

The Co-optation of Charities by Threatened Welfare States

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Throughout the Commonwealth, there is growing concern that charitable resources are increasingly being “co-opted” by cash-strapped governments in order to further particular political goals. This development threatens the “voluntary” role that charities are understood to play in a welfare state and potentially subjects them to onerous public law standards. This article explores the legal environment for charities in Canada and in England and Wales, and identifies certain legal and institutional mechanisms that may either encourage or limit the co-optation of charitable resources by government. By examining certain modern phenomena that tend toward the co-optation of charitable resources by government, and by assessing the ways in which English and Canadian law address these phenomena, the author aims to highlight the role that legal and institutional environments play in either enabling or preventing such co-optation. Ultimately, the author argues that English law does far more than Canadian law to prevent charities from becoming mere instruments of government policy, and she identifies some concrete legal measures that could strengthen Canada’s political commitment to the charitable sector’s independence.

* Assistant Professor, Faculty of Law, University of Victoria. I acknowledge the financial assistance of the Trudeau Foundation and the Social Sciences and Humanities Research Council in undertaking the research upon which this article is based. I thank Mark Freedland for his helpful guidance, and the participants in the Gendered Dissent, Democracy & Law Workshop at Osgoode Hall Law School in May 2014 for providing inspiration. I also thank Lorne Sossin, Andrew Green, Freya Kodar, Blake Bromley and three anonymous referees for their comments on previous versions.

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Introduction

We are in a period of heightening anxiety over the contemporary use (or misuse) of charitable resources by “threatened welfare” states. There is a growing chorus of voices, centred in England but audible across the Anglo-Commonwealth world, expressing concern that charities are increasingly being treated as instruments of government welfare policy rather than as independent institutions.¹ The English have long been committed to the principle that charities are independent from government. Despite (or perhaps because of) this political commitment, they have also harboured fears about the threats that might be posed

1. See especially Matthew Smerdon, ed, *The First Principle of Voluntary Action: Essays on the Independence of the Voluntary Sector from Government in Canada, England, Germany, Northern Ireland, Scotland, United States of America and Wales* (Baring Foundation, 2009). See also Debra Morris, “Paying the Piper: The ‘Contract Culture’ as Dependency Culture for Charities?” [Morris, “Paying the Piper”] in Alison Dunn, ed, *The Voluntary Sector, the State and the Law* (Oxford: Hart, 2000) 123 [Dunn, *The Voluntary Sector*]; Alison Dunn, “Demanding Service or Servicing Demand?: Charities, Regulation and the Policy Process” (2008) 71:2 Mod L Rev 247 [Dunn, “Demanding Service or Servicing Demand?”]; Debra Morris, “Charities and the Big Society: A Doomed Coalition?” (2012) 32:1 LS 132 at 144 [Morris, “Charities and the Big Society”] (Morris has also described how these concerns have been compounded by the UK Conservative government’s “Big Society” agenda).

to this independence by an “overbearing State”.² The level of angst has increased markedly since the government of Margaret Thatcher began the process of “slimming down” the welfare state by contracting out its statutory functions to charities and other non-governmental organizations.³ Concerns have intensified again since 2010, when the government of David Cameron embarked upon its “Big Society” agenda of (further) decentralizing government functions and involving charities even more heavily in the delivery of public services.⁴ Today, in a climate of significant economic austerity, increasing numbers of English charities deliver social welfare services on the basis of performance-based contracts that were previously delivered directly by government. In this climate, there is a growing perception that the United Kingdom government views charities and other voluntary organizations as “instruments of government policy rather than independent agents”.⁵ Prominent public figures have begun to comment on the issue, and the Baring Foundation has set up a special panel to monitor the situation. The 2013 report of this Panel on the Independence of the Voluntary Sector found that the conditions for sectoral independence had continued to deteriorate during the twelve months leading up to the report, such that “the very identity of the sector is in question”.⁶

In Canada, where there is no equivalent political commitment to the charitable sector’s independence, the trend toward using charities as

2. See Nicholas Deakin, “Voluntary Action and the Future of Civil Society” in Dunn, *The Voluntary Sector*, *supra* note 1, 241 (noting that at the start of the twentieth century, the leader of the Charity Organization Society expressed his concern about “the overbearing State asserting its financial control” at 241).

3. For a short review of this history, see Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith’s Judicial Review*, 6th ed (London, UK: Sweet & Maxwell, 2013) at para 3-057. See also Deakin, *supra* note 2 at 246–47; Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 249–50.

4. Morris, “Charities and the Big Society”, *supra* note 1 at 133.

5. Ben Cairns, “The Independence of the Voluntary Sector from Government in England” in Smerdon, *supra* note 1, 35 at 37.

6. Panel on the Independence of the Voluntary Sector, *Independence Under Threat: The Voluntary Sector in 2013* (Baring Foundation, 2013). See also UK, Cabinet Office, *Trusted and Independent: Giving Charity Back to Charities—A Review of the Charities Act 2006*, by Lord Hodgson of Astley Abbotts (London, UK: Her Majesty’s Stationery Office, 2012) at 3.15, 4.21–4.23, online: < www.gov.uk/government/uploads/system/uploads/attachment_data/file/79275/Charities-Act-Review-2006-report-Hodgson.pdf >.

instruments of government policy is arguably even stronger. As Peter Elson has documented, Canadian charities have historically worked in “interdependent partnership” with the federal and provincial governments, delivering government-funded services such as health care and education within the context of a “mixed social economy of social service delivery”.⁷ The Canadian charitable sector came of age at a time when there was arguably already a welfare state in place and never achieved the representational capacity nor the political clout of its English counterpart. Thus, when the Canadian government began cutting block funding for charities as part of its own welfare retrenchment program in the 1980s, the charitable sector mustered little opposition. Instead, Canadian charities gradually decreased their role in policy advocacy and increased their role in service delivery under performance-based contracts with government.⁸

In 2001, then-Prime Minister Jean Chrétien’s Liberal Government made a rare political commitment to the principle of charity independence, describing the voluntary sector as “autonomous”, and affirming its right to advocate for change.⁹ Today, however, many people working in the Canadian charitable sector consider the 2001 Accord a dead letter. Charities complain not only of onerous reporting requirements and of unpredictable project-based funding,¹⁰ but also of “witch hunts” against charities that are opposed to the government’s policies.¹¹ A growing number of Canadian voluntary organizations claim to have lost their

7. Peter R Elson, “Independence in a Cold Climate: A Profile of the Nonprofit and Voluntary Sector in Canada” in Smerdon, *supra* note 1, 13 at 17.

8. For an overview of this process, see Susan D Phillips, “Dual Restructuring: Civil Society and the Welfare State in Canada, 1985–2005” (2012) 25:2 *British J Can Studies* 161.

9. Government of Canada, *An Accord Between the Government of Canada and the Voluntary Sector* (Ottawa: Voluntary Sector Task Force, Privy Council Office, 2001), online: < www.publications.gc.ca/collections/Collection/CP32-75-2001E.pdf > .

10. See Lynn Eakin, “An Overview of the Funding of Canada’s Voluntary Sector” (2001) Voluntary Sector Initiative Working Group on Financing Working Paper, online: < www.vsi-isbc.org/eng/funding/pdf/overview_of_funding.pdf > .

11. See Shawn McCarthy, “Group’s Charitable Status Being Audited”, *The Globe and Mail* (8 May 2012), online: < www.theglobeandmail.com > .

charitable status or their government funding because of their dissenting views.¹²

What are we to make of these perceived threats to the independence of the charitable sector? Looking back at the history of charities in the Anglo-Commonwealth world, it is arguable that government has *always* been inclined to direct charitable resources toward its own political agenda, and that today's phenomena are simply new forms of an old trend. Nevertheless, this article takes the position that there are good reasons to be concerned about regulatory or other government activity that orients charities toward conformity with the incumbent government's agenda and away from independent agency and dissent. Such activity is troubling because it works against the understood strengths of the charitable sector in a welfare state—its voluntariness, its imaginativeness and its role as an autonomous source of ideas about social change. It is also troubling because it threatens to dislodge charity law from its delicate position within the border zone between the private law and public law spheres, and to pull charities decisively into the domain of the state. It is of particular concern in the current Canadian context because it appears to form part of a broader pattern of the governmental silencing of dissent.

If we are to protect charities from such pressures, however, we must first be able to identify them and understand the legal environment in which they operate. It is with this goal in mind that this article seeks to advance a theoretical contrast between “independent” charities and “co-opted” charities, and to identify certain legal and institutional mechanisms that may either encourage or limit the co-optation of charitable resources by governments in England and Canada.¹³ It is beyond the scope of this doctrinal work to assess how far Canadian and English charities *in fact* further government policies or are subject to government influence and control. However, by examining certain modern phenomena that tend toward the co-optation of charitable resources by government, and assessing the ways in which English and

12. Many of these claims are documented at the website of the Voices-Voix coalition. See Voices-Voix, “Voices-Voix: Defending Advocacy and Dissent in Canada”, online: <voices-voix.ca/en/hit-list>.

13. The “English” laws and institutions that I describe in this work are in fact applicable to both England and Wales. Scotland and Northern Ireland have their own legislation and regulation relating to charities. As someone who has lived in Wales, I express my regret for this simplification.

Canadian law address these phenomena, I aim to highlight the role that legal and institutional environments play in either *enabling* or *preventing* such co-optation. English law does far more than Canadian law, I argue, to prevent charities from becoming mere instruments of government policy. By contrasting the two regulatory landscapes, we may also identify some concrete legal measures that could strengthen Canada's political commitment to the charitable sector's independence.

The article proceeds in three Parts. In Part I, I advance an argument in support of the value of an "independent" charitable sector and the perils of allowing a nation's charitable resources to be co-opted by the state. I proceed in Part II to articulate two indicia of a "co-opted" charity, relating these indicia to an important body of Anglo-Commonwealth law on the functional public law/private law divide and associated debates over what types of entities should bear human rights obligations and the other special responsibilities of the state. In Part III, I distinguish three broad categories of co-optation that are applicable to charities: definitional (or existential) co-optation, managerial co-optation and contractual (or fiscal) co-optation. I then examine several modern phenomena that tend toward the co-optation of charitable resources by government: the exertion of government influence over the legal definition of charity, the creation of statutory charities that are controlled by government or directed toward its purposes, and the exertion of influence over the administration of charitable resources through the negotiation of funding agreements or the appointment of government authority trustees. I consider how, in their response to each of these phenomena, English and Canadian laws and institutions either assist or obstruct government efforts to make charities comply with particular public welfare goals. I conclude by contrasting the regulatory landscape for charities in England and in Canada, and linking each landscape to the principle of the charitable sector's independence.

I. In Defence of the Charitable Sector's Independence

It is a sign of the deep differences between the English and Canadian charity law traditions that it is necessary to preface a "Canadian" discussion of governmental co-optation of charities by defending the

independence of charities from the state. The English, as I have noted, have long accepted that independence from government is one of the charitable sector's most central and valuable characteristics. Charitable activity is a species of voluntary action, as Lord Beveridge framed it in his famous post-war report, and voluntary action is "action not under the directions of any authority wielding the power of the state".¹⁴ The UK government has repeatedly declared its commitment to the principle of the sector's independence, undertaking in its renewed Compact with civil society organizations to "respect and uphold the independence" of charities "regardless of any relationship, financial or otherwise, which may exist".¹⁵ Lord Hodgson's review of the *Charities Act 2006*¹⁶ affirmed widely held views in asserting that political micromanagement of the charitable sector would be damaging, and that the sector's independence "must remain paramount".¹⁷

In Canada, on the other hand, the paramountcy of the charitable sector's independence from government cannot be taken for granted, in part because it has so rarely been asserted. As this article will recount, Canadian non-profit organizations have routinely functioned both as charities and as agents of government, without raising any questions about the compatibility of these roles. Because a taxation narrative dominates the contemporary Canadian discourse about charities, the significant public funding that registered charities receive is often portrayed as their most essential characteristic.¹⁸ North American proponents of an independent and publicly funded charitable sector are also encountering growing criticism of just how far many charities have strayed from the

14. William Henry Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (London, UK: Allen & Unwin, 1948) at 8 (also describes voluntary action as "private action").

