.

7 See, for example, subsections 149.1(6.1) and (6.2) of the Act and CPS-022, supra note 4.

Public Benefit and the Activities-Purposes Distinction

A useful starting point is to consider how the phrase "political activity" is currently interpreted. The Act's definition of "political activity" is limited to a specific statement, in subsection 149.1(1), that political activity "includes" the making of a gift to a qualified donee to support the political activity of the qualified donee.[8] The CRA sets out its administrative interpretation of "political activity" in CPS-022.[9] This interpretation appears to be based on the classification of "political purposes" in the leading common-law authority, *McGovern v. Attorney General*.[10] Distinguishing charitable purposes from political purposes, Slade J famously concluded that non-charitable political trusts include trusts of which a "direct and principal purpose" is[11]

1. to further the interests of a particular political party,
2. to procure changes in the laws of this country,[12]
3. to procure changes in the laws of a foreign country,
4. to procure a reversal of government policy or of particular decisions of governmental authorities in this country, or
5. to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

Corresponding with the first category in the *McGovern* classification of political purposes is the CRA's definition of "prohibited political activity" as supporting or opposing a political party or candidate for public office.[13] Corresponding with the balance of the *McGovern* classification is the CRA's definition of "political activity" as involving efforts to secure a change to the law, public policy, or administrative practices of a domestic or foreign government.[14]

Given that the understanding of political activities is based on the *McGovern* categories of political purposes, it might be assumed that the explanation for the non-charitableness of political purposes simply carries over to the context of political

8 See the definition of "political activity" in subsection 149.1(1).

9 See sections 6.1 and 6.2 of CPS-022, supra note 4.

10 *McGovern v. Attorney General*, [1982] Ch. 321 (CA).

11 Ibid., at 340.

12 On its face, this formulation implies that it might not be political to oppose changes to the law. Other cases have clarified, however, that it is political either to seek or to oppose proposed changes to the law. See, for example, *Re Koeppler's Trusts*, [1984] Ch. 243, at 260; and *Re Hopkinson*, [1949] 1 All ER 346, at 350.

13 See CPS-022, supra note 4, at section 6.1. This understanding of prohibited political activity also corresponds with subsections 149.1(6.1) and (6.2). However, as we shall see below (under the heading " 'Safe Harbour' or 'Complete Code'?"), it is not obvious that subsections 149.1(6.1) and (6.2) actually prohibit anything.

14 Ibid., at section 6.2.

activities—that we can rely on the rationale for the non-charitableness of political *purposes* to explain the need for restrictions on political *activities*. This is true in at least one sense. Since a charity's activities can indicate its purposes,[15] a charity that is primarily engaged in political activities might be thought to be operating for political purposes. Restricting political activities can therefore be understood as one method of prohibiting political purposes. To the extent that this is true, the reasons for prohibiting political purposes do indeed help to explain the need for restrictions on political activities. Prohibiting political purposes and restricting political activities are simply two sides of the same coin.

However, concerns about political activities being transformed into political purposes do not fully explain the disconnection between political activities and charitable purposes. Once we are assured that an institution has exclusively charitable purposes, what is the basis for concerns about *those* purposes being pursued through political activities? Explaining the discordance between political activities and charitable purposes is difficult because courts have justified the non-charitableness of political purposes by means of reasoning that cannot readily be transplanted to the analysis of political activities.[16] To the contrary, the reasoning that precludes the charitableness of political purposes is unique to the analysis of purposes and thus establishes very little about the justifiability of restrictions on political activities.

The primary reason for this state of affairs is the judicial authorities' remarkable lack of concern about distinguishing between charitable and political purposes on the basis of the disparate substantive characteristics of "charity" and "politics."[17] In fairness, it is true that Slade J described the first category of trusts with political purposes—trusts intended to further the interests of a political party—as "plainly 'political trusts.'"[18] Although he did not elaborate on what he meant by this, the implication of his words is that party politicking is by its very nature (or substance) political. By extension, party politicking can be considered political regardless of whether it is pursued as a purpose or as an activity. However, the balance of the *McGovern* account of non-charitable political trusts—trusts involving purposes to reform the law, policy, or administrative practices of a domestic or foreign government—uses the term "political" not as a label for purposes that are specifically found to be political in substance but rather to describe purposes that cannot be

15 See below, under the heading "Why Legislatively Regulate the Political Activities of Charities?"

16 See, for example, Joyce Chia, Matthew Harding, and Ann O'Connell, "Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation" (2011) 35:2 *Melbourne University Law Review* 353-93; Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 *Alberta Law Review* 871-900; and Adam Parachin, "Charity, Politics and Neutrality" (2015-2016) 18 *Charity Law & Practice Review* 23-56.

17 For a detailed explanation of this point, see Parachin "Charity, Politics and Neutrality," supra note 16, at 25-34.

18 *McGovern*, supra note 10, at 507.

found, so the reasoning goes, either to possess or to lack the substantive character of charitable purposes.[19]

In other words, the label "political" is primarily used in the *McGovern* typology of political purposes to describe purposes in relation to which there exists an impediment to courts' determining, one way or the other, whether the prerequisites for charitable status are met. Thus, it is more that charitable status is withheld from institutions with political purposes than that the charitableness of these institutions is specifically denied. The ultimate outcome is the same—charitable status is not granted—but the reasoning is different. To use a scholastic metaphor, institutions with political purposes are assigned neither a passing nor a failing grade; they are given an "incomplete" due to the deliberate failure of courts to conclude whether the prerequisites for charitable status are or are not met.

Charity law's concept of public benefit is central to this reasoning. No purpose can qualify as a charitable purpose at common law unless it meets a "public benefit" requirement. The problem with purposes necessitating reform to the law, policy, or administrative practices of a domestic or foreign government is the following: courts have concluded that they should maintain a neutral stance on whether these purposes pass or fail the public benefit requirement. The shallow reasons given by the courts for the necessity of this stance have been explained and critically evaluated elsewhere.[20] But the persuasiveness (or lack thereof) of these reasons is not our present concern. For our purposes, what matters is that these reasons are centred on the public benefit requirement to which charitable purposes must conform.

Notably, the law of charity looks for public benefit in purposes but not in activities. The requirements for activities are comparatively modest. To be deemed charitable, activities must merely be in furtherance of charitable purposes.[21] The analytical exercise in the context of activities is therefore not directly concerned with public benefit but rather with confirming that there exists the requisite link between means (activities) and charitable ends (purposes). Public benefit factors into the analysis only inasmuch as the ends being pursued through the activities of charities must possess public benefit. And so the logic of the *McGovern* classification of political purposes—namely, that courts ought to remain neutral on the public benefit (or lack thereof) of purposes—only goes so far in explaining the need for restrictions on political activities. Once we are assured that the purposes being pursued through any given activity are charitable, we are necessarily assured that public benefit is present. So if there is a case for restricting political activities, it cannot be derived from the concern that political purposes mandate a neutral stance on public benefit. The case for restricting political activities must instead rest on the conclusion that the link between political activities and charitable purposes is problematic.

