

Charity, Politics and Public Benefit

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Distinguishing the Charitable from the Non-Charitable

- Most fundamental question posed to a charity lawyer is whether a given purpose will qualify as “charitable” at law
- Difficulty is that contours of the boundary delineating the “charitable” from the “non-charitable” takes some unexpected turns

<u>CHARITABLE PURPOSES</u>	<u>NON-CHARITABLE PURPOSES</u>
<p>Provision of a home for starving and forsaken cats. (<i>Swifte v. A.G. for Ireland (No. 2)</i> [1912] 1 IR 133.)</p>	<p>Seeking the abolition of torture (<i>of humans</i>). (<i>McGovern and Others v. Attorney General and Another</i>, [1982] Ch. 321 (Ch. D.) and <i>Action by Christians for the Abolition of Torture v. Canada</i> (2002) 225 D.L.R. (4th) 99.)</p>
<p>Promoting good housewifery through an annual award for the woman with the “best-kept cottage”. (<i>Re Pleasants, Pleasants v. A.G.</i> (1923) 39 TLR 675.)</p>	<p>Promoting awareness of the social problems created by pornography, e.g., degradation of woman and children. (<i>Positive Action Against Pornography and M.N.R.</i> (1988), 49 D.L.R. (4th) 74 F.C.A.)</p>
<p>Ringling bells to annually commemorate the restoration of the monarchy. (<i>Re Pardoe, McLaughlin v. A.G.</i> [1906] 2 Ch. 184.)</p>	<p>Appeasing racial tension. (<i>Re Strakosch</i> [1949] Ch. 529. Not applied by CRA. See CPS-021 and 024)</p>
<p>Promoting marriage among Jews. (<i>Re Cohen</i> (1919) 36 TLR 16.)</p>	<p>Encouraging personal intercourse between inhabitants of different countries. (<i>Buxton and Others v. Public Trustee and Others</i> (1962), 41 T.C. 235 (Ch. D.))</p>

<u>CHARITABLE PURPOSES</u>	<u>NON-CHARITABLE PURPOSES</u>
<p>Actual provision of abortion services. <i>(Everywoman's Health Centre Society (1988) v. Canada [1991] F.C.J. 1162.)</i></p>	<p>Promoting a view on the provision of abortion services. <i>(Human Life International in Canada Inc. v. M.N.R. [1998] F.C.J. No. 365 and Alliance for Life v. M.N.R.. (1999), 174 D.L.R. (4th) 442 (F.C.A.))</i></p>
<p>Education directed towards acceptance of view that international peace is preferable to war. <i>(Southwood & Another v. Her Majesty's A.G. 2000 WL 877698.)</i></p>	<p>Helping two societies find peaceful ways to live together. <i>(Anglo-Swedish Society v. C.I.R. [1931] 47 TLR 295 and Toronto Volgograd Committee v. M.N.R. [1988] F.C.J. No. 212. For similar holding, see Canada UNI Assn. v. M.N.R. [1992] F.C.J. No. 1130 (F.C.A.)).</i></p>
<p>Passively responding to media questions. (CPS-022 para 14.1.5.)</p>	<p>Actively engaging the media. (CPS-022 para 14.3.4.)</p>

Doctrine of Political Purposes

- All of the preceding non-charitable purposes fell prey to the doctrine of political purposes
- What is the doctrine of political purposes?
 - doctrine providing that institution with a political purpose \neq charitable
 - manifestation of the “exclusive charity rule”

Sources of Doctrine of Political Purposes

Three Key Sources:

1. Common law
2. Income Tax Act (Canada)
 - Para 149.1(6.1)
 - Para 149.1(6.2)
3. CRA Commentary
 - CPS-022

Categories of “Political” Purposes

- Political purposes have been held to include the following:
 - Promoting a political party.
 - Seeking a change to the law or policy in a domestic or foreign jurisdiction.
 - Promoting a point of view or attitude of mind.
 - Advocating in favour of one side of a controversial social issue.
 - Creating a climate of opinion.

Rationale for Doctrine of Political Purposes

Why should a practicing lawyer care about the rationale?