15. UK, Cabinet Office, *The Compact: The Coalition Government and Civil Society Organisations Working Effectively in Partnership for the Benefit of Communities and Citizens in England* (London, UK: Cabinet Office, 2010). See also UK, Her Majesty's Treasury, *Exploring the Role of the Third Sector in Public Service Delivery and Reform: A Discussion Document* (London, UK: Her Majesty's Stationery Office, 2005).

16. (UK), c 50.

17. Lord Hodgson of Astley Abbots, *supra* note 6 at paras 3.15, 4.21, 4.23.

18. For a discussion, see Adam Parachin, "Legal Privilege as a Defining Characteristic of Charity" (2009) 48:1 Can Bus LJ 36.

core welfare needs of their communities.¹⁹ Neither the propriety of an independent Canadian charitable sector nor the impropriety of its co-optation can therefore be lightly assumed.

Notwithstanding these contrary perspectives, I argue that there are good reasons to assert the independence of the Canadian charitable sector and to guard against regulatory or other institutional mechanisms that tend toward compelling charities to conform to or carry out the government's substantive goals. First, the very notion of co-optation—of the government assuming charitable resources for its own use—is antithetical to the spirit of “voluntariness” that typically characterizes charitable activity and that has historically been understood to be its greatest strength.²⁰ Voluntary action does not preclude co-operation between charities and government agencies, as Lord Beveridge noted, but it does require that charities have “a will and a life of their own”.²¹ Charities whose resources have been co-opted by the state are also unlikely to have the capacity to play their historic role in “pioneering” new and innovative educational, social and cultural projects.²² If voluntariness and a capacity to innovate are among the greatest strengths of the charitable sector, we should be wary of phenomena that work against those strengths.

A second reason to be concerned about mechanisms that erode the independence of the charitable sector, as we shall see in Part II, is that co-opted charities may find themselves subject to onerous public law standards that are designed to address the special powers and responsibilities of the state. While the trend is not yet notable in Canada, English claimants have begun relying on the “public” character of charities to argue that charities, like governmental bodies, must give a fair hearing

19. See e.g. Stephanie Strom, “Donors Weigh the Ideals of Meaningful Giving”, *The New York Times* (1 Nov 2011), online: <www.nytimes.com>.

20. The classic statement of this view is generally attributed to Lord Beveridge. See Beveridge, *supra* note 14.

21. *Ibid* (describing voluntary action as “action not under the directions of any authority wielding the power of the state” at 8). See also Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 248–49 (noting that the great achievements and innovations of the Victorian philanthropists were due in part to laissez-faire policy and a moderate regulatory framework).

22. For a description of this pioneering role, see UK, *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (London, UK: Her Majesty's Stationery Office, 1952) at paras 659–60 [*Nathan Report*].

to those affected by their decisions, or respect their human rights.²³ From the perspective of the consumers of health, education or other public welfare services, the extension of public law liabilities to charities that carry out “public functions” or “government activities” may be perfectly appropriate. However, such an extension is likely to unduly burden small charities that are effectively compelled to carry out a governmental agenda against their better judgment, and that are ill-equipped to meet or even understand the requirements of public law.

Finally, it is especially important to assert and defend the independence of the Canadian charitable sector in this period of widespread concern about the government’s posture toward dissenting views. Over the last decade, Canada’s federal government has eliminated a number of programs that served as forums for the public expression of alternative views on matters of public policy, including the Women’s Health Contribution Program and the Court Challenges Program. A growing list of individuals and civil society institutions are allegedly being “silenced” because they disagree with the government’s policies and views.²⁴ There is also widespread concern about the dwindling government funding for research, and decreasing access to public information.²⁵ This political context makes it difficult to view trends toward the co-optation of charitable resources as a merely coincidental alignment of the charitable sector and government’s priorities, rather than the manifestation of a broader pattern of governmental stifling of dissent.

II. Co-optation and the Public Law/Private Law Divide

The balance of this article is devoted to identifying certain modern mechanisms that tend to result in the co-optation of charitable resources

23. See *Scott v National Trust* (1997), [1998] 2 All ER 705 at 719 (Ch); *R v Charity Commissioners for England and Wales* (2001), 33 HLR 48 at para 55 (QB). See also Jonathan Garton, “The Judicial Review of the Decisions of Charity Trustees” (2006) 20:3 *Tolley’s Trust L Intl* 160 at 178–79.

24. See *Voices-Voix*, *supra* note 12.

25. See Jennifer Raso, “Access to Information and Democratic Dissent” (Paper delivered at Gendered Dissent, Democracy & Law: A Workshop on the Gendered Face of Canada’s Crackdown on Dissent, 12 May 2014) [unpublished].

by government, and to considering how English and Canadian law either promote or limit these mechanisms. In order to embark upon this task, however, we need a more robust account of what co-optation means. This article uses the term “co-optation” to describe the phenomenon of a government channeling charitable resources toward its own purposes, or aligning the substantive agenda of the charitable sector with its own goals. It is meant to describe stringent, if indirect, mechanisms of control that go beyond requiring that charities be accountable to the public, or that their benefits be accessible to the entire political community. Co-optation represents one end of a continuum that extends, at the opposite pole, to full independence from the public welfare goals of the state. Without purporting to articulate an exhaustive list, we may identify two key indicia of a co-opted charity. The first is that a co-opted charity furthers a specific government policy or program in carrying out its purposes and activities. The second indicia of a co-opted charity is that the charity is subject to governmental influence and control in carrying out its purposes and activities.

These indicia of a co-opted charity have not been plucked from thin air. Rather, they reflect a growing body of Anglo-Commonwealth law that is focused on controlling the exercise of public (or government) functions by non-governmental institutions.²⁶ During the last thirty years, the widespread effects of corporatization, privatization and the contracting out of government services have led jurists to acknowledge the existence of a range of institutions that are neither self-evidently public bodies nor private persons.²⁷ Jurists have also recognized that these “hybrid institutions” may perpetrate the types of abuses of power historically associated with government.²⁸ One response to these developments has been the expansion of the “province” of public law,²⁹

26. For a short summary of the evolution of this body of law, see Peter Cane, “Accountability and the Public/Private Distinction” in Nicholas Bamforth & Peter Leyland, eds, *Public Law in a Multi-layered Constitution* (Oxford: Hart, 2003) 247 at 249.

27. *Ibid.*

28. See e.g. Sir Gordon Borrie, “The Regulation of Public and Private Power” [1989] Public L 552.

29. See Michael Taggart, “The Province of Administrative Law Determined?” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 1. Another significant development has been the reassertion of the court’s private supervisory jurisdiction in contexts such as a restraint of trade. See *Bradley v Jockey Club*, [2005] EWCA Civ 1056.

which has been achieved by shifting public law's focus "from controlling the *institutions of . . . government* to controlling the exercise of [the] *functions of governance . . . whether performed by government or non-government entities*".³⁰ The criteria of a "public function" vary between jurisdictions and between legislative contexts—in the context of the *Canadian Charter of Rights and Freedoms*, as we shall see, the terms "public" and "function" are not used at all.³¹ In all of these contexts, however, the fundamental normative question that courts are being asked to address is whether an entity that is not strictly governmental should nonetheless, in relation to a particular function or act it carries out, be considered sufficiently of or like government to "bear the special responsibilities of the state".³² The issue arises in judicial review and under a variety of statutory instruments.³³ For our purposes, however, a brief review of the chief human rights instruments in England and Canada will suffice to illustrate how the answer to this normative question has come to depend on whether, in carrying out these functions or acts, the entity furthers a specific government policy or program, or is subject to governmental influence and control.

Human rights law is an important area in which the application of public law standards to a charity will depend on whether the charity is characterized as exercising public (or governmental) functions (or

30. Peter Cane, *Administrative Law*, 4th ed (Oxford: Oxford University Press, 2004) at 5 [emphasis added]. See also Woolf, Jowell & Le Sueur, *supra* note 3 at para 3-075 (the concept of a public function or "function of a public nature" is increasingly being employed in other legislative contexts). This work will not address the debate over whether there is any difference between the two terms.

31. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

32. Nicholas Bamforth, "The Public Law-Private Law Distinction: A Comparative and Philosophical Approach" in Peter Leyland & Terry Woods, eds, *Administrative Law Facing the Future: Old Constraints and New Horizons* (London, UK: Blackstone, 1997) 137 at 151.

33. In the UK, judicial review claims are generally brought under Part 54 of the *Civil Procedure Rules*, which defines a claim for judicial review as a claim regarding the lawfulness of "a decision, action, or failure to act in relation to the exercise of a public function". *Civil Procedure Rules*, SI 1998/3132, s 54.1. For a review of the evolving case law in this area, see Woolf, Jowell & Le Sueur, *supra* note 3 at 109.

acts).³⁴ In the UK, this determination is carried out under the *Human Rights Act 1998*, which makes it unlawful for a “public authority” to act in a way that is incompatible with the rights set out therein.³⁵ The term “public authority” is not comprehensively defined in the Act, but section 6(3)(b) provides that it includes “any person certain of whose functions are functions of a public nature”.³⁶ While there is no single test of universal application to determine whether a body exercises functions of a public nature within the meaning of the Act, the relevant factors include whether the function is “intrinsically an activity of government”,³⁷ whether government has assumed responsibility for seeing the function performed,³⁸ and whether those appointed to carry out the function are subject to government influence and control.³⁹ Such “hybrid public authorities”, as they have come to be known, assume human rights obligations in respect of their public acts.⁴⁰

In the Canadian constitutional context, where the relevance of the public law/private law distinction is sometimes questioned⁴¹ and the courts have officially rejected a “public function” test,⁴² the substance of the test for the imposition of human rights liability is nonetheless similar. Pursuant to section 32(1) of the *Charter*, the application of the *Charter* is limited to “the Parliament and government of Canada” and to “the legislation and government of each province”.⁴³ However, case law has

34. In the context of judicial review and human rights law, “public” is understood to mean “governmental”. See *R (Mullins) v Jockey Club*, [2005] EWHC 2197 (Admin) at para 15; *Parochial Church Council of the Parish of Aston Cantlow v Wallbank*, [2003] UKHL 37 at para 163 [*Aston Cantlow*].

35. (UK), c 42, s 6(3)(b) [*HRA 1998*].

36. *Ibid*, s 6(3)(b). Section 6(5) clarifies that a person will not be considered a public authority in relation to a particular act if the nature of the act is private. *Ibid*, s 6(5).

37. *Cameron v Network Rail Infrastructure Ltd*, [2006] EWHC 1133 at para 29 (QB) [*Cameron*].

38. *YL v Birmingham City Council*, [2007] UKHL 27 at para 66.

39. *Cameron*, *supra* note 37 at para 29.

40. *HRA 1998*, *supra* note 35, s 6(5).

41. Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007), vol 2 (loose-leaf updated 2013, release 1), ch 37.2(h).