19 For a detailed explanation of this point, see Parachin, "Charity, Politics and Neutrality," supra note 16, at 26-34.

20 Supra note 16.

21 See below, under the heading "Why Legislatively Regulate the Political Activities of Charities?"

Problematic Link Between Political Activities and Charitable Purposes

Courts have not had much to say about the link between political activities and charitable purposes. Nonetheless, there are reasons to be wary of whether the requisite link between the two exists. Activities directed at reforming law, public policy, or the administrative practices of government have something in common: they involve calling on government to start doing something it is not currently doing or to change (or discontinue) what it is currently doing. Charities that engage in these sorts of activities, inasmuch as they seek to attain charitable purposes by changing the behaviour of government with respect to law, public policy, or administration, tend to draw on government as the means to charitable ends. That is, these charities tend to pursue charitable purposes *through government*. The question to ask about such activities is whether charitableness is vitiated when charity and government become so entangled. I have suggested elsewhere that this can indeed be the case.[22]

The gist of this perspective is that government and charity, though they sometimes pursue similar goals, are distinct from each other. Charity is a private (in the sense of non-governmental), voluntary institution. Viewed in this light, charity is not simply concerned with attaining ends that qualify as charitable. It is concerned with attaining those ends in a particular way—through voluntary action, and outside of government. The scholarly literature supports the notion of the distinctness of charity and government. This notion is consistent with the idea that the voluntary nature of charity makes charity distinct from government, whose nature is coercive,[23] and it is consistent with the contention that voluntarism, as in private autonomous choice, makes charity distinct from government.[24] It also draws on the conceptualization of the charitable sector as a separate sovereign.[25] The distinctness of charity and government also helps to explain why trusts established for the purpose of carrying out governmental policy have not been recognized as charitable.[26] In addition, it explains the policy position of the Charity Commission of England

22 Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?" (2016) 91:3 *Chicago-Kent Law Review* 1047-78; and Adam Parachin, "Legal Restrictions on Advocacy by Charities: Sound Regulation or Artificial Constraint?" in Nick Mulé and Gloria DeSantis, eds., *The Shifting Terrain: Nonprofit Sector Public Policy Advocacy in Canada* (Montreal: McGill University Press, forthcoming).

23 Darryn Jensen, "Charitable Purposes and Political Purposes (or Voluntarism and Coercion)" (2015) 18:3 *Charity Law & Practice Review* 57-78.

24 Matthew Harding, "Distinguishing Government from Charity in Australian Law" (2009) 31:4 *Sydney Law Review* 559-78.

25 Evelyn Brody, "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption" (1998) 23:4 *Journal of Corporation Law* 585-629.

26 Harding, supra note 24, at 561-63.

and Wales—namely, that charitable trusts must be independent of government.[27] In the view of the Charity Commission, if the purpose of a trust is ultimately to implement the policies of government, or if the trust operates in such a way that it merely carries out the directions of government, it does not qualify as charitable.

The Charity Commission's position is particularly instructive. It supports the idea that governments cannot "do government" through charities. The charity-politics distinction can be understood as simply applying this principle in reverse. When we say that activities directed at reforming law, public policy, or the administrative practices of government are "political activities," we can explain this as follows: just as governments cannot "do government" through charities, charities cannot "do charity" through governments. Since government and charity are separate and distinct, government cannot be the means to achieve charitable ends any more than charity can be the means to achieve governmental ends. Therefore, the doctrine of political purposes is perhaps misnamed; it is arguably less concerned with the non-charitableness of politics than with the non-charitableness of government.

Admittedly, not all advocated reforms to law, public policy, and administration are equally vulnerable to the objection that charitable purposes are being pursued through government. This concern is greatest when a charity advocates (for example) that new or enhanced government interventions would further its charitable purposes. But what if a charity advocates in favour of deregulation? Here, the charity is not trying to achieve its charitable mission through government. To the contrary, such advocacy for deregulation may be animated by the conviction that certain goals are best pursued not by government but rather by charities, outside of government.

But all reform activities, whether directed at regulation or deregulation, ultimately share a direct and immediate focus—not charity per se but rather the proper role and function of government. This is one of the reasons why the nature of the reform sought—regulation or deregulation—is not a controlling consideration. What we can say of advocacy for reform to law, public policy, or the administrative practices of government is not that charitable purposes are being furthered but rather that governmental responses that may facilitate charitable purposes are being sought.

But if charity and government are so distinct, why merely restrict the political activity of charities as opposed to categorically prohibiting it? Political activity should not be categorically prohibited to charities, if only because the distinction between charity and government is not categorical. Charity and government—although distinct in many relevant ways—are also intertwined. One might say that the interconnectedness of charity and government is increasingly apparent. It is shown by, among other things, the overlap between the welfare state and certain charitable purposes, especially those relating to poverty, health, and education; by

27 Charity Commission for England and Wales, *Independence of Charities from the State*, Reviews of the Charity Register Policy, Paper RR7 (London: Charity Commission, October 1, 2009) (www.gov.uk/government/uploads/system/uploads/attachment_data/file/358888/rr7text.pdf).

the tendency for governments to rely on charities as contract service providers; and by the government's promotion and subsidization of charitable purposes through tax concessions and through many other legal advantages conferred on charities. Permitting charities to perform political activities (subject to restrictions) can be rationalized as a concession of sorts to this overlapping of charity and government.

In addition, although a charity's engagement in political activities compromises the distinctness of charity and government, these activities can be reconciled with a liberal understanding of charitable mission. At the risk of resorting to platitude, one might note that charities ultimately exist "to do good."[28] Political activities represent one limited way for charities to increase social welfare. Charities are uniquely suited to constructive participation in the process of law and policy reform. Owing to their frontline experience and grassroots connections, charities frequently have valuable insights into the unique and varying needs of the constituencies served by government programming. This combination of field experience, specialized knowledge, and closeness to the community gives charities the potential to comment meaningfully on the effectiveness of government programming or on the need for new programming. Allowing charities to engage in political activities within limits is a way to harness this potential without sacrificing altogether the distinctness of charity and government.

WHY LEGISLATIVELY REGULATE THE POLITICAL ACTIVITIES OF CHARITIES?

General

Once it is resolved that charities' involvement in political activities should be regulated, the issue becomes how this should be done. Should restrictions on political activity be (1) expressed legislatively or (2) elaborated by the common law? The ideal way to regulate the political activity of charities is through a supplement to the common law, in the form of a properly drawn-up Act provision.

This conclusion may be controversial because the distinction between charity and politics is ultimately concerned with a topic (the meaning of "charity") that the Act does not legislatively address.[29] It is well known that in the absence of a legislative definition, the meaning of "charity" for income tax purposes has long corresponded with its common-law meaning.[30] Therefore, to be eligible for charitable

28 In its ground-breaking study of the law of charity, the Ontario Law Reform Commission based many of its conclusions on the foundational insight that charity means "doing good for others." See Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997), at chapter 6.