- Difficult to competently apply a legal rule without regard to its rationale
- Understanding shortcomings of rationale is helpful on at least two fronts:
 - (1) Planning to avoid falling offside the doctrine.
 - (2) Convincing courts/regulators to reconsider certain authorities.

Rationale for Doctrine of Political Purposes

Three Key Rationales:

- (1) Time Honoured Practice
- (2) Judicial Incapacity
- (3) Charity and Politics are Distinguishable

Rationale #1 - Time Honoured Practice

- Application of the doctrine appears reflexive at times:
→ courts apply the doctrine if only b/c it appears to be so well-established

- Mechanical adherence to the following statement (made in obiter) by Lord Parker in *Bowman v. Secular Society*

[A] trust for the attainment of political objects has *always* been held invalid... ([1917] A.C. 406 (H.L.) at 442.)

- All decisions on political purposes follow *Bowman* or follow a decision that has followed *Bowman*

Rationale #1 - Time Honoured Practice

Problem:

- Lord Parker's statement in *Bowman* that political purposes have “always” been considered “invalid” is arguably wrong
- Various described by analysts as follows:
 - “innaccurate”
 - “not one which is established with any certainty by high authority in England”
 - “difficult to reconcile with certain decided cases”
 - based upon a “paucity of judicial authority”
 - “clearly wrong”
 - “considerably overstated”
 - “not supported by an examination of reported cases”
 - “unconvincing”

Rationale #1 - Time Honoured Practice

Problem:

- Prior to *Bowman*, several decisions upheld charities with “political purposes”
- Prior to *Bowman*, several charities engaged in unchallenged political activism
- Lord Parker appears to have uncritically relied upon an incorrect statement of law in an 1888 text, *The Law of Charitable Bequests*

Rationale #2 – Judicial Incapacity

General:

- Given purpose will not qualify as “charitable” unless:
 - (1) Falls under one of the four “heads” of charity;
 - (2) Exclusively Charitable; and
 - (3) Public Benefit.

Rationale #2 – Judicial Incapacity

General:

- Judicial incapacity rationale relates to the requirement for “public benefit”
- Courts contend that it is beyond the institutional capacity of judiciary to opine upon whether political purposes are of public benefit
- Non-charitability is practical consequence of this alleged incapacity rather than a positive finding made by courts

<u>Description of Judicial Incapacity Rationale</u>	<u>Source</u>
<p>[T]he court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.</p>	<p>Lord Parker in <i>Bowman v. Secular Society</i> ([1917] A.C. 406 (H.L.) at 442.)</p>
<p>[T]his kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views...</p>	<p>Strayer J.A. in <i>Human Life International in Canada Inc. v. M.N.R.</i> [1998] F.C.J. No. 365 at para 12.</p>

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- Judicial incapacity rationale uncritically embraced by CRA in CPS-022
- Weak justification for the doctrine of political purposes
- Judicial incapacity rationale presupposes a constitutional regime – Parliamentary supremacy – that is descriptively inaccurate of the Canadian regime

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- Do the following judicial pronouncements reflect an incapacity to weigh in on difficult and controversial issues?

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- On the topic of sex:

[Sex] is not a binary concept limited to “male” and “female” but includes a continuum of personal characteristics which may manifest in individuals. (As per Edwards J. in *Vancouver Rape Relief Society v. Nixon* [2003] B.C.J. No. 2899 (B.C.S.C.) para 25.)

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- On the topic of marriage:

[I]t is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. (*Halpern v. Canada (A.G.)* [2003] O.J. No. 2268 (Ont. C.A.) para. 108.)

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- On the topic of abortion:

In essence, what [s. 251 of the *Criminal Code*] does is assert that the woman's capacity to reproduce is not subject to her own control...It is to be subject to the control of the state...Can there be anything that comports less with human dignity and self-respect? (*Morgentaler v. The Queen* [1988] 1 S.C.R. 30 (S.C.C.) @ para 245.)

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- Ironically enough, on the topic of charity law:

[T]he appellant argued orally...that the provisions of the Act referring to charitable organizations and to a limitation on political activities are void for vagueness. *I would heartily agree that this area of the law requires better definition by Parliament...* (As per Strayer J.A. in *Human Life International in Canada Inc. v. M.N.R.* [1998] F.C.J. No. 365 at para 19.)