42. See *McKinney v University of Guelph*, [1990] 3 SCR 229 at 269, 76 DLR (4th) 545, Laforest J [*McKinney*].

43. *Supra* note 31, s 32(1).

established at least two situations where the *Charter* may be found to apply to an entity that is not, by its very nature, “government”. First, an entity may be characterized as “government” within the meaning of section 32(1) by virtue of the degree of governmental control exercised over it. Second, a non-governmental entity may be found to attract *Charter* scrutiny to the extent that it “performs governmental activities”.⁴⁴ The fact that an entity performs a “public service” will not be sufficient to make it subject to the *Charter*, even if it is subject to government regulation and receives funding from the public purse.⁴⁵ However, if an institution performs an act that is truly “governmental” in nature—for example, by implementing a specific statutory scheme or a government program—the institution will be required to carry out that act in accordance with *Charter* values.⁴⁶

In sum, the tests that are emerging to determine when an entity is sufficiently of or like government to bear the special responsibilities of the state have many parallels with the indicia of a co-opted charity that I put forward in this Part. These parallels suggest that where charities are co-opted in the ways outlined in this article, they are more likely to be subject to human rights liability, judicial review and other public law standards. With this in mind, we may turn to consider some specific modern phenomena that tend toward the co-optation of charitable resources by government. By identifying these phenomena and comparing the ways in which they are addressed by English and Canadian law, we may reach some conclusions about the extent to which English and Canadian law either enable government to, or prevent government from, compelling charities to conform to or carry out particular public welfare goals.

44. See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 42, 151 DLR (4th) 577 [Eldridge]; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 16, [2009] 2 SCR 295.

45. *McKinney*, *supra* note 42 at 268.

46. This seems to be the combined effect of *Eldridge* and *Doré v Barreau du Québec*. *Eldridge*, *supra* note 44; *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395. Note that this standard is apparently higher than that set by the *Human Rights Act 1998*; in the UK, an entity may be amenable to human rights liability if it performs functions that government “typically” performs. See *Aston Cantlow*, *supra* note 34, citing *R v London & Quadrant Housing Trust*, [2009] EWCA Civ 587 at para 70 (the provision of subsidized housing is “typically, although not necessarily, a function which government provides” and can properly be described as a public service within the meaning of *Aston Cantlow*).

III. Mechanisms of Co-optation

The co-optation of charitable resources by government can take a variety of different forms. For example, a legislative body with authority to regulate charities may at any time enact a definition of “charity” that reflects (to its chosen degree of specificity) the policy agenda of the incumbent government. Government may put in place tax laws that assign greater or lesser fiscal advantages to different *categories* of charities, depending on how closely the charities’ objects align with the objects of the state. It may require that government representatives be placed on the boards of charities that it wishes to influence or control. Alternatively, government may provide funding to charities on terms that prohibit them from criticizing government policy, or that ensure that the government’s own welfare priorities are carried out.

If the specific mechanisms and manifestations of government co-optation in the charitable sphere are potentially infinite, they may nonetheless generally be understood to fall within one of three broad categories of co-optation: definitional (or existential) co-optation, managerial co-optation and contractual (or fiscal) co-optation. Definitional co-optation stems from the government’s ultimate power to define (or redefine) the concept of charity, and to make the acquisition or retention of charitable status dependent upon compliance with the government’s laws and administrative policies. Managerial co-optation occurs where the government is able to affect the administration of a charity through its influence over members of the board. Finally, contractual or fiscal co-optation stems from the ability of government to enter into contractual or other funding arrangements with charities, and to negotiate the terms upon which charities will be paid for the services they provide.⁴⁷ We will examine some common instances of each of these categories of co-optation below.

47. While I concentrate on contractual funding agreements in this piece, the financial pressures that may cause charity trustees to agree to terms put forward by government may equally affect charities seeking grants or other non-contractual funding. I thank an anonymous referee for making this point.

A. Mechanisms of Co-optation: The Legal Definition of Charity

A first modern phenomenon that tends toward the co-optation of charitable resources by government involves the exertion of government influence over the legal definition of charity. The legal definition of charity plays the crucial function of setting the outer bounds of the purposes and activities that charities are authorized to pursue. Thus, a government that exercises a high degree of control over that definition has a greater capacity to align the resources of the charitable sector with its own policies and programs. It can exercise this capacity at the point of entry to the charitable sector or at the point of exit.

(i) Historical Roots

The exertion of government influence over the formation, interpretation and application of the legal definition of charity is a modern phenomenon with distinct historical roots. The Preamble to the *Statute of Charitable Uses, 1601* (Statute of Elizabeth)⁴⁸—the statutory list of “good, godly and charitable uses” that became the “judicial lodestar”⁴⁹ as to the objects the common law would recognize as charitable—was itself a manifestation of the legislature’s ultimate authority to give legal meaning to the term “charity” and to align the legal concept with a specific welfare agenda. While there is debate about the precise provenance of the Preamble,⁵⁰ there is significant consensus that the charitable uses set out therein were designed to reinforce a broader Tudor policy agenda involving the construction of public works, local taxation, forced labour and the criminalization of vagrancy.⁵¹ By articulating the charitable objects within the jurisdiction of the statute’s commissioners, the Elizabethan

48. 43 Eliz I, c 4 (also referred to as the Statute of Elizabeth).

49. *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10 at 144, 169 DLR (4th) 34 [*Vancouver Society*], citing DWM Waters, *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) at 550.

50. See Hubert Picarda, *The Law and Practice Relating to Charities*, 4th ed (Haywards Heath, UK: Bloomsbury Professional, 2010) at 496 (suggesting that the Preamble took its inspiration from a fourteenth-century poem).

51. Blake Bromley, “1601 Preamble: The State’s Agenda for Charity” (2002) 7:3 *Charity L & Practice Rev* 144. See also Michael Chesterman, *Charities, Trusts and Social Welfare* (London, UK: Weidenfeld & Nicolson, 1979) at para 74.

Parliament explicitly sought to draw philanthropic resources toward the governmental agenda of the day.⁵²

From 1601 until the middle of the twentieth century, however, the task of articulating the legal meaning of charity fell mostly to the independent courts. In both England and Canada, the courts developed and refined the common law concept of a charitable purpose in judgments concerning the validity of charitable trusts, the application of mortmain legislation and, eventually, the application of tax legislation. Over the course of several centuries, the judicial practice of drawing analogies to the Preamble list, and further analogies to those analogies, produced a legal concept of charity that would have been neither within the intention nor the imagination of the Elizabethan Parliament. In 1891, Lord MacNaghten's four-fold classification of charitable purposes—the relief of poverty, the advancement of education, the advancement of religion and “other purposes beneficial to the community”—effectively replaced the Preamble as the starting point of the law.⁵³

The courts also developed a new charity law doctrine in the twentieth century, which placed some distance between the legal definition of charitable purposes and the government policy realm. According to the political purposes doctrine, charities cannot have a principal purpose of furthering the interests of a particular political party, procuring changes in domestic or foreign law, or procuring reversals of government policy or of particular government decisions.⁵⁴ It is less well known, but also generally accepted, that an institution whose purpose is to *promote* the maintenance of an existing law or government policy falls within the scope of the prohibition.⁵⁵ Thus, in *Re Hopkinson*, the English Chancery Division held that a gift to four members of the ruling Labour party, to be applied for the advancement of adult education with reference to a Labour Party memorandum, was intended to secure a certain political

52. See *Nathan Report*, *supra* note 22 at 18 (noting that the Statute of Elizabeth formed part of a concerted plan for dealing with the economic and social problems of the day). See also Marion R Fremont-Smith, *Foundations and Government: State and Federal Law and Supervision* (New York: Russell Sage Foundation, 1965) at 26.

53. *Special Commissioners of Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) at 583, MacNaghten B [*Pemsel*]; *Vancouver Society*, *supra* note 49 at 144.

54. See *McGovern v Attorney General*, [1981] 3 All ER 493 (Ch) at 509.

55. See *Picarda*, *supra* note 50 at 240.

policy and thus was not charitable.⁵⁶ Similarly, in *Re Co-operative College of Canada*, the Saskatchewan Court of Appeal concluded that a college that (like the incumbent government) encouraged the “specific economic principles” of co-operatives and credit unions was not charitable, holding that any effort to change existing laws, enact new laws or to “resist any such change or enactment” would fall outside the concept of charity.⁵⁷

While the political purposes doctrine prevents charities from explicitly furthering government policy as a principal purpose, it does not prevent charities from furthering the *same* policies as government, nor from assisting government in its own policy implementation. As the Nathan Committee noted in 1960, the theory of “mutual exclusiveness” between charitable and government functions held favour with the Court of Chancery for a period during which it sought to prevent charitable endowments from being applied in relief of rates to a greater extent than necessary.⁵⁸ However, the theory was at odds with the fact that some of the charitable uses listed in the Preamble—such as the repair of bridges—had been provided by local authorities for centuries, and that others—such as assisting the poor in the payment of their taxes—were directly in aid of the National Revenue.⁵⁹ The theory was (and is) also at odds with the endlessly shifting scope of the government’s welfare role; some functions that are, at one time, understood to be charitable may, at another time, come to be understood as the responsibility of the state. The theory of mutual exclusiveness between charitable and government functions never gained much ground, and thus a charitable purpose may coincide with an existing government policy if it otherwise meets the common law test.⁶⁰ However, the courts (and later the Charity Commissioners) maintained a preference for applying charitable resources

56. [1949] 1 All ER 346 (Ch) at 350.

57. (1975), 64 DLR (3d) 531 at para 21, [1976] 2 WWR 84 (Sask CA). *Re Hopkinson* was also referred to with apparent approval. *Supra* note 56.

58. *Nathan Report*, *supra* note 22 at paras 622–27.

59. See Picarda, *supra* note 50 at 201–02.

60. See Jonathan Garton, “Charities and the State” (2000) 14:2 Trust L Intl 93. Since the motive of the settlor or founder is irrelevant to the charitable nature of a gift, it will be irrelevant that such settlor desires to further government policy through their charity. See Picarda, *supra* note 50 at 24.

to purposes that fell outside of the government's mandatory functions when they settled cypres schemes.⁶¹

By the mid-twentieth century, then, the courts had assumed most of the responsibility for the legal definition of charity and had placed some degree of distance between that definition and the government policy realm. The trend that has characterized the last half-century, however, has been the shifting of control over the legal definition of charity to *outside* the judicial domain. A number of factors have contributed to this shift, including the rise of charitable registration systems and the role of charities regulators therein, the cost of appealing regulatory decisions⁶² and, in Canada, the general failure of the provincial attorneys general to bring charity law matters before the courts. The shift may also reflect dissatisfaction with the analogical reasoning used by the courts to develop the common law definition of charity and dissatisfaction with the substantive law this methodology has produced.⁶³ Canada and England have both experienced this shift away from judicial control over the legal definition of charity, but each has filled the resultant gap in a different way. While the UK Parliament has explicitly adjusted the parameters of the English charitable sector following an extended political debate, the Canadian Parliament has remained silent, leaving the Canadian government with a broad power to use the legal concept of charity to align charitable resources with its own programs and goals.

(ii) Government Influence over the Definition of Charity in England and Wales

Until quite recently, the Preamble to the *Statute of Charitable Uses, 1601* remained the most up-to-date statutory articulation of charitable purposes in the UK. The *Charitable Trusts Act, 1853*, which established the jurisdiction of the Charity Commissioners, defined the term "charity" by

61. *Nathan Report*, *supra* note 22 at para 625.

62. See Charles Mitchell, "The Search for Public Benefit: Redefining Charity in English Law" (Paper presented at the Foundations of Charity Conference, King's College, London, September 1998) [unpublished].