29 See the definition of "registered charity" in subsection 248(1) and the definitions of "charitable foundation" and "charitable organization" in subsection 149.1(1). These definitions use the word "charitable" without defining what it means.

30 See, for example, *Vancouver Society of Immigrant and Visible Minority Women v. MNR*, [1999] 1 SCR 10, at paragraphs 28 and 143.

registration under the Act, an institution must be established for one or more of (and only one or more of) the purposes that are recognized as charitable at common law: the relief of poverty, the advancement of education, the advancement of religion, and other purposes of public benefit.[31]

On balance, the common-law meaning of "charity," though it has attracted sustained criticism, works rather well, including for the purposes of the Act. But the charity-politics topic exposes a characteristic of the common law that is simultaneously a strength and a weakness—namely, its failure to directly regulate the activities of charities. Understanding the common law's approach to regulating these activities is the key to understanding why we need (1) specifically, a legislative solution under the Act to the charity-politics conundrum; and (2) more generally, legislative supplements to the common law.

The Common Law and the Activities of Charities

The common law regulates the purposes of charities but not their activities, at least not directly. To be sure, although charities must at common law be established and operated for exclusively charitable purposes[32] (and thus cannot have political purposes),[33] there is no analogous common-law requirement regarding charities' activities. The common law does not simply ignore the activities of charities. However, to the extent that it regulates these activities, it does so indirectly (and, arguably, somewhat imprecisely), through enforcement of the common-law requirement for exclusively charitable purposes. Since charities must have exclusively charitable purposes, the activities of charities must reflect the means of achieving charitable purposes rather than non-charitable ones (political or otherwise).

Under this approach, regulatory objections to particular activities carried on by charities must be articulated with reference to purposes. These objections can take two forms. A given activity being carried on by a charity is impermissible at common law (1) because it lacks the requisite connection to charitable purposes or (2) because it is not a means to charitable ends but a non-charitable end (or purpose) in itself.

The analysis is slightly more nuanced in the context of income tax because the Act divides registered charities into two categories, "charitable organizations" and "charitable foundations."[34] Following the conventional logic of the common law, the Act specifies that charitable foundations must be established and operated for exclusively charitable *purposes*.[35] However, it specifies that charitable organizations

31 The "four heads" of charity, as they are known, derive from *Special Commissioners of Income Tax v. Pemsel*, [1891] UKHL 1. The *Pemsel* categories of charitable purposes were expressly adopted by the Supreme Court of Canada in *Guaranty Trust Company of Canada v. Minister of National Revenue*, [1967] SCR 133, at 141.

32 See, for example, *Vancouver Society*, supra note 30, at paragraphs 38-40 and 154-155.

33 Parachin, supra note 6.

34 See the definition of "registered charity" in subsection 248(1).

35 See the definition of "charitable foundation" in subsection 149.1(1).

must be established and operated for exclusively charitable *activities*.[36] The implication is that the activities of charitable organizations are regulated under the Act in a way that charitable foundations' activities are not.

The distinction between charitable purposes and charitable activities has been misdescribed as something "fundamental in the [Income Tax Act] legislative scheme."[37] Properly understood, the requirements for charitable foundations and charitable organizations are functionally alike. That is, the requirement that charitable foundations have exclusively charitable purposes and the requirement that charitable organizations engage exclusively in charitable activities reflect a common concern.

Because the Act does not define "charitable purposes" and "charitable activities," the common law informs the meanings of both phrases. It is important that the common law characterizes activities on the basis of the purposes that they are carried on to achieve.[38] Under the logic of the common law, a charitable activity is therefore an activity carried on to achieve a charitable purpose.[39] Thus, to specify that a charitable foundation must have exclusively charitable purposes is essentially to require that the foundation's activities be carried on to achieve charitable purposes. If a foundation carried on a non-charitable activity—an activity understood, at common law, as one that is carried on to achieve a non-charitable purpose—the foundation would not meet the requirement for exclusively charitable purposes. Likewise, to specify that a charitable organization must have exclusively charitable activities is in essence to require the very same thing—namely, that none of the organization's activities be carried on for non-charitable purposes.[40] The definitions of "charitable organization" and "charitable foundation" are ultimately different ways of requiring the same thing.

Thus, the definitions of "charitable organization" and "charitable foundation" are both unavoidably concerned with purposes.[41] To determine whether a charitable foundation meets the requirement of serving exclusively charitable purposes, one examines the purposes being pursued through the foundation's activities. To determine whether a charitable organization meets the requirement of being engaged in

36 See the definition of "charitable organization" in subsection 149.1(1).

37 *Toronto Volgograd Committee v. MNR*, [1988] 3 FC 251, at 257.

38 See, for example, *Vancouver Society*, supra note 30, at paragraphs 53, 54, 56, 58, 152, and 154. See also Maurice C. Cullity, "The Myth of Charitable Activities" (1990) 10:1 *Estates and Trusts Journal* 7-29.

39 Ibid.

40 Ibid.

41 The majority and the dissenting judgments in *Vancouver Society* concurred that a determination of whether an organization is eligible for the status of "registered charity" (as either a "charitable foundation" or a "charitable organization") requires that consideration be given first to purposes and then to whether the activities engaged in are sufficiently related to those purposes. Supra note 30, at paragraphs 55, 56, and 159.

exclusively charitable activities, one does the very same thing—examines the purposes being pursued through the organization's activities.[42]

On balance, this "purpose-focused" methodology works surprisingly well. It constrains the purposes that charities may pursue while giving them enormous flexibility in the range of activities through which to pursue these purposes. It is well suited to encouraging a dynamic and pluralistic charitable sector. However, this methodology has weaknesses, and these weaknesses are fully exposed in the context of activities (like political activities, for example) that are laden with policy sensitivities. Here, the flexibility of the common law might be seen as a liability in need of cure. Three objections to the common law's failure to directly regulate the activities of charities can be raised.

The first objection is that the common-law methodology is too inexact. An activity must be connected to charitable purposes in order to qualify as charitable, but the precise nature of the requisite connection is a matter of some uncertainty.[43] Similarly, there is no universal agreement on the precise point at which an activity ceases to be the means to fulfilling charitable purposes and becomes a non-charitable purpose in itself.[44] As a result, registered charities, the CRA, and the courts lack a definite common-law standard for delimiting the scope of permissible political activities for registered charities. In the ordinary course, this uncertainty is not fatal to the Act's reliance on the common law. But it becomes problematic in the context of sensitive matters, such as political activities, where greater precision may be desired.

The second objection is that the common law supplies too accommodating a standard. From this perspective, the common law's ability to tolerate occasional non-charitable activities in a charitable organization, at least those activities that stop short of non-charitable political purposes, is sometimes excessive. For example, the common law does not directly regulate one-time or limited-term advocacy activities. Legislative intervention might be thought necessary to prohibit registered charities outright from engaging in certain one-time or limited-term activities (for example, partisan participation in election campaigns) that might otherwise go unregulated by the common law.