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[S]ubstantial change in the law of charity would be *desirable and welcome at this time.* (As per Iacobucci J. in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (M.N.R.)* [1999] S.C.J. No. 5 (S.C.C.) at para 203.)

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- At the very least, courts can't possibly deny having capacity to rule on public benefit of:
 - (1) Law reform sought on *Charter* grounds
 - (2) Reform of judge made rules of the common law
- But aren't these exceptions that are capable of swallowing the rule?

Rationale #2 – Judicial Incapacity

Evaluating the Judicial Incapacity Rationale:

- In any event, why not evaluate public benefit more abstractly?
- Why do courts presuppose that they *must* evaluate whether the *particular* point of view or the *particular* law reform being sought is of public benefit?
- Courts don't evaluate the efficacy of *particular* religious doctrines to evaluate the public benefit of religion – So why be so particular here?
- Why not simply accept that there is public benefit inherent in public debate of controversial and difficult issues?

Rationale #3 - Charity and Politics are Distinguishable

General:

- Idea here is that charity and politics are “just different”
- But how exactly is the difference to be defined and applied?
- Notion that charity and politics are “just different” can’t satisfactorily justify the doctrine of political purposes if the distinction isn’t drawn rationally

Rationale #3 - Charity and Politics are Distinguishable

Select Issues of Concern:

- (a) Distinguishing Activities from Purposes
- (b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

Rationale #3 - Charity and Politics are Distinguishable

(a) Distinguishing Activities from Purposes

- M. Cullity contends (correctly) that it is impossible to characterize an *activity* as charitable or political without regard to the *purpose* for which it is carried out (M. Cullity, “The Myth of Charitable Activities” 8 Estates and Trusts Journal 7.)
- How then is it that law reform has been characterized as a political *purpose*?

As political activities designed to procure legislation will almost inevitably be a means to some other end, the decisions that have characterized the authority to engage in such activities as ends rather than means are **unfortunate.** (M. Cullity, “The Myth of Charitable Activities” 8 Estates and Trusts Journal 7 at 25.)

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- characterization of promoting a point of view as “political” raises difficult conceptual questions in light of the 2nd and 3rd heads of charity

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- How exactly does the advancement of religion differ from the promotion of a point of view?
- Jurisprudence arguably defines religion broadly enough to include the promotion of a *theological worldview*

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- How exactly does the advancement of education differ from the promotion of a point of view?
- As per Sharlow J. in *Challenge Team v. Canada* [2000] F.C.J. No. 433 (F.C.A.) at para 1.

[E]ducating people *from* a particular political or moral perspective *may* be educational in the charitable sense...However, an activity is not educational in the charitable sense when it is undertaken “solely to *promote* a point of view”...[Emphasis added.]

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- “objectivity” and “neutrality” are sometimes discussed in the cases as being necessary for charitable status
- In CPS-022, CRA sets out the following interpretation of such authorities:

To be considered charitable, an educational activity must be reasonably objective and based on a *well-reasoned position*. This means a position that is based on *factual information* that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present (i.e., address) serious arguments and facts to the contrary.

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- In turn, CRA defines in CPS-022 “factual information” to mean:

Information used or produced by a registered charity that is based on *facts* resulting from the charity’s direct experience or research from a reputable source. Research should be methodical and objective.

Rationale #3 - Charity and Politics are Distinguishable

(b) Distinguishing Promotion of a Point of View from Recognized Charitable Purposes

- How does CRA's position square with following description of the kinds of "knowledge" that may be advanced through education:

[T]here are different kinds of knowledge: theoretical and practical; speculative and technical; scientific and moral. (OLRC at 207 and *Vancouver Society* at para 170.)

Conclusion

- Difficulties with doctrine of political purposes highlight a larger problem plaguing charity law:
 - absence of a theory of “charity” to guide judicial and administrative decision making
- Mere understanding of charity as 4 disparate *Pemsel* categories is bound to lead to the kinds of difficulties discussed here
- Theory to make sense of the legal depiction of “charity” and the privileges of charitable status is desperately needed