63. For an exploration of the particular disjuncture that exists in Quebec between the objects that are legally charitable and those that are of special importance to society, see Kathryn Chan, "Charitable According to Whom?: The Clash Between Québec's Societal Values and the Law Governing the Registration of Charities" (2008) 49:2 *Cahiers Dr* 277.

reference to “the meaning, purview or interpretation” of the seventeenth-century Act.⁶⁴ The Preamble was formally repealed by the *Charities Act, 1960*.⁶⁵ However, both the 1960 and 1993 versions of the *Charities Act* defined charitable purposes as “purposes which are exclusively charitable according to the law of England and Wales”, leaving the common law requirement that a charitable object be within the “spirit and intendment” of the Preamble in place.⁶⁶

Once the Charity Commission for England and Wales became responsible for maintaining the official register of charities in 1960, however, it effectively replaced the judiciary as the body with operational responsibility for determining questions of charitable status within its jurisdiction.⁶⁷ Over time, the Commission came to the position that it had “the same powers as the court” to recognize new purposes as charitable in carrying out its registration function.⁶⁸ The Commission exercised these powers actively during the years prior to 2006, adding purposes such as the relief of unemployment, the promotion of community capacity building and the promotion of human rights to the “fourth head” of the *Pemsel* test.⁶⁹ It also determined in the 2004 *Trafford and Wigan* decision that if an organization was otherwise exclusively charitable and independent, it could have as its purpose “a function or service that a governmental authority had a responsibility to provide”.⁷⁰ The recognition that public

64. (UK), 18 & 19 Vict, c 124, s 66.

65. (UK), 8 & 9 Eliz II, c 58, s 48(2), Schedule 7 [*Charities Act, 1960*].

66. *Ibid*; *Charities Act 1993* (UK), c 10, s 97(1).

67. While the revenue authorities also had to decide whether institutions were “charities” for purposes of various statutory schemes, the Charities Acts provided that any institution registered by the Charity Commission was conclusively presumed to be a legal charity. See Mitchell, *supra* note 62 at 31.

68. UK, Charity Commission, *Recognising New Charitable Purposes* (2001) at 2, online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/358849/r11text.pdf>.

69. See Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 252. See also Lindsay Driscoll, “England and Wales: *Pemsel* Plus” in Myles McGregor-Lowndes & Kerry O’Halloran, eds, *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham, UK: Edward Elgar, 2010) 48 at 53–54.

70. UK, Charity Commission, *Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust* (21 April 2004) at para 6.1.5, online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/324397/trafforddecision.pdf> [*Trafford and Wigan*].

service delivery was a valid charitable objective marked “a new juncture in state/charity relations” and extinguished any embers of the theory of mutual exclusivity between charitable and government functions.⁷¹

The Charity Commission’s role in developing the English concept of charity changed somewhat with the enactment of the *Charities Act 2006*. Parliament seized upon its political opportunity to redraw the outer boundaries of the charitable sector, making England only the third Commonwealth jurisdiction to adopt a statutory definition of charitable purposes since the time of Elizabeth I.⁷² Pursuant to section 2 of what is now the *Charities Act 2011*, a purpose may be charitable if it falls within one of thirteen “descriptions of purposes” set out in section 3.⁷³ The list in section 3 begins with a slightly modified version of the first three *Pemsel* heads: the relief and prevention of poverty, the advancement of education and the advancement of religion.⁷⁴ It continues with nine other descriptions of purposes, which largely restate the purposes that courts and the Commission had already recognized as charitable under the “fourth head” of the *Pemsel* test.⁷⁵ The list concludes with a “catch-all” provision, which specifies that the definition of charitable purposes includes any purpose that was recognized as charitable prior to the *Charities Act 2006* coming into force, and any purpose that may “reasonably be regarded as analogous to” an existing charitable purpose.⁷⁶

At one level, the definition of charitable purposes in the *Charities Act 2011* can be seen as a reassertion of the perennial power of the legislature to direct the charitable sector toward the ends of its choosing. While the list in section 3 largely restates purposes that had previously been recognized as charitable by the courts and the Commission, it is nonetheless a *statutory* list, which emerged from a long and contentious process of democratic

71. Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 253.

72. Prior to 2003, only Barbados had enacted a statutory definition. See Stephen Lloyd, *Charities: The New Law 2006—A Practical Guide to the Charities Acts* (London, UK: Jordans, 2007) at 3. In 2005, Scotland passed their own act. *Charities and Trustee Investment (Scotland) Act 2005*, ASP 10.

73. (UK), c 25, s 2(1)(a). The purpose must also be for the public benefit within the meaning of section 4. *Ibid*, s 2(1)(b).

74. *Ibid*, ss 3(1)(a)–(c); Driscoll, *supra* note 69 at 56–58 (the “prevention” of poverty is a new addition).

75. See Driscoll, *supra* note 69 at 55.

76. *Charities Act 2011*, *supra* note 73, s 3(1)(m).

deliberation.⁷⁷ Moreover, the statutory definition alters the common law status quo in several material respects. For example, it provides that the “religions” that a charity may properly advance include multi-deity and non-deity faiths. This position had little support in the common law jurisprudence and was the subject of extensive legislative debate.⁷⁸ The Act also makes the advancement of amateur sport (and of health-promoting mental games such as chess) charitable, an extension the Supreme Court of Canada has been unwilling to carry out by judicial analogy.⁷⁹ Finally, the Act undoes the link drawn by the common law between the definition of charitable purposes and the Statute of Elizabeth, and instead makes its own section 3 list of purposes the starting point for any extension of the definition by analogy.

While the *Charities Act 2011* reasserts Parliament’s ultimate sovereignty over the legal definition of charity, it does little to enable the English government to shift the boundaries of the charitable sector on an ongoing basis, in accordance with the government’s own shifts in policy. The Act’s preservation of the common law method of analogical reasoning has admittedly ensured that the Charity Commission will continue to enjoy substantial discretion in the exercise of its charitable registration function. However, because of its relative specificity, the new statutory definition of charity has *reduced*, not increased, the scope for the Commission to use personal assessments in applying the definition.⁸⁰ The enumeration of thirteen descriptions of charitable purposes has bounded the Commission’s discretion, and thus made the outer boundary of the English charitable sector less malleable than it was before 2006.

Perhaps more importantly, the *Charities Act 2011* places a number of institutional barriers in the way of the Commission’s discretion

77. See Lloyd, *supra* note 72 (noting that the statutory list of charitable purposes and public benefit test were the “most high profile and hotly debated elements of the new legislation” at 15).

78. *Charities Act 2011*, *supra* note 73, s 3(2)(a). How far the concept of religion should extend was a matter of prolonged Parliamentary debate. See Driscoll, *supra* note 69 at 59.

79. *Charities Act 2011*, *supra* note 73, ss 3(1)(g), 3(2)(d). Cf *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217.

80. See DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 8–9 (arguing that the concept of discretion is based around two variables: the scope for personal assessments in the course of a decision, and the extent to which such assessments are accepted as final and conclusive by other officials).

becoming subject to political influence. While the *Charities Act 2011* does not make the Charity Commission a wholly independent body, it does establish the Commission as a non-ministerial government department, and specifically provides that in the exercise of its functions it shall “not [be] subject to the direction or control of any Minister of the Crown or of another government department”.⁸¹ The Act also goes a long way in ensuring that the Commission remains oriented toward the goal of promoting the public interest in charity property, providing, among other things, that the Commission must carry out its registration function in a manner consistent with its statutory objective of increasing public trust and confidence in charities.⁸² Finally, the Commission’s registration decisions are appealable in the first instance to the First-Tier Tribunal (Charities), an independent judicial body with the power to quash the Commission’s registration decisions;⁸³ the Commission’s policies on the interpretation of the statutory definition have also been subject to judicial review.⁸⁴ All of these measures serve to limit the Commission’s discretion over the definition of charitable purposes, to direct the exercise of that discretion toward particular ends, and to reduce the risk of that exercise coming under the influence of the executive branch.

(iii) Government Influence over the Definition of Charity in Canada

How does the definition of charity under the Canadian registered charity regime compare to English law in this regard? The Parliament of Canada has never exercised its power to determine the substantive purposes that registered charities may carry out. The ambit of the Canadian charitable sector is effectively set by subsections 149.1(1) and 248(1) of the *Income Tax Act*, which together define the three categories of charities that the Minister of National Revenue may register under the Act.⁸⁵ Subsection 149.1(1) defines charitable organizations and foundations by reference to the “charitable purposes” for which they are constituted and

81. *Supra* note 73, s 13(4).

82. *Ibid*, ss 14, 16(1).

83. *Ibid*, Schedule 6.

84. See e.g. *Independent Schools Council v Charity Commission for England and Wales*, [2011] UKUT 421 (TCC).

85. See “registered charity”/« organisme de bienfaisance enregistrés », RSC 1985, c 1 (5th Supp), ss 149.1(1), 248(1) [*ITA*].

the “charitable activities” they carry out.⁸⁶ However, the *Income Tax Act* does not specify the meaning of a “charitable purpose”, save to state that it includes the disbursement of funds to defined “qualified donees” and does not include gifts that constitute “political activities”.⁸⁷ Similarly, the Act does not define “charitable activities”, although it does clarify that certain business and investment activities fall within the term.⁸⁸ In this absence of substantive legislative content, the meaning of the terms “charitable purpose” and “charitable activity” in the *Income Tax Act* has always been determined exclusively by reference to the common law.⁸⁹

The open-ended nature of the *Income Tax Act* provisions could be taken to suggest that the Canadian government is more “hands-off” in shaping the charitable sector than its English counterpart. With no statutory definition of charity in Canada, the operative definition of charity is, in theory at least, almost surreally dislocated from the country’s public policy goals; an institution is charitable in Canada if its purposes fall within the spirit and intendment of an ancient statute enacted in a far-off land. Furthermore, unlike the Charity Commission, the Canada Revenue Agency’s (CRA) Charities Directorate does *not* claim to have the same powers as the courts to recognize new charitable purposes, instead taking the position that it must apply the law of charities as it stands.⁹⁰ These factors would seem to suggest that the legal definition of charity in Canada is independent and insulated from the government’s public welfare agenda.

However, while Parliament has exerted minimal influence over the legal definition of charity and the CRA claims not to make new charity law, the operative definition of charity is constantly being adjusted and evolved by the CRA in a way that undermines its deferential claims. Like

86. See “charitable foundation”/« fondation de bienfaisance » and “charitable organization”/« oeuvre de bienfaisance ». *Ibid*, s 149.1(1).

87. See “charitable purposes”/ « fin de bienfaisance ». *Ibid*.

88. The *Income Tax Act* specifies, for example, that the carrying on of a related business, the disbursement of income to an associated charity or qualified donee and the devotion of part of an organization’s income to “ancillary” non-partisan political activities are all charitable activities. *Supra* note 85, ss 149.1(1), 149.1(6), 149.1(6.2).

89. For a criticism of this position, see Kathryn Chan, “Taxing Charities/Imposer les Organismes de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law” (2007) 55:3 Can Tax J 481.

90. Interview of Blake Bromley, practicing charity lawyer (3 March 2013).

the Charity Commission for England and Wales, the CRA in Canada is the main source of decisions, policies and guidance documents on what the term “charitable” means. Despite its purported lack of power to recognize new charitable purposes, there is little question that the CRA approaches its task broadly and exercises a broad institutional discretion in determining the outer bounds of the charitable sphere.⁹¹ The breadth of this discretion is evidenced by the fact that the CRA and Charity Commission often interpret the same common law authorities in a different way; a comparison of each regulator’s policy, for example, reveals that the CRA takes a significantly stricter view of political advocacy than the common law.⁹² The CRA has extensive policy documents on purposes whose charitable nature has never been addressed in any substance by the courts. It also periodically publishes bulletins with specific examples of “charitable” and prohibited “political” activities, which are often perceived by charities as reflecting the particular ideology of the incumbent government.⁹³

Against this background, it is significant that the provisions of the *Income Tax Act* do far less than the *Charities Act 2011* to protect the regulator’s discretion from becoming subject to political influence. First, compared to the definition of a charitable purpose under the *Charities Act*

91. The CRA has developed an extensive collection of policy and guidance documents, which articulate its views on whether and in what circumstances specific purposes are charitable. See Canada Revenue Agency, “Alphabetic Index of All Policies and Guidance” (27 August 2014), online: <www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp_mnn-eng.html>.