---

42 In *Vancouver Society*, supra note 30, Iacobucci J observed at paragraph 154, with reference to charitable organizations, that "*exclusively* charitable activities would be those that directly further charitable purposes and not other, non-charitable, purposes" (emphasis in original). Elaborating on this, Gonthier J observed at paragraph 53 that "[i]n determining whether an organization should be registered as a charitable organization, we must, as my colleague Iacobucci J. indicates, look not only to the purposes for which it was originally instituted, but also to what the organization actually does, that is, its activities. *But we must begin by examining the organization's purposes, and only then consider whether its activities are sufficiently related to those purposes*" (emphasis added). See also paragraph 60.

43 See, for example, *Vancouver Society*, supra note 30, at paragraphs 62 and 154.

44 Ibid., at paragraphs 40 and 60.

The third objection is that the common law is too blunt an instrument to categorize, much less effectively regulate, activities, such as political activities, with a potentially dual character. The common law's method of categorizing activities as charitable or non-charitable on the basis of the purposes being pursued through them results in blunt binary categories. Activities are either in furtherance of charitable purposes (and thus permissible) or in furtherance of non-charitable purposes (and thus impermissible). In the ordinary course, this simple taxonomy is adequate. However, it is not well suited to recognizing that certain activities should be permitted but subject to restrictions.

An activity may, for example, serve a mixture of charitable and non-charitable (for example, political) purposes. The all-or-nothing orientation of the common law whereby activities are either charitable (and thus permissible) or non-charitable (and thus impermissible) does a poor job of recognizing the potentially dual character of this kind of activity. Also, what if Parliament wants to regulate certain activities of charities not on the basis of the usual instrumental (or purpose-focused) assessment of the ends being pursued but, instead (or also), on the basis of an assessment of the intrinsic nature of the activities? An activity might, for example, be carried on to achieve a charitable purpose but nonetheless be of a political nature because it situates the charity in the realm of politics. Given that the common law characterizes activities not in the abstract but with reference to purposes, the best way both to allow and to restrict this kind of activity is via legislative intervention.

In some contexts, then, the common law's purpose-focused approach to regulating the activities of charities appears not to be a strength but a liability that needs to be remedied through strategic legislative supplements to the common law of charity. This is the case where (1) the common law's characteristic shades of grey are viewed as a regulatory enforcement and compliance liability, (2) the common law's fixation on purposes is determined to be too accommodating of episodic activities that stop short of revealing non-charitable purposes, and (3) the common law's blunt approach to characterizing activities as charitable or non-charitable stands in the way of a regulatory response that appropriately reflects the potentially dual character of certain activities, such as political activities. Lately, the heightened sensitivities over the political activities of charities have called attention to the need for greater clarity in this area. Also, certain political activities (for example, partisan party politicking) should, it is generally agreed, be prohibited notwithstanding that they may not, strictly speaking, fail the common law's requirement that charities have exclusively charitable purposes. Finally, political activity qualifies as an activity with a potentially dual character—a type of activity that the common law is ill-equipped to regulate. Viewed instrumentally (that is, in terms of their purposes), political activities could be said to be charitable in that they can serve charitable ends. But they also have a political nature which is shown by, among other things, their connection to the domain of politics.

WHAT IS WRONG WITH THE CURRENT LEGISLATIVE TREATMENT OF POLITICAL ACTIVITIES UNDER SUBSECTIONS 149.1(6.1) AND (6.2)?

Current Legislative Treatment

General

The Act regulates the political activities of charities through subsections 149.1(6.1) and (6.2). For ease of reference, the first of these subsections is reproduced here.[45]

> **149.1(6.1) Charitable purposes**—For the purposes of the definition "charitable foundation" in subsection (1), where a corporation or trust devotes substantially all of its resources to charitable purposes and
>
> (a) it devotes part of its resources to political activities,
>
> (b) those political activities are ancillary and incidental to its charitable purposes, and
>
> (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,
>
> the corporation or trust shall be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.

These two provisions, adopted in 1985, were meant to codify a simple idea, which is that politics can sometimes be the means to charitable ends. With that aim, subsections 149.1(6.1) and (6.2) specify that a registered charity will not jeopardize its charitable registration if it devotes resources to political activities (left undefined) provided that three criteria are met: the "substantially all" criterion, the "ancillary and incidental" criterion, and the "partisan politics" criterion.

The "Substantially All" Criterion

The first criterion is satisfied if, notwithstanding the devotion of resources to political activities, "substantially all" resources remain "devoted" to charitable purposes (in the case of charitable foundations)[46] or (in the case of charitable organizations) to charitable activities.[47]

"Substantially all" is a familiar tax concept. In subsections 149.1(6.1) and (6.2), this phrase is evidently meant to guard against the expansion of an organization's mission beyond its original goals (sometimes known as "mission creep"). It is a useful and flexible way of specifying that political engagement will not vitiate charitable status if it is a supplement to (rather than substitute for) a charity's programming.

---

45 Subsection 149.1(6.2) is a parallel provision specific to charitable organizations. The primary difference is that it substitutes the references to "charitable purposes" in subsection 149.1(6.1) with references to "charitable activities."

46 Subsection 149.1(6.1).

47 Subsection 149.1(6.2).

The "Ancillary and Incidental" Criterion

The second criterion is satisfied if political activities are "ancillary and incidental" to charitable purposes (in the case of charitable foundations)[48] and charitable activities (in the case of charitable organizations).[49]

The "ancillary and incidental" criterion was apparently meant to capture the idea that political activity must be a means to charitable ends. This intention was clearly revealed in a speech by Minister of National Revenue Perrin Beatty in 1985, which described this requirement as follows:

> Political activities undertaken by a registered charity must be ancillary and incidental to one or more of its charitable purposes. *This means that it must be clear that they are in furtherance of a charitable purpose and that they are conducted only to an extent that is subordinate and supplementary to direct charitable activities.* This test will not be met if legislative reform is the only means by which the objects of an organization can be achieved, or where its political activities are no longer ancillary but grow to the point where they become dominant purposes in themselves. (Emphasis added.)[50]

Likewise, this understanding of "ancillary and incidental" is reflected in Department of Finance Technical Notes, dated November 1985, which state (in part) that

> [t]hese amendments [subsections 149.1(6.1) and (6.2)] recognise that it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities *in support of its charitable goals*. (Emphasis added.)[51]

The "Partisan Politics" Criterion

The third criterion is satisfied if the charity's political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office. The historical source materials reveal that subsections 149.1(6.1) and (6.2) were specifically intended to prohibit charities from pursuing their charitable missions through party politicking and electioneering. Perrin Beatty's 1985 speech noted that "partisan support of candidates and political parties . . . will not be allowed."[52] The technical notes cited above likewise specified that "purely partisan activities such as supporting or opposing a political party or candidate will not be permitted."[53]

---

48 Subsection 149.1(6.1).

49 Subsection 149.1(6.2).

50 Perrin Beatty, Minister of National Revenue, "Background Statement Regarding Political Activities of Charitable Organizations," May 29, 1985 (emphasis added).

51 Canada, Department of Finance, *Technical Notes to a Bill Amending the Income Tax Act and Related Statutes* (Ottawa: Department of Finance, November 1985), at subclause 85(2) (emphasis added).

52 Supra note 50.

53 Supra note 51.

Critically Evaluating Subsections 149.1(6.1) and (6.2)

Though subsections 149.1(6.1) and (6.2) deal with a simple idea (that charities can, within limits, achieve charitable ends through political means), they were poorly drafted. I now turn to the problems, all of them eminently correctable, that have plagued these provisions.

"Safe Harbour" or "Complete Code"?

Confusion exists in relation to the most basic of issues—namely, the consequences of non-compliance with subsections 149.1(6.1) and (6.2). What happens, for example, if a charity lends partisan support to a particular candidate for public office and thereby fails to meet the criteria of these provisions? The answer turns on whether subsections 149.1(6.1) and (6.2) establish a "safe harbour" or a "complete code." Under the safe-harbour interpretation, advocacy that meets the criteria of subsections 149.1(1) and (6.2) is legislatively deemed to be charitable and thus within a statutory safe harbour. According to this interpretation, all that happens if the criteria of subsections 149.1(6.1) and (6.2) are not met is that the protection of the legislative safe harbour is lost. Here, it becomes necessary to apply common-law principles in order to assess the charitableness of political activity. Under the complete-code interpretation, charities are only permitted to engage in political activities that satisfy the criteria of subsections 149.1(6.1) and (6.2). All other political activity is prohibited. The complete-code interpretation is adopted by the CRA in CPS-022.[54] This interpretation is consistent with the above-mentioned legislative intention to prohibit partisan politics. However, the safe-harbour interpretation is the only interpretation consistent with the text of subsections 149.1(6.1) and (6.2). These provisions merely state that if the enumerated criteria are satisfied, a politically engaged charity shall be considered to be constituted and operated for charitable purposes and activities, respectively. Neither provision states that a politically engaged charity will be so considered *only if* the statutory criteria are met. Further, neither provision expressly provides that the logic works in reverse—that is, that a politically engaged charity *not* in compliance with subsections 149.1(6.1) and (6.2) shall be considered *not* to be constituted and operated for, respectively, charitable purposes and charitable activities.

However, the complete-code interpretation was bolstered by the addition of paragraphs 188.2(2)(e) and (f) further to the 2012 budget. These provisions provide that a charitable foundation or charitable organization may have its gift-receipting privileges suspended for one year if it engages in political activities that do not meet the criteria of subsections 149.1(6.1) and (6.2). The penalty for non-compliance with subsections 149.1(6.1) and (6.2) rebuts the safe-harbour interpretation: if subsections 149.1(6.1) and (6.2) merely provide a safe harbour, a failure to meet the

54 See section 6.1 of CPS-022, supra note 4. Presumably on the basis of paragraphs 149.1(6.1)(c) and (6.2)(c), the CRA takes the position that partisan electioneering is a categorically prohibited activity. This reflects a complete-code interpretation.

criteria of these provisions would merely deny a charity the benefit of the safe harbour rather than attract a penalty. Nonetheless, the correct interpretation of subsections 149.1(6.1) and (6.2)—whether safe-harbour or complete-code—remains a matter of controversy: the complete-code interpretation is impossible to reconcile with the actual text of subsections 149.1(6.1) and (6.2).

Failure to Define "Political Activity"

The least satisfactory aspect of subsections 149.1(6.1) and (6.2) is that they both use the phrase "political activities" without defining what it means. It was perhaps assumed that the common law could inform the meaning of "political activities" just as it informs the meaning of "charitable purposes" and "charitable activities" under the Act. But the absence of a statutory definition has caused considerable confusion.

Subsections 149.1(6.1) and (6.2) do not and cannot work effectively without a legislative definition of "political activities." As discussed above, the very reason why a legislative provision addressing political activities is attractive in the first place is that the common law directly regulates purposes but not activities. That is, subsections 149.1(6.1) and (6.2) fill a gap left by the common law in relation to the regulation of activities. It is peculiar, then, that these provisions draw on the common law in their attempt to fill a void left by the common law. If the common law had a classification of political activities to draw on, subsections 149.1(6.1) and (6.2) might have been unnecessary to begin with.

The drafters were perhaps content that the *McGovern* common-law classification of political purposes supplied a reference point for interpreting political activities. There is a natural appeal to this approach. Recall that the common law characterizes activities on the basis of the purposes being pursued. It follows that a definition of "political activities" can be deduced from the common-law classification of political purposes. Just as a "charitable activity" is an activity carried on to achieve a charitable purpose, a "political activity" is an activity carried on to achieve a political purpose. This means that political activities, in keeping with the *McGovern* classification of political purposes, consist of electioneering and seeking changes to law, policy, or the administrative practices of domestic or foreign governments. Notably, this is essentially the approach to interpreting political activities taken by the CRA in CPS-022.[55]

There are, however, some significant problems with this approach. Under the logic of the common law, a political activity—because it is by definition an activity carried on to achieve a political purpose—cannot exist independently of a political purpose. It follows that subsections 149.1(6.1) and (6.2), by allowing for political activities, must allow (within limits) for charities to have political purposes.

But this contradicts the stated intention (discussed above) of subsections 149.1(6.1) and (6.2), which is merely to recognize legislatively that political means can be used to achieve charitable purposes. The problem is that this legislative

55 See section 6.2 of CPS-022, supra note 4.

intention is inconsistent with the common law's instrumental approach—its characterizing of activities on the basis of the purposes being pursued. The idea that political activities can be used to achieve charitable purposes necessitates that the adjective "political" in the phrase "political activities" be interpreted not as a descriptor of the ends being pursued but rather as a descriptor of the intrinsic nature of the activities. A legislative definition of "political activities" is the ideal (perhaps the only) way to implement this understanding of political activities.

There is also the problem of contradictory logic in subsections 149.1(6.1) and (6.2). To qualify as a political activity in a way that is consistent with common-law logic, an activity must be carried on for a political purpose. But, as we shall see, to meet the "ancillary and incidental" criterion, that same activity must be a means to charitable ends—that is, a charitable activity. This opposing logic confusingly restricts the application of subsections 149.1(6.1) and (6.2) to situations in which an activity is simultaneously political *and* charitable. It is no wonder that this causes confusion. Since the common law treats charitable and political purposes as mutually exclusive categories, it is not clear how an activity could be both charitable and political under common-law logic. This would require that the activity be undertaken to achieve purposes regarded by the common law as incompatible. Again, a statutory definition of "political activities" would resolve the matter.

"Ancillary and Incidental" Criterion

As indicated above, the "ancillary and incidental" criterion was meant to reflect the uncontroversial idea that political activities do not vitiate charitable registration provided that they are the means to charitable ends. In principle, this criterion is defensible in the light of the requirement that registered charities be established and operated for exclusively charitable purposes. Given this requirement, political activities are only benign when they are carried on to achieve charitable purposes and not when they are either the means to non-charitable purposes or are non-charitable political purposes in their own right.