92. Some, but not all of these differences, are attributable to the Canadian jurisprudence. Cf UK, Charity Commission, “Speaking Out: Guidance on Campaigning and Political Activity by Charities” (1 March 2008), online: <www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>; Canada Revenue Agency, “Political Activities”, Policy Statement, CPS-022 (2 September 2003), online: <www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>.

93. For example, a recent CRA publication about distinguishing between charitable and political activities illustrates impermissible “political activity”, using the example of a refugee settlement charity that calls for the government to make application forms for government social programs available in various languages. The author has had conversations with members of the refugee community who interpreted this as evidence of the current government’s anti-refugee ideology. Canada Revenue Agency, “Distinguishing Between Charitable and Political Activities” (12 March 2013), online: <www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-clctvts/chrttblplcl-eng.html>.

2011, the open-ended definitions in the *Income Tax Act* provide the CRA with significant autonomy in determining the boundaries of the charitable sphere. Second, the *Income Tax Act* does not lay out any charity-specific objectives or duties to guide the CRA's application of the statutory terms; the regulator's mandate is simply to support the administration and enforcement of the *Income Tax Act*.⁹⁴ Third, the Charities Directorate's registration decisions are appealed in the first instance to the Charities Redress Section of the Tax and Charities Appeals Directorate; like the Directorate itself, this is an internal division of the CRA whose decisions and policies are not generally available to the public.⁹⁵ Finally, unlike the Charity Commission, the CRA is a *ministerial* government department, which is subject to the direction and control of the Minister of National Revenue. All of these characteristics of the registered charity regime serve to expand the ambit of official discretion respecting the definition of charitable purposes in Canada, and to increase the risk of it coming under political influence.

B. Mechanisms of Co-optation: The Creation of Statutory Charities

A second modern phenomenon that tends toward the co-optation of charitable resources by government is the proliferation of statutory charities. Statutory charities are constituted by the legislature, which also defines their purposes and domestic rules. As such, a government that establishes statutory charities increases its potential to align the resources of the charitable sector with its own policies, and to subject charities to its influence and control.

(i) Historical Roots

It has long been settled that the constituting instrument created by a charity's settlor or founder is the primary source of rules for the

94. *Canada Revenue Agency Act*, SC 1999, c 17, s 5(1).

95. For initial procedure, see *ITA*, *supra* note 85, s 168(4). There is a further right of appeal to the Federal Court of Appeal under subsection 172(3). However, the Federal Court of Appeal has tended to defer to the decisions of the CRA. See e.g. *Canadian Magen David Adom for Israel v Canada (MNR)*, 2002 FCA 323, 293 NR 144.

administration of the charity's property.⁹⁶ A charity's constituting legal instrument (often called a charitable instrument) enshrines the particular charitable objects that the charity is bound to pursue. It also sets down the charity's fundamental rules of governance and may include detailed directions about how charity property is to be held and managed, how the property's managers are to be selected, how disputes over the charity's governance are to be resolved, and how the property should be distributed if the charity is wound up. Whether the charitable instrument takes the form of articles of association, a trust deed, a constitution, a Royal Charter or an Act of Parliament, the principle of the document's primacy remains the same. When we are considering the extent to which the law of charities enables government to influence and control charitable institutions, therefore, it is important to consider the role that the executive and legislative branches of government play in the creation of these charitable instruments.

Looking back at the history of this matter, we must draw a distinction between the role that government played in the creation of charitable corporations and charitable trusts. F.W. Maitland points out that as unincorporated creatures, charitable trusts "asked nothing and obtained nothing from the State".⁹⁷ Their existence was the automatic consequence of a settlor communicating his intention that certain ascertainable property be held on trust for charitable purposes.⁹⁸ The common law required only that the courts be competent to control and reform the charitable trusts that were created.⁹⁹ While government was presumably able to create charitable trusts for its own purposes, provided they remained within the jurisdiction of the courts, this does not appear to have been a common practice in either England and Wales or in Canada. In general, therefore, it seems fair to say that *individuals* settled charitable trusts within the common law tradition, and that government had little scope

96. See e.g. Peter Luxton, *The Law of Charities* (New York: Oxford University Press, 2001) at 256.

97. F.W. Maitland, "Trust and Corporation" in David Runciman & Magnus Ryan, eds, *State, Trust and Corporation* (Cambridge, UK: Cambridge University Press, 2003) 75 at 118.

98. See Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 140.

99. See *National Anti-Vivisection Society v IRC*, [1947] 2 All ER 232 (HL), Lord Simonds ("[o]ne of the tests, and a crucial test, whether a trust is charitable lies in the competence of the court to control and reform it" at 232).

for influencing the particular objects or rules of governance that settlers chose. It is perhaps for this reason that the Court of Chancery sometimes referred to charitable trusts as “private charities” when comparing them to charitable corporations.¹⁰⁰

Government historically played a far greater role in the creation of charitable *corporations*, which depended on the Crown for their very existence. Granting corporate status was historically a royal prerogative in English law. Therefore, the incorporation of English corporations could technically only be achieved by the consent of the sovereign and was in practice accomplished by a grant of letters patent, a Royal Charter or the enactment of a special Parliamentary Act.¹⁰¹ A significant effect of this government involvement was to insulate charitable corporations from judicial supervision by replacing it with the supervision of an appointed visitor. The rule that every charitable trust must be subject to the controlling power of the court did not apply to charitable corporations at common law,¹⁰² and the court could not alter or act inconsistently with any charitable instrument established by government.¹⁰³ By creating charitable corporations, in other words, the government could effectively control both the objects toward which charitable resources were devoted, and the manner in which those resources were administered.

Today, the English and Canadian governments only rarely establish charities by Royal Charter.¹⁰⁴ The practice of establishing charities by statute, however, has continued apace. Museums, libraries, art galleries, hospitals, universities and colleges are among the charitable institutions

100. See *AG v Smart* (1748), 1 Ves Sen 72 (Ch).

101. See Picarda, *supra* note 50 at 267.

102. The Court of Chancery did interfere with the administration of charitable corporations in certain circumstances. See Maurice Cullity, “The Charitable Corporation: A ‘Bastard’ Legal Form Revisited” (2001) 17:1 *Philanthropist* 17. Where a charitable corporation had a set of internal rules and a visitor, however, the court considered itself unable to review the visitor’s decisions. *R v Lord President of the Privy Council* (1992), [1993] AC 682 (HL (Eng)) at 698–700.

103. See Picarda, *supra* note 50 at 523–24.

104. See UK, Privy Council Office, “Applying for a Royal Charter”, online: <privycouncil.independent.gov.uk/royal-charters/applying-for-a-royal-charter>.

commonly established or continued by statutory instrument.¹⁰⁵ These statutory instruments vary widely, and a comprehensive study of their contents is far beyond the scope of this article.¹⁰⁶ It seems fair to assume, however, that as creatures of the legislature, statutory charities are particularly likely to act in furtherance of specific government policies and programs, and to be subject to government control. The question addressed in this section is whether the modern law of charities in either England and Wales or Canada does anything to limit this co-optative potential.

(ii) The Treatment of Statutory Charities in England and Wales

There are two main ways in which English charity law limits the ability of government to constitute statutory charities as instruments of its own welfare policy; both are related to the definition of charity set out in the *Charities Act 2011*. First, the Act preserves the pre-enactment case law on the meaning of charity and thus implicitly incorporates *Re Hopkinson* and the related case law on “pro-government” political purposes. While the modern reach of these decisions is not beyond debate, the Charity Commission has interpreted them broadly, stating in its publications that a charity must exist in order to carry out its charitable purposes and not for the purpose of carrying out the policies or directions of a governmental authority.¹⁰⁷ If a body with a stated charitable purpose is constituted in terms that enable a government authority to make political determinations about what services the body will provide and who will benefit from those services, the Commission is likely to conclude that the body is not a charity at all.¹⁰⁸ Factors that may indicate an unstated,

105. See e.g. *British Library Act 1972* (UK), c 54; *Museums and Galleries Act 1992* (UK), c 44. In Canada, see *An Act respecting the National Sanitarium Association*, SC 1896, c 52; *National Arts Centre Act*, RSC 1985 c N-3 (some, although not all, of the more recent Canadian statutes “deem” these institutions to be registered charities).

106. Cliff Goldfarb has recently written a useful overview of statutory corporations in Canada. See Cliff Goldfarb, “Special Challenges of Special Act Corporations” (Presented at the Canadian Bar Association National Charity Law Symposium, Toronto, 2013) [Goldfarb, “Special Act Corporations”].

107. UK, Charity Commission, *The Independence of Charities from the State* (Charity Commission, 2009) at para 5, online: <www.gov.uk/government/publications/independence-of-charities-from-the-state-rr7>.

108. *Ibid* at paras 6–7.

non-charitable purpose include restraints on the trustees' ability to reject funding on the terms proposed, restraints on the trustees' ability to discuss business in confidence, the existence of trustees with a conflict of interest, and a lack of discretion on the part of the trustees to select beneficiaries for the services provided.¹⁰⁹

The second way in which the *Charities Act 2011* limits the ability of government to construct statutory charities as instruments of public welfare policy is by requiring that all charities be subject to the controlling power of the courts. At common law, as we have seen, charitable corporations could be constituted so as to avert this jurisdiction, and this remained the case under the *Charitable Trusts Act, 1853*.¹¹⁰ In 1960, however, the UK Parliament expressly extended the stricter trust law rule to charitable corporations that wanted to register by incorporating the requirement of subjection to judicial control into the statutory definition of charity.¹¹¹ This extension continues in the *Charities Act 2011*, which provides in section 1 that in order to qualify as a charity, an institution must not only be established for purely charitable purposes, but must also "be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".¹¹²

The meaning and significance of this provision have only been closely considered in one case. In *Construction Industry Training Board v AG*,¹¹³ a corporation that had been established by ministerial order under the *Industrial Training Act 1964*¹¹⁴ for the purpose of providing training to persons in the construction industry applied to be entered on the register of charities. The regulator refused the Training Board's application on the ground that institutions set up under the *Industrial Training Act 1964* were not subject to the High Court's control.¹¹⁵ On an appeal by the Attorney General, the Court of Appeal agreed that the effect of the *Charities Act, 1960* definitional provision was to exclude from the statutory definition of charity any institution that by its terms

109. *Ibid* at para 8.

110. The *Charitable Trusts Act, 1853* did not define charity, in other words, by reference to the supervisory jurisdiction of the courts. See *supra* note 64, s 43.

111. *Charities Act, 1960*, *supra* note 65, s 45(1).

112. *Supra* note 73, s 1(1)(b).

113. [1973] Ch 173 (CA) [*Construction Industry*].

114. (UK), c 16.

115. *Construction Industry*, *supra* note 113 at 173–74.

“substantially ousted the jurisdiction of the court”, for example, by leaving control of the institution in the hands of the executive branch of government.¹¹⁶ The Court split in the result, however, with the majority holding that the relevant provisions of the *Industrial Training Act 1964* did not oust the court’s charitable jurisdiction over the Training Board.¹¹⁷

The *Construction Industry* case arguably sets the bar fairly high for ousting the court’s jurisdiction over charities by statutory instrument. As Russell LJ noted in dissent, the statute at issue in that case required the board to submit proposals as to the functions it would carry out for the approval of the Minister of Labour. It also empowered the Minister to appoint the board’s directors, to approve the remuneration of its chairman and to remove directors in specified circumstances.¹¹⁸ However, as the majority noted in concluding that the statute did not oust the court’s jurisdiction, the *Industrial Training Act 1964* did not give the Minister any means of controlling how the board *performed* its functions once they were approved.¹¹⁹ The *Construction Industry* decision may therefore be taken as authority for the proposition that where an institution’s constituting statute gives the executive branch of government broad authority to control the institution’s trustees or directors in the exercise of their functions, that institution will not qualify as a charity under the *Charities Act 2011*.¹²⁰ In this way, the statutory definition of charity acts as a limit on government influence and control.