Nonetheless, it is not clear that the "ancillary and incidental" criterion should necessarily be included in subsections 149.1(6.1) and (6.2), at least not in the absence of a statutory definition of "political activities." As currently drafted, these provisions draw on opposing statutory and common-law logic. To qualify as a political activity in a way that is consistent with common-law logic, an activity must be carried on to achieve a political purpose. But the intention behind the ancillary and incidental criterion in paragraph 149.1(6.1)(b) was to require that that same activity be carried on to achieve a charitable purpose. This confusingly restricts the application of subsection 149.1(6.1) to situations in which an activity is simultaneously political *and* charitable.

The interpretive problems are even more pronounced when we consider the requirement of paragraph 149.1(6.2)(b) that the political activity of a charitable organization be ancillary and incidental—again in the sense of being a means to ends—to a charitable *activity*. Taken literally, this would require that a political activity be the means to a charitable activity. How is this possible? An activity can

only ever be a means to an end. An activity cannot be a means to an activity (or a means to a means). Again, it is no wonder that this drafting has caused confusion.

"Substantially All" Criterion

The "substantially all" criterion in subsections 149.1(6.1) and (6.2) involves a familiar tax concept. Its advantages are that it is a practical and flexible way of guarding against mission creep for politically engaged charities. Political mission creep is effectively thwarted if "substantially all" of a charity's resources are applied to apolitical charitable purposes and activities. The problems with the "substantially all" criterion stem less from the criterion itself than from the CRA's administrative interpretation of it.

Regarding subsections 149.1(6.1) and (6.2), the CRA interprets "substantially all" to mean 90 percent or more of a charity's resources.[56] For charities with modest resources, the CRA adjusts this percentage minimally downward, with a corresponding increase in the percentage of resources that may be applied to political activities.[57] But there are some significant problems with this approach.

There is ample case law calling into question whether "substantially all" should be so wedded to a 90 percent threshold.[58] In non-charity contexts, courts have emphasized the importance of context to the interpretation of "substantially all." In many instances, "substantially all" has been held to mean something less than 90 percent or more.[59] The CRA's administration of the "substantially all" criterion in the context of charities would be improved by being more flexible in its quantitative understanding of "substantially all."

Better yet, the "substantially all" criterion should not be approached as a strict quantitative test; instead, as courts in other contexts have advocated, it should incorporate a qualitative component.[60] A strictly quantitative approach to "substantially all" fails to take adequate account of relevant contextual factors unique to the charity context. For example, unlike non-charities, charities have the luxury of attracting volunteers. For the purposes of the "substantially all" calculation, according to the CRA, volunteers are "resources."[61] Demonstrating compliance with a strictly quantitative understanding of "substantially all" (as meaning 90 percent or

56 See, for example, Canada Revenue Agency, *Charities Summary Policy Statement* CPS-016, "Distinction Between Self-Help and Members' Groups," September 7, 2000 and CPS-022, supra note 4, at section 9.

57 See section 9 of CPS-022, supra note 4.

58 See, for example, Alicia Grant, *Political Activities and the Meaning of "Substantially All"— An Analysis for Registered Charities*, Policy Brief (Edmonton: Pemsel Case Foundation, 2015) (www.pemselfoundation.org/papers/political-activities-and-the-meaning-of-substantially-all-an-analysis-for-registered-charities/).

59 Ibid.

60 Ibid.

61 CPS-022, supra note 4, at section 9.

more) requires the monetizing of volunteer hours. But it is, of course, not at all clear how to monetize volunteer services for the purposes of this calculation.

The inadequacy of a strictly quantitative understanding of "substantially all" is shown in many other ways. For example, charities are unique in the sense that many of them hold property in perpetual charitable-purpose trusts whose annual income alone may be expended. If it is assumed that endowed capital qualifies as a "resource," a bluntly quantitative approach to "substantially all" would presumably require that allowable expenditures on political activities be calculated with reference not merely to the annual income available for expenditure but to the endowed capital as well. This could enable a charity to expend 100 percent of its annual income—the entirety of what it is lawfully permitted to expend in any given year—on political activities but nonetheless to claim that it did not exceed its allowable expenditure on political activities.

A simple solution would be to calculate the 90 percent threshold according to that portion of a charity's resources that are capable of being expended in any given year. In the case of a perpetual endowment, this would mean that the 90 percent threshold would be calculated only in relation to the annual income. But even this approach would not answer all of the relevant questions. What if a charity holds property in a perpetual endowment but has the discretion to encroach upon the capital? Would the 90 percent threshold be applied in any given year against the income alone, the entire capital base, or the income plus that portion, if any, of the capital encroached upon in that year?

These issues, among others, reveal the inadequacy of a strict quantitative test as opposed to a qualitative one. Whereas a strict quantitative test compares the value of resources expended on political activities with the total value of a charity's resources, a qualitative test would adopt a holistic approach to assessing whether a charity's core mission had ceased to be charitable.[62] Although such an approach would not ignore the amounts expended on political activities relative to the amounts expended on charitable programming, it would not adhere dogmatically to mathematical expression; rather, it would assess circumstances holistically and contextually. It is not necessary for our present purposes to establish what precisely this would entail. What matters now is that the problems afflicting the "substantially all" criterion could be addressed through improved CRA interpretation. As a matter of statutory design, the "substantially all" criterion or something analogous to it is a useful way to codify the idea that political activities are a supplement to, rather than a supplement for, charitable programming.

WHAT NEW LEGISLATIVE MEASURES SHOULD REPLACE SUBSECTIONS 149.1(6.1) AND (6.2)?

General

Subsections 149.1(6.1) and (6.2) should be repealed and replaced by legislative measures better conceived to regulate the political activities of charities. One way

62 Grant, supra note 58.

to improve on the status quo would be to replace subsections 149.1(6.1) and (6.2) with two new grounds for the revocation of charitable registration under subsection 149.1(4.1).[63] Paragraphs 149.1(4.1)(a) through (f) currently enumerate six grounds for the revocation of charitable registration. New paragraphs 149.1(4.1)(g) and (h) could be added to deal with political activities. The new grounds for revocation enumerated in subsection 149.1(4.1) could be

> (g) devoting resources to a prohibited political activity; and
> (h) devoting resources to a political activity except where
> (i) the political activity is carried on in furtherance of a charitable purpose, and
> (ii) substantially all of the charity's resources are otherwise devoted to charitable purposes or charitable activities.

"Prohibited political activity" could be defined to mean direct or indirect support of, or opposition to, any government, political party or candidate for public office. "Political activity" could be defined to mean an activity whose direct and principal purpose is either to secure or to oppose a change on any basis to any law (domestic or foreign) or to the policy or administrative practices of any government (domestic or foreign).

Explanation of Proposed Reform

The proposed reform would improve on the status quo in the following ways.

Complete Code

The proposed reform brings clarity both to the rules themselves and, importantly, to the consequences of non-compliance. Given that non-compliance with the proposed rules would carry with it the prospect of charitable registration being revoked, the proposed reform makes clear that it establishes a complete code rather than a mere safe harbour.

Critics of this reform proposal might object to its enumeration of restrictions on political activity in the context of a legislative provision specifying the grounds for revocation of charitable status. Doing so, it might be argued, casts political activity in an uncongenial light. It introduces the risk that political activities will be viewed suspiciously by CRA auditors and courts—viewed, that is, not as a natural fulfilment of charitable mission but rather as a departure from that mission potentially serious enough to warrant revocation of charitable status. Thus, political activities might be approached not as something that charities should be doing (as something welcomed) but rather as something that jeopardizes charitable status (as something tolerated, at best).

63 This would require a corresponding amendment to paragraphs 188.2(2)(e) and (f). The references therein to subsections 149.1(6.1) and (6.2) would have to be amended to refer to new paragraphs 149.1(4.1)(g) and (h).

This objection is not without merit. Enumerating restrictions on political activity in the context of a legislative provision specifying the grounds for revocation of charitable status could very well affect the approach adopted by courts and the CRA to this topic. An alternative way to proceed would be to replace subsections 149.1(6.1) and (6.2) with a new provision expressly affirming, "for greater certainty," that a charity may engage in political activity provided that (1) the political activity is in furtherance of a charitable purpose, (2) the political activity is not a prohibited political activity, and (3) substantially all of the charity's resources are otherwise devoted to charitable purposes or charitable activities. But a penalty provision for violating these restrictions would still be necessary. If political activity is going to be limited, as I have suggested it should be, clearly enumerated consequences for exceeding the limits are inevitably necessary. The amendments to subsection 149.1(4.1) that I have suggested would efficiently achieve the dual goals of allowing for political activity within limits while simultaneously setting out the consequences for exceeding those limits.

"Substantially All" Criterion

Like subsections 149.1(6.1) and (6.2), the proposed reform guards against mission creep through a "substantially all" criterion. Devoting resources to political activity will not therefore jeopardize charitable registration, provided that "substantially all" resources are devoted to charitable programming. As suggested above, the "substantially all" criterion is not without problems, but these problems are primarily interpretive in nature. They can be satisfactorily resolved by transitioning from a bluntly quantitative understanding of "substantially all" to a qualitative understanding that views a charity's programs holistically and contextually. The phrase "substantially all" could be replaced with an alternative expression, but doing so would achieve little: the essence of the criterion would remain the same.

"Ancillary and Incidental" Criterion

Subsections 149.1(6.1) and (6.2) currently use the "ancillary and incidental" criterion to express the idea that political activities, to be permitted to a charity, must be the means to achieving charitable purposes. This is defensible in principle because no one argues that charities should be expressly permitted to engage in political activities for non-charitable ends. The problems with the "ancillary and incidental" criterion as currently used in subsections 149.1(6.1) and (6.2) primarily arise from the lack of a statutory definition of "political activity."[64] Nevertheless, the most obvious way to express the idea that the "ancillary and incidental" criterion is meant to capture is to state specifically that political activities are permissible only if they serve charitable purposes. Although the proposed reform favours a formulation in plain language over the phrase "ancillary and incidental," the two are alternative routes to effectively the same destination.

64 As discussed above, under the heading "The 'Ancillary and Incidental' Criterion."

Definition of "Prohibited Political Activity"

The definition of "prohibited political activity" that I propose is based on the language currently used in paragraphs 149.1(6.1)(c) and (6.2)(c). Adopting this definition would codify a widely held view that party politicking is, to use Slade J's phrase in *McGovern*, "plainly political."[65] Practically nobody argues that partisan electoral politics represent an appropriate way for charities to pursue their charitable missions. The proposed reform brings the formal requirements of the Act into conformity with the CRA's administrative position that partisan electoral politics are categorically prohibited—a position that is difficult to reconcile with the current drafting of subsections 149.1(6.1) and (6.2).[66]

Definition of "Political Activity"

General

The proposed definition of "political activity" remedies a severe deficiency in subsections 149.1(6.1) and (6.2)—their failure to define that term. The proposed definition identifies "political activities" as activities concerned with achieving or opposing reform to law, public policy, or the administrative practices of government.[67] In this respect, the proposed definition is consistent with the idea, discussed above (under "Why Regulate the Political Activities of Charities?"), that political activity should be restricted as a way of respecting the distinctness of charity and government. To that end, the proposed definition of "political activity" will catch situations in which charities are pursuing charitable ends through changes in the behaviour of government. In this regard, the proposed definition closely parallels the CRA's current administrative interpretation of "political activity" in CPS-022. This leaves the proposed definition vulnerable to the criticism that it is much ado about nothing—that it will not significantly change current administrative practices. But this criticism misses the point.

The statutory definition of "political activity" that I propose provides relief for the many intractable interpretive problems that have afflicted subsections 149.1(6.1) and (6.2), problems mostly owing to the absence of a statutory definition of this term. As we have seen, the common law characterizes activities as charitable or noncharitable on the basis of the ends being pursued. The current absence of a statutory definition of "political activity" leads to significant confusion when activities of an intrinsically political nature are used to achieve charitable purposes. Strictly speaking, such activities could be characterized as charitable at common law because they

65 Supra note 6, at 507.

66 As discussed above (under the heading "'Safe Harbour' or 'Complete Code'?"), the language of subsections 149.1(6.1) and (6.2) creates a "safe harbour." Interpreting these provisions as prohibiting electioneering requires a complete-code interpretation that is irreconcilable with the current drafting.

67 "Opposing reform" is included in the definition because opposing reform is no less concerned with the behaviour of government than proposing reform. See supra note 12.

are carried on to achieve a charitable purpose. The proposed statutory definition brings clarity to this area by establishing that certain activities are political notwithstanding that they are carried on to achieve charitable purposes.

The idea that pursuing reform to law, public policy, or the administrative practices of government is political activity was developed above with reference to the distinctness of charity and government. At this point, it is necessary to consider refinements to this idea. Should it make a difference if a charity frames its advocacy for law reform as a defence of human rights? Or what if a charity does not advocate for any concrete reform but instead promotes public awareness the by-product of which may be support for reform?

Human Rights Advocacy

For several reasons, human rights advocacy might be treated differently from other kinds of advocacy for reform. Upholding human rights has been recognized by the CRA as charitable.[68] Also, a UK decision, *Human Dignity Trust v. Charity Commission*,[69] recognized the potential charitableness of "interpreting and/or enforcing superior constitutional rights."[70] The basis for this decision was as follows: given the constitutionally legitimate role that courts play in the interpretation and enforcement of constitutionally protected human rights, the usual impediment to recognizing the charitableness of advocacy for reform—that is, the need for a neutral stance on the presence or absence of public benefit—is absent where charities pursue reform as a defence of human rights.[71]

Nonetheless, the definition of "political activity" that I have proposed deliberately includes human rights advocacy if the goal of the activity is to secure a change to law, public policy, or the administrative practices of government, including cases where a charity seeks judicial review of governmental action on the basis of alleged violations of constitutionally protected human rights.[72] The choice to include human rights advocacy in the definition of "political activity" is likely to be controversial. I made this choice after evaluating the following three options:

1. Exclude human rights advocacy from the definition of "political activity."
2. Include some but not all human rights advocacy in the definition of "political activity."
3. Include human rights advocacy in the definition of "political activity."