(iii) The Treatment of Statutory Charities Under the Canadian Registered Charity Regime

Turning to the Canadian context, it is arguable that the first definitional element that serves to limit government control of statutory charities in England and Wales is also observable under the Canadian registered charity regime. The *Income Tax Act*, as we have seen, defines registered charities primarily in terms of the “charitable purposes” and

116. *Ibid* at 174.

117. *Ibid* at 187–88.

118. *Ibid* at 182–83.

119. *Ibid* at 188.

120. *Ibid* (the case also suggests that certain grants of visitatorial authority may also place an institution outside the statutory definition of charity).

“charitable activities” they must carry out.¹²¹ The courts and the CRA interpret these terms by reference to the common law tradition in every Canadian province and rely heavily on English law in doing so. If a Canadian court was faced with an argument that an applicant for registered charity status was *not* a charity because it was constituted to carry out the policies or directions of the government, it would need to address the effect of *Re Hopkinson* and *Re Co-operative College of Canada*. However, the only party that would generally be in a position to *make* such an argument would be the Charities Directorate itself,¹²² and, rather unsurprisingly, this delegate of the Minister of National Revenue has never taken a public position on the independence of charities from the state.

With regard to the *Charities Act 2011* requirement that all charities be subject to the controlling power of the courts, the parallels between the Canadian and English regimes cease. Neither section 149.1 nor any other provision of the *Income Tax Act* requires that registered charities be subject to the jurisdiction of the superior courts. It is of course arguable that to the extent the terms in the *Income Tax Act* are interpreted by reference to the common law, a trust will not be “constituted and operated exclusively for charitable purposes” within the meaning of the statute unless the courts remain competent to control and reform it.¹²³ As we have seen, however, the common law provides far less support for the argument that every corporation constituted for charitable purposes must be subject to the charities jurisdiction of the superior courts. In the absence of any statutory extension of the trust law rule, it must be concluded that the Canadian registered charity regime permits the creation of statutory charities that are substantially controlled in the exercise of their functions by the executive branch of government, provided they do not have an unstated, non-charitable purpose.

What are the implications of this seldom-noted distinction between the English and Canadian regimes of charities regulation? To answer this question thoroughly, one would need to study the instruments

121. See “charitable foundation”/« fondation de bienfaisance » and “charitable organization”/« oeuvre de bienfaisance ». *ITA*, *supra* note 85, s 149.1(1).

122. This is because the applicant for registered charity status would be arguing that it *was* a charity. It is possible that a third party could intervene to make such an argument, but such intervention is very rare in registered charity appeals.

123. *Supra* note 85, s 149.1(1).

constituting the statutory charities in each jurisdiction and assess the level of governmental control built into each. For a taste of where such research might lead, however, let us consider the status of one Canadian educational institution that has been found to meet one of the tests of “publicness” described in Part I. Douglas College is a post-secondary college in British Columbia falling within the purview of the province’s *College and Institute Act*.¹²⁴ In the early 1990s, employees challenged the college’s mandatory retirement policy, requiring the Supreme Court of Canada to consider whether the college was subject to the *Charter*. Having considered the college’s constituting statute, a unanimous court held that this issue could be “quickly disposed of”:

As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact.¹²⁵

The important point for our purposes is that despite this high profile ruling that Douglas College was established to implement government policy and was controlled by the government to the point of being its agent, the college at all times maintained its registered charity status under the federal *Income Tax Act*.¹²⁶ While a variety of explanations might be offered for this situation (including mere inadvertence on the part of the regulator), a perusal of the Canadian charities register suggests that Douglas College is not the only government-directed institution with registered charity status. The more likely explanation, therefore, is the one already discussed: The only limitation that the *Income Tax Act* places on the creation of government-controlled statutory charities stems from the common law rule that charities may not carry out pro-government political purposes, and the registered charity regime gives this rule little force or effect.

124. RSBC 1996, c 52.

125. *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 at 584, 77 DLR (4th) 94.

126. See Canada Revenue Agency, “Charities Listing: Douglas College”, online: <www.cra-arc.gc.ca/chrts-gvng/lstngs/menu-eng.html>.

*C. Mechanisms of Co-optation: Charities and the Contract Culture*¹²⁷

A final modern phenomenon that tends toward the co-optation of charitable resources by government is the exertion of government influence over the *administration* or *management* of charities through the negotiation and implementation of service delivery contracts and through the appointment of government authority trustees. Working within the frameworks of their charitable instruments, trustees and other charity officers must continually make decisions about what activities their charity should carry out, who should benefit from those activities, and how those activities should be organized and administered. A government that can influence these decisions through the imposition of contractual terms or through the influence of its officers has considerable potential to align charitable resources with its own policies, and to bring even non-statutory charities under its effective control.

We have already seen that in “post-welfare” or threatened welfare states such as England and Canada, the practice of contracting out important welfare services to charities and other non-governmental organizations has become increasingly prevalent. The English charitable sector derives well over one third of its income from government sources, much of which is made up of payments for the delivery of welfare services that were formerly the responsibility of the state.¹²⁸ In Canada, the number is significantly higher.¹²⁹ Historically, much of this government income took the form of block funding grants with few strings attached. Today, however, it is more common for charities to deliver public services on the basis of legally binding service agreements, which often include

127. See Morris, “Paying the Piper”, *supra* note 1 at 123. This is the term used by Debra Morris. I arguably use it to describe a broader range of trends.

128. See Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 251.

129. Government funding constitutes over half of the revenue of Canada’s community non-profit sector. See Statistics Canada, “Satellite Account of Non-profit Institutions and Volunteering” (7 December 2007), online: <www.statcan.gc.ca/daily-quotidien/071207/dq071207b-eng.htm>.

detailed provisions about performance targets, financial and reporting requirements, and permissible and impermissible “advocacy”.¹³⁰

Within this evolving “contract culture”, the co-optation of charitable resources by government is increasingly a source of concern. In an early and important article, Debra Morris noted that the increasing reliance of charities on contracts has meant “increased intrusion into [their] general management and goal-setting processes”.¹³¹ The more dependent that charities are on contract funding, the more pressure they will feel to direct their resources in ways that reflect the agenda and priorities of the purchaser of their services. Studies have found that charities routinely undervalue their services in order to win government contracts, “topping up” the contractual payment with other charitable income, and thereby subsidizing core welfare services with charitable funds.¹³² Some charities claim that government has bullied them into accepting unfair contract provisions.¹³³ Charities that carry out work under contract with government also complain of restrictive or inappropriate performance measures, limitations on their advocacy ability and excessive prescription of their organizational practices.¹³⁴ All of this suggests that the greatest threat to charity independence in the modern age may not be *imperium*, but *dominium*: the use of the government’s economic power to achieve its aims.¹³⁵

The pressures that have been placed on charities by the trend toward contract-based, limited-term funding have only been exacerbated by the practice of appointing government representatives as charity trustees. Appointing government representatives as charity trustees appears to be

130. See Morris, “Paying the Piper”, *supra* note 1 at 125. For information regarding the situation in Canada, see Imagine Canada, “A Submission on the Community Nonprofit Sector of Canada to the Blue Ribbon Panel on Grants and Contributions Under the Federal Accountability Action Plan, 2006” (November 2013), online: <www.imaginecanada.ca/files/www/en/publicaffairs/final_blue_ribbon_panel_aug_2006.pdf>.

131. Morris, “Paying the Piper”, *supra* note 1 at 128.

132. *Ibid* at 136 (and the empirical studies reviewed therein).

133. *Ibid* at 126.

134. See Cairns, *supra* note 5 at 38–41.

135. For a classic discussion on the government’s use of *dominium*, see Terence Daintith, “Regulation by Contract: The New Prerogative” (1979) 32:1 *Current Leg Probs* 41.

a relatively common practice, though it is rarely discussed in Canada.¹³⁶ In a statutory charity, where the legislature generally establishes the method of appointment, provision is often made for trustees to be appointed by government authorities. Individual charity founders may also choose to appoint a government authority (or the authority's nominee) as the sole trustee of their charity because the authority knows the local beneficiary population, has the power to rezone the charity's land, or represents a potential source of additional funds for the charity's operations.¹³⁷

While the appointment of government trustees may produce advantages for charities, it also increases the likelihood that those charities will become subject to government influence and control. Where a government authority acts as the trustee of a charity located in its area, the authority will face potential conflicts between its duties to the charity and its general democratic duty to serve the interests of its constituents. Where a local authority is authorized to appoint one or more nominee trustees to a charity, similar conflicts will arise. A party that appoints a nominee trustee to the board of a charity generally expects that trustee to act as its voice on the board,¹³⁸ particularly if it is also the nominee's employer. This expectation creates the risk that trustees nominated by a government authority will act in the interests of the officer or body that appointed them, rather than in the interests of the charity.¹³⁹

(i) Historical Roots

The common law of charities does not specifically address the issue of government influence in the administration of charity property. The issue has emerged as a modern issue, which reflects the ways in which the roles of government and charities have been increasingly intertwined.

136. See UK, Charity Commission, *Local Authorities as Trustees* (14 March 2012) at OG 56 A1, online: <ogs.charitycommission.gov.uk/g056a001.aspx> [Charity Commission, *Local Authorities*]; Goldfarb, "Special Act Corporations", *supra* note 106 at 5–6.

137. See Charity Commission, *Local Authorities*, *supra* note 136 at OG 56 C1.

138. See Paul D Finn, *Fiduciary Obligations* (Sydney: The Law Book Company, 1977) at 54.

139. See Peter Luxton, "Conflicts of Interest in Charity Law" in Dunn, *The Voluntary Sector*, *supra* note 1, 227. For an illustration of the conflicts that may arise where a government council is the sole trustee of charity land within its jurisdiction, see *Maidment v The Charity Commission for England and Wales* (16 November 2009), London CA/2009/0001 & 0002 (UK First-Tier (Charity)).

Nevertheless, the common law contains a number of rules that may serve to protect charities from third party influence over the direction of their funds. First, charity trustees are obliged to adhere to the terms of their charitable instrument.¹⁴⁰ For example, where a trust instrument stipulates that the object of the charitable trust is to provide housing to the elderly, it will be a breach of trust to use the fund to provide housing to youth, even if the latter project has government funding attached to it or is supported by the government nominee on the board.¹⁴¹ Strict liability follows a trustee's failure to adhere to the trust instrument,¹⁴² and the Attorney General may seek an injunction to restrain a trustee from carrying out an act that falls outside the terms of a charitable trust.¹⁴³ Where there is no trust, as in the case of some corporate charities, the common law's *ultra vires* doctrine may provide an alternative tool to require that directors adhere to the charity's original purposes.¹⁴⁴ Depending on the form of the charity and the specificity of the charitable instrument, therefore, the "duty of adherence" may protect charities against the pressures that mark the contract culture.

The second way in which the common law protects charities from becoming subject to outside influences in the administration of their property is by imposing a duty of loyalty on trustees and other fiduciary officers. The precise scope and function of the so-called duty of loyalty have long been a matter of debate in Anglo-Commonwealth law, with jurists on either side of the Atlantic taking somewhat different views of the duty's parameters.¹⁴⁵ It is agreed, however, that the trustees and directors of charities are required to act (or not act) in what they perceive

140. See Jean Warburton, Debra Morris & NF Riddle, *Tudor on Charities*, 9th ed (London, UK: Sweet & Maxwell, 2003) at 263

141. For support of this general principle, see *AG v The Earl of Mansfield* (1827), 38 ER 423 (Ch). For a similar example, see Morris, "Paying the Piper", *supra* note 1 at 129.

142. See Lionel Smith, "The Motive, Not the Deed" in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London, UK: LexisNexis UK, 2003) 53 at 65.

143. See *AG v Ross*, [1985] 3 All ER 334 (Ch).

144. Modern corporate statutes in Canada and the UK have largely abandoned *ultra vires*, but the doctrine still applies to many companies that are charities. See e.g. *Companies Act 2006* (UK), ss 39, 42; *Society Act*, RSBC 1996, c 433, s 4(1)(d).

145. For an overview of this debate and an argument about the true function of the fiduciary duty of loyalty, see Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Portland, Or: Hart, 2010).

to be the “best interests” of the charity they serve and to avoid various situations that might prevent them from acting in that best interest.¹⁴⁶ This general duty is bolstered by a variety of more particularized rules. The best known of these rules are the “no-conflict” rule, which requires fiduciaries to avoid all conflicts of interest and duty or conflicts of duty and duty, and the “no-profit” rule, which requires fiduciaries to avoid profiting from the fiduciary relationship.¹⁴⁷

In principle, there are at least three offshoots of the fiduciary duty of loyalty that should function to protect charities from experiencing government influence over the actions of their trustees. First, a fiduciary generally may not delegate his discretion to determine how the interests of his beneficiaries (or charity) will be best served, nor can he exercise that discretion under the dictation of another person.¹⁴⁸ As the House of Lords stated in *White v Baugh*, equity does not permit a fiduciary to “[relieve] himself from the fetters imposed upon his own custody and management of the fund, by sharing that management with another, and giving that other as much power over it as himself”.¹⁴⁹ In *Re Partanen*, an Ontario court applied this “no delegation principle” to a charity, refusing an application by the charity’s trustees to delegate their discretion to establish certain scholarships.¹⁵⁰ While the courts have not yet had occasion to address the no delegation principle in a circumstance where government was seeking to influence the expenditure of a charity fund, the strict limitations placed on the delegation of a fiduciary’s authority seem to provide a bulwark against such influence.

A second equitable principle that is potentially relevant to contractual agreements between charities and government is that a fiduciary cannot fetter his discretion by binding himself “as to the manner in which he will exercise discretion in the future”.¹⁵¹ Such a fetter does mischief, the Court of Chancery has explained, because it prevents a trustee or other fiduciary from exercising his discretion solely according to “his own conscientious judgment *at the time* as to what is best in the interests of those for whom

146. See Smith, *supra* note 142 at 73.

147. See *ibid* at 55.

148. See Finn, *supra* note 138 at 21.

149. (1835), 6 ER 1354 at 1361 (HL).

150. [1944] 2 DLR 473, [1944] OWN 130 (CA).

151. Finn, *supra* note 138 at 25. See also John McGhee, ed, *Snell’s Equity*, 32nd ed (London, UK: Sweet & Maxwell, 2010) at 10–16.

he is trustee”.¹⁵² Based on this rule, the courts have refused to enforce lease agreements entered into by trustees that gave the lessee the exclusive option to purchase the trust property at a fixed price within a set number of years.¹⁵³ While the precise parameters of the principle are unclear, the general prohibition on the fettering of a trustee’s discretion might well render unenforceable a contract entered into by charity trustees that committed the charity to carrying out various government programs for an extended future period.

A final equitable principle, this one highly relevant to the appointment of government authority trustees, is that a fiduciary must avoid situations where his duty to one person conflicts with his duty to another. This “duty-duty principle” is of more recent provenance than the classic rule regarding conflicts of duty and interest, but it developed by analogy with the earlier doctrine, and thus relies on similar reasoning.¹⁵⁴ In *Bristol & West Building Society v Mothew*, the English Court of Appeal clarified that the duty has three constituent parts.¹⁵⁵ First, the principle prevents a fiduciary from acting for two principals with *potentially* conflicting interests without the informed consent of both, whether or not there is an actual conflict.¹⁵⁶ Second, the principle requires a fiduciary to avoid situations where there is an *actual conflict* of duty so that he cannot fulfill his obligations to one principal without failing in his obligations to the other.¹⁵⁷ Finally, according to *Mothew*, the duty-duty principle encompasses a “no inhibition principle”, which requires a fiduciary to “*not* allow the performance of his obligations to one principal to be influenced by his relationship with the other”.¹⁵⁸ By prohibiting charity trustees from seeking to serve both a government and a charity master where such duties conflict, the duty-duty principle would seem to provide

152. Finn, *supra* note 138 at 25, citing *Osborne v Amalgamated Society of Railway Servants (No 1)*, [1909] 1 Ch 163 at 187 (CA) [emphasis added].

153. See *Clay v Rufford* (1852), 64 ER 1337 (QB).

154. See Conaglen, *supra* note 145 at 143.

155. (1996), [1998] Ch 1 (CA).

156. *Ibid* at 18.

157. *Ibid* at 19.

158. *Ibid* [emphasis added] (noting also that “the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer”).

charities with a strong protection against having their trustees become subject to government influence and control.

However, the seeming robustness of these fiduciary protections is significantly undermined by difficulties related to their enforcement. In practice, there are major obstacles to the application of the no-delegation, no-fettering and duty-duty principles. These include the evidentiary difficulties of proving that a fiduciary did not exercise independent discretion for the no-delegation principle,¹⁵⁹ and the “weak and unclear” nature of the remedies available for breaches of the duty-duty rule.¹⁶⁰ The general difficulties involved in enforcing fiduciary principles are exacerbated in the charitable sector, as there is generally no ascertainable beneficiary to enforce them, and the attorneys general are not prone to act.¹⁶¹ These factors help to explain why, despite the increasing use of government authority trustees and the economic pressure on charity trustees to submit to contractual terms put forward by government, there is very little case law in England and Wales or Canada considering the application of the duty of loyalty to charity trustees.¹⁶² In what follows, I will consider whether contemporary English and Canadian law contain any additional tools to protect charities from these pressures.

(ii) Charities and the Contract Culture in England and Wales

Before the rise and subsequent retrenchment of the English welfare state, charity law did not devote much attention to the potential difficulties associated with the contractual delivery of welfare services. However, the issues raised by the appointment of government authority trustees for charities were on the radar by the mid-nineteenth century. As a former head of the Charity Commission recounts, the policy of the

159. See Finn, *supra* note 138 at 21.

160. See Conaglen, *supra* note 145 at 158 (noting that the remedies for breach of the duty-duty principle are somewhat weak and unclear).

161. For a discussion, see Kathryn Chan, “The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales” (2011) 89:2 Can Bar Rev 373.

162. Luxton suggests that in England, the dearth of case law on conflicts of interests involving charities is due to the fact that such issues are usually dealt with by the Charity Commission. See Luxton, *supra* note 139 at 228. However, there appears to be a similar dearth of case law in Canada. See Clifford Goldfarb, “Dual Loyalties on Non-profit Boards: Serving Two Masters” (Lecture presented at the Canadian Bar Association/Ontario Bar Association National Charity Law Symposium, Toronto, May 2011) 8.

UK Parliament during this period was “to discourage the appointment of local authorities as trustees because of the risk of confusion between their duties as trustees and as organs of government”.¹⁶³ Thus, a series of nineteenth-century acts removed municipal corporations from their existing positions as the trustees of charities vested in them and empowered them to appoint individuals as trustees instead. The Local Government Acts of the period did not authorize local councils to accept charitable trusts.¹⁶⁴

The current legislative position is significantly more permissive but nonetheless evidences a policy to limit the use of local authority trustees. Pursuant to section 139 of the *Local Government Act 1972*, a local authority may accept, hold and administer gifts of property for the purpose of discharging any of its functions, or for the purpose of benefiting the inhabitants of its area or of some part of it.¹⁶⁵ However, no local government can act as the trustee of an ecclesiastical charity or of a charity for the relief of poverty.¹⁶⁶ In respect of these trusts, the conflict between the authority’s duties to the charity and its democratic duties is considered to be particularly severe.¹⁶⁷ Special provision is made under the *Open Spaces Act, 1906*¹⁶⁸ and the *Charities Act 2011*¹⁶⁹ for transferring land held under certain charitable trusts to local authorities. However, the legislation specifies that such transfers can only be made on terms consented to by the Charity Commission, and the policy of the Commission is to consent only where it is satisfied that the transfer is “the most beneficial arrangement for the charity having regard to the need to avoid conflicts of interest to safeguard the charity’s property and the beneficiaries’ interests”.¹⁷⁰

163. CP Hill, *A Guide for Charity Trustees*, revised ed (London, UK: Faber & Faber, 1974) at 32.

164. See *ibid* at 33.

165. (UK), c 70, s 139.

166. *Ibid*.

167. See Francesca Quint, “Local Authorities and Charities I: Trusteeship” (1991) 155 LGR 922 at 922. See also Charity Commission, *Local Authorities*, *supra* note 136 at OG 56 A1.

168. (UK), 6 Edw 7, s 3.

169. *Supra* note 73, s 298.

170. Charity Commission, *Local Authorities*, *supra* note 136 at OG 56 C1.

Indeed, the Charity Commission seeks, in the exercise of its regulatory authority, to serve as an additional barrier against the threats posed to charities by the trusteeship of local authorities and their nominees. The Commission cannot rightly refuse to register a charity on the basis that it names a local authority or local authority nominee to its board, unless the evidence indicates that the true purpose of the institution is some “ulterior non-charitable purpose of the local authority”.¹⁷¹ Where the Commission exercises its own statutory power to appoint charity trustees, however, it will not appoint a local authority unless there is some compelling reason for doing so.¹⁷² Charity Commission schemes sometimes provide that the boards of local charities shall include trustees appointed by local authorities. However, the Commission’s stated preference in making schemes is “not to confer a power on local authorities to nominate all or a majority of trustees”.¹⁷³

The Charity Commission also provides significant online resources for local authority and nominee trustees.¹⁷⁴ These resources aim to draw attention to, and ultimately prevent, situations where charity trustees may act in the interests of their government instead of their charity. Thus, the Commission’s operational guidance, *Local Authorities as Trustees*, stipulates that unless charitable funds are held for charitable purposes that “necessarily involve applying them for the statutory functions of the local authority”, a local authority cannot, as charity trustee, use charity funds to pay for staff or services required for the discharge of its statutory functions.¹⁷⁵ Related guidance clarifies that where a local authority officer appoints a trustee to a charity, the officer “must not expect its appointee to represent its interests. He or she must appoint the individual best fitted to carry out the trusteeship of the charity in question.”¹⁷⁶ And where a nominee trustee has a conflict in relation to any matter, including a conflict “arising from his or her employment by or membership of a

171. *Ibid* at OG 56 B1.

172. *Ibid* at OG 56 A1, s 4. In cases of concern, the Charity Commission may also ask a local authority trustee to voluntarily stand down.

173. *Ibid* at OG 56 B2, r 2.2.

174. See e.g. UK, Charity Commission, *Setting Up and Running a Charity*, online: <www.charity-commission.gov.uk/Charity_requirements_guidance/Specialist_guidance/Local_authorities/default.aspx#2>.

175. Charity Commission, *Local Authorities*, *supra* note 136 at OG 56 B1.

176. *Ibid* at OG 56 B2.

local authority”,¹⁷⁷ the guidance confirms that “he or she should consider withdrawing from any meetings in which the matter is discussed”.¹⁷⁸

A final set of rules, which protect against breaches of loyalty in *corporate* English charities with local authority trustees, are set out in secondary legislation under the *Companies Act 2006*.¹⁷⁹ The *Local Authorities (Companies) Order 1995* imposes additional regulatory requirements on companies (including charitable companies) that are controlled or influenced by local authorities.¹⁸⁰ Where a local authority has the power to appoint or remove a majority of a corporate charity’s board, or where twenty percent or more of a charity’s directors are persons associated with a local authority and more than half of the charity’s income or capital is derived from that local authority, the charity will be considered a “regulated company” under the Order. Among other things, regulated companies are required to give the public notice of the fact that they are controlled or influenced by a local authority.¹⁸¹ They are not permitted to remunerate their directors in excess of local authority rates, and they must make all minutes of their general meetings available for public inspection.¹⁸² All of these measures increase the accountability and transparency of corporate charities with local authority trustees, and thus reduce the temptation for their boards to act in the interests of government rather than the charity itself.

In terms of the growing potential for the contractual co-optation of charitable resources by government, the Charity Commission has been attentive to this issue for over fifteen years. In 1998, the Charity Commission published its first guidance on “charities and contracts”, taking the position that while charities could use their resources to supplement government activities, they could not pay for services that the government was legally required to provide at the public expense.¹⁸³ The Commission

177. *Ibid* at OG 56 C2.

178. *Ibid*.

179. *Supra* note 144.

180. SI 1995/849.

181. *Ibid*, s 4.

182. *Ibid*, ss 5, 10.

183. UK, Charity Commission, *Charities Delivering Public Services* (2012), online: <forms.charitycommission.gov.uk/detailed-guidance/working-with-other-organisations/charities-and-public-service-delivery-an-introduction-and-overview-cc37>. See also Dunn, “Demanding Service or Servicing Demand?”, *supra* note 1 at 253.

reversed its position on this issue in the *Trafford and Wigan* decision and held that there was “no rule of law which prevented trustees entering into a contract with a government authority to carry out a function or service of that authority”, whether the authority had a mandatory duty or a discretionary power to provide that service.¹⁸⁴ However, the Commission also stated that in entering such a contract, the trustees had to consider certain “guiding principles”, including whether the service fell within the objects and powers of the charity, whether the undertaking of the function served the needs of the charity’s beneficiaries and whether the trustees were able to secure proper consideration for the service from the government.¹⁸⁵ Where the service to be subsidized was a legal responsibility of the government authority, the Commission suggested that the trustees should question “why such responsibilities are not being carried out”, and carefully consider whether the expenditure of the charity’s funds to provide the service was the most effective use of the charity’s resources.¹⁸⁶

In March 2012, the principles articulated in *Trafford and Wigan* were confirmed and expanded upon in the Commission’s new guidance document, *Charities and Public Service Delivery*.¹⁸⁷ The Commission explicitly stated that it does not consider its role to be either to “encourage or discourage the delivery of public services by charities”.¹⁸⁸ Nevertheless, the Charity Commission has emerged, at least on paper, as a staunch defender of the independence of charities from government within the prevailing contract culture. *Charities and Public Service Delivery* makes it very clear that charity trustees must not enter into any contract or funding agreement with government unless they are satisfied that its terms are in their charity’s best interests. It also addresses the contentious issue of contractual restrictions on advocacy, stating that charities that deliver public services should not feel inhibited from engaging in political activity or campaigning.¹⁸⁹ The thirty-eight page document closes with a

184. *Trafford and Wigan*, *supra* note 70 at para 6.1.7.

185. *Ibid*.

186. *Ibid* at para 6.1.10.

187. UK, Charity Commission, *Charities and Public Service Delivery: An Introduction and Overview* (2012), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/345602/cc37text>.

188. *Ibid* at 2.

189. *Ibid* at 21.

long list of sources of further information and advice, suggesting that the Commission views the “contract culture” issue as one that is here to stay.

(iii) Charities and the Contract Culture in Canada

Unlike in England, it is difficult in Canada to identify any coherent policy on either the negotiation of contracts between charities and government, or on the appointment of government authority trustees. At the federal level, the negotiation of service delivery agreements between charities and government falls within the scope of the far broader Treasury Board Policy on Transfer Payments.¹⁹⁰ In 2006, a federally appointed “Blue Ribbon Panel on Grants and Contributions” made a variety of recommendations on how the government could reduce “the current morass of rules and general red tape” enveloping grants and contributions programs, and the federal government amended its Treasury Board Policy in response.¹⁹¹ However, neither the report nor the policy distinguishes charities from other recipient organizations, nor does either document place any limit on the substantive “performance conditions” that the government is entitled to impose.¹⁹² Neither the CRA nor the Ontario Public Guardian and Trustee has any discernable policy on this issue.

With regard to the issue of local authority trustees, the regulation of municipal institutions is a matter of exclusive provincial jurisdiction in Canada.¹⁹³ Thus, the wide range of matters that English law addresses under the Local Government Acts are governed, in Canada, by a multiplicity of provincial statutory instruments. While many of these municipal statutes *do* require elected officials to declare any conflicts or divided loyalties that might arise as a result of their trusteeship of a charity when voting on matters in council,¹⁹⁴ the statutes *do not appear to*

190. Treasury Board of Canada, “Policy in Transfer Payments” (Ottawa: TBC, 2008), online: <www.tbs-sct.gc.ca/pol/doc-eng.aspx>.

191. Independent Blue Ribbon Panel on Grant and Contribution Programs, *From Red Tape to Clear Results* (Ottawa: Treasury Board of Canada Secretariat, December 2006), online: <publications.gc.ca/collections/Collection/BT22-109-2007E.pdf>.

192. It is quite possible that there are provincial policies that address this issue in more detail. However, these will have to be the subject of a subsequent work.

193. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(8), reprinted in RSC 1985, Appendix II, No 5.

194. See especially *Schlenker v Torgrimson*, 2013 BCCA 9, [2013] 3 WWR 232.

place any limitations on the appointment of local authorities as charity trustees.¹⁹⁵ Indeed, Nova Scotia's *Municipal Government Act* expressly provides that a local authority may acquire and own property granted or conveyed to the municipality in trust for a public or charitable purpose.¹⁹⁶ British Columbia's *Local Government Act* similarly allows the board of directors of a regional district to accept property in trust and specifically authorizes the board to apply for judicial variation of such a trust if the board considers that the trust is "no longer in the best interests of the regional district".¹⁹⁷ These enabling provisions seem likely to exacerbate, rather than reduce, the natural conflicts between the democratic and fiduciary duties of government authority trustees.

The registered charity provisions of the *Income Tax Act* also evidence no policy to protect charities from government influence and control either by virtue of a service delivery contract or by virtue of the role of government authority trustees. It is, of course, arguable that any such policy would fall outside federal legislative authority over taxation. However, the federal Parliament has a long track record of "federalizing" provincial law subjects for purposes of the registered charity regime where such federalization suits its aims. Recent amendments to the *Income Tax Act*, for example, have introduced several categories of "ineligible directors", whose appointment to the board of a registered charity constitutes grounds for revocation of its charitable status.¹⁹⁸ Had Parliament so desired, it could presumably have extended the statutory definition of an "ineligible director" to include a local government authority.

The argument that the registered charity regime evidences little concern to protect charities from government influence is further supported by recent amendments to the *Income Tax Act* definition of a charitable organization. Pursuant to these amendments, the definition of a charitable organization now excludes any organization that is "controlled directly or indirectly in any manner whatever" by a person who has contributed over fifty percent of the capital of the organization.¹⁹⁹ At

195. However, an extensive study of these instruments is beyond the scope of this article.

196. SNS 1998, c 18, s 50(1).

197. RSBC 1996, c 323, s 314.

198. See "ineligible individual"/« particulier non admissible ». *ITA*, *supra* note 85, s 149.1(4.1)(e).

199. *Ibid.*

first glance, this provision would appear to protect charities that receive most of their funding from government from also being controlled by that government by contractual or administrative means. However, the amendment specifies that the prohibition on donor control does *not* apply to Her Majesty in right of Canada or a province, nor to any Canadian municipality.²⁰⁰ In light of this specific exemption, one might say that at best, the registered charity regime does nothing to discourage the appointment of government authority trustees for registered charities, nor to prevent other forms of government influence and control.

Conclusion

I began this article by defending the principle of the charitable sector's independence from government and by arguing that this principle faces a major challenge in the present day. The challenge stems from a growing consensus that charities in the Anglo-Commonwealth world are experiencing regulatory and other government activity that orients them strongly toward conformity with the incumbent government's substantive agenda and away from independent agency and dissent. These co-optative pressures and processes have always existed in the charitable sphere but become particularly acute in times like the present, when governments struggle with extensive welfare commitments they no longer can or want to sustain. These pressures and processes are concerning because they work against the traditional strengths of the charitable sector: They increase the likelihood that charities will be held to public law standards and norms, and they contribute to broader patterns of the stifling of dissent.

In light of these concerns, I have sought to advance a theoretical contrast between independent and co-opted charities to explore a number of phenomena that seem to be contributing to the co-optation of charitable resources in present day England and Canada, and to assess each jurisdiction's legal and institutional responses to these phenomena. Further work will be required to assess the extent to which Canadian and English charities *in fact* further government policies or are subject to government influence and control. The conclusion that may be drawn from the present study, however, is that English law does far more than

200. See "charitable organization"/« oeuvre de bienfaisance ». *Ibid*, s 149.1(1).

Canadian law to prevent charities from coming to function as agents of government policy.

With regard to the first identified co-optative phenomenon—the exertion of government influence over the legal definition of charity—the English and Canadian charities regulation regimes have built upon the common law concept of charity in strikingly different ways. The UK *Charities Act 2011* modifies the common law definition of a charitable purpose in several material respects, thereby reasserting the legislature’s perennial power to direct charitable resources toward the objects of its choosing. However, the UK legislation simultaneously limits the ambit of the discretion that may legitimately be exercised by the Charity Commission in applying this statutory definition, both through the definition’s own specificity, and through the statute’s articulation of the Commission’s objects and functions. The *Charities Act 2011* also protects the independence of the Commission itself, thereby reducing the risk of it coming under political influence. In Canada, by contrast, the boundaries of the charitable sector continue to be set by reference to the 1601 Preamble and court decisions. However, the regulator that applies these judicial decisions is a ministerial government agency with no articulated “charity law” function, whose decisions are appealable at first instance to another division of the same agency. The effect of these structural characteristics is to expand the official discretion that is exercised in the application of the legal definition of charity, to increase the potential for political influence, and to make it more likely that the definition will be used as a tool to align charitable projects with the welfare agenda of the state.

If we turn to the second co-optative phenomenon—governments creating statutory charities—the contrast between the English and Canadian regimes is even starker. At common law, the sovereign’s approval was required for the creation of charitable corporations, but such charities could be placed outside the controlling power of the courts. This meant that in respect of this limited but important class of charities, the legislative and executive branches of government could effectively mould the purposes toward which charitable resources were directed or craft governance rules that left control of the charity in the hands of the state. The *Charities Act 2011* limits the English government’s ability to construct statutory charities in this way by requiring that *all* charities be subject to the controlling power of the courts. The Charity Commission

has also developed policies for identifying charities with an unstated, non-charitable purpose of carrying out government policies. The Canadian registered charity regime, by contrast, is silent on these matters and has not extended the rule regarding the controlling power of the courts to charities that are not trusts. While it is conceivable that a Canadian court might prevent the co-optation of a statutory charity by reading the common law authorities on pro-government political purposes into the registered charity regime, it is difficult to imagine a judicial context in which such an argument might arise.

Finally, in respect of the third phenomenon