---

68 Canada Revenue Agency, *Charities Guidance*, CG-001, "Upholding Human Rights and Charitable Registration," May 15, 2010. Note, though, that CG-001 confusingly states in section 3.2 that it is charitable to "clarify the status of particular rights" but political to advocate "for the establishment of new legal rights." What precisely is the difference?

69 *Human Dignity Trust v. Charity Commission*, [2014] FTTT 0013 B(GRC).

70 Ibid., at paragraph 99.

71 Ibid., at paragraph 96.

72 The definition of "political activity" I have proposed captures reform to law, public policy, and government administration "on any basis."

The first option has certain advantages. It is consistent with the notion of the charitableness of upholding human rights.[73] It avoids the controversy that the third option's inclusion of human rights advocacy as a political activity will understandably attract. But the first option comes with a considerable downside. An exception for human rights advocacy might inspire significant avoidance behaviour.[74] Such an exception would give charities incentive to defeat the restrictions on political activity by couching their advocacy for reform to law, public policy, and administration in terms of human rights claims. The risk is that form would come to take priority over substance in the regulation of political activities. Given the enormous breadth of advocacy causes that could be given the form of human rights claims, this is no small regulatory problem.

The second option is in principle the most attractive of the three options. Under this option, the definition of "political activity" would include cases where mere policy preferences are being presented in the guise of human rights advocacy. But it would not include human rights advocacy that lacks the features of mere fishing expeditions or polemics. The appeal of this option is that it recognizes that charities have a proper role to play in apolitical human rights advocacy (and, more generally, that human rights are not themselves political) without naively ignoring the fact that human rights advocacy can consist, in substance, of repackaged political activity.

The disadvantage of this second option is that it would prove enormously challenging to legislatively draft and to administer. How, in practice, would charitable human rights advocacy be distinguished from repackaged political activity? When a charity bases its human rights advocacy—before courts, elected representatives, or civil servants—on universally accepted understandings of specific human rights, then we have a basis for concluding that the charity is not disguising mere policy preferences as human rights claims. But how often will this exacting standard be met? Presumably, most charities' human rights advocacy will embroil them in contentious interpretive processes through which the specific content of human rights will be discovered iteratively. There is simply no satisfactory way to prejudge whether a given charity's anticipated human rights advocacy will in substance amount to disguised political activity. It cannot be pre-determined at the stage of charitable registration, except perhaps where a charity's registration materials narrowly restrict it to the advancement of specific, well-established interpretations of human rights in specific circumstances. Even here, the CRA would be obliged to

73 Supra notes 68 and 69. See also Mayo Moran, "Rethinking Public Benefit: The Definition of Charity in the Era of the Charter," in Jim Phillips, Bruce Chapman, and David Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal and Kingston, ON: McGill-Queen's University Press, 2001), 251-87.

74 See, for example, Parachin, "Charity, Politics and Neutrality," supra note 16, at 34-37; and Adam Parachin, "Human Rights and Charity—Regulatory Challenges" (2016) *The Philanthropist* (http://thephilanthropist.ca/2016/09/human-rights-and-charity-regulatory-challenges).

assess the planned advocacy in the light of established human rights norms, something that it is ill-equipped to do. Neither can a charity's human rights advocacy be effectively evaluated ex post facto. How frequently would a charity's human rights advocacy need to succeed, and before what kinds of decision makers, before the bona fides of its human rights advocacy could be acknowledged? If rate of success is the wrong metric, then what other metrics could be drawn on to distinguish mere political advocacy from human rights advocacy?

This takes us to the third option. It may be controversial to include human rights advocacy in the definition of "political activity": doing so implies that human rights are themselves political. Nonetheless, the third option is the least bad of the three options. The first option, as we have seen, leaves the restrictions on political activities severely vulnerable to avoidance behaviour. Human rights are not political but it would be naïve to ignore that human rights advocacy can be. The second option, although appealing in principle, poses significant (perhaps insurmountable) challenges for administrative enforcement. The third option avoids these problems while still recognizing that human rights advocacy (within the limits to which political activity is subject) is a proper way for a charity to pursue its charitable mission.

Public Awareness

The proposed definition of "political activity" deliberately leaves out public-awareness activities, at least where they do not involve a specific attempt to secure changes to law, public policy, or the administrative practices of government. There are several reasons for this exclusion.

First, the case law authorities have never established that public awareness is necessarily political.[75] Taken out of context, certain authorities could be interpreted as hinting that promoting a point of view, attitude of mind, or climate of opinion on controversial social issues is political.[76] However, these authorities tend to be concerned with (1) institutions pursuing law-reform agendas or (2) distinguishing formal education from propaganda.[77] They do not unambiguously establish that public awareness in relation to charitable purposes is necessarily political.

Second, public awareness is categorically distinct from electioneering or campaigning for reform. Charities can readily stay clear of electioneering. Likewise, charities either can avoid campaigning for law and policy reform or can selectively engage in such campaigning on a strategic and compliant basis. Public awareness, however, is altogether different. Public awareness is unavoidable. It is implicated in practically everything that charities do. Literally all programming and all communications by charities entail some form of public awareness. A charity's advocacy for,

75 Indeed, an Australian decision, *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42, specifically refutes that public awareness is a non-charitable political purpose.

76 See Parachin, supra note 6.

77 Ibid.

say, law and policy reform can be occasional, but that is not true, at least not as readily true, in relation to public awareness. The latter is non-occasional and unexceptional, thoroughly integrated into all charitable programming.

To be sure, value-laden messaging is implicated in practically everything that charities do, and properly so. Even though charities are not always openly engaged in public-awareness campaigns, messaging is going to contribute to their fundraising, choice of target population, and design of charitable programming. Even such seemingly benign charitable trusts as scholarship funds communicate potentially controversial value judgments in the selection criteria that they establish for identifying meritorious scholarship candidates (for example, gender, religion, financial need, geographic residence, disadvantaged ancestry, military service), and for deciding on the sorts of athletic and academic pursuits that are worthy of their financial support. Likewise, charities devoted to relief of poverty communicate ideas about the basic standard of living below which no-one should be allowed to fall.

Given the pervasiveness of public awareness or messaging in practically all charitable programming, public awareness should not be included in the definition of "political activity." Such inclusion would have a severely negative impact on charities. To some extent, it would be like restricting the ability of charities to be charities.

CONCLUSION

In this article, I have made four contributions to the process of reforming the treatment of political activity by charities. I began by explaining why the political activity of charities should be regulated. I proceeded to explain why the ideal way to regulate the political activity of charities is through an addition to the Act, a legislative supplement to the common law. I then identified the problems plaguing the current Act provisions concerned with this area: subsections 149.1(6.1) and (6.2). Finally, I sketched an alternative legislative solution. I hope to have demonstrated that the problems with the status quo can be corrected without radical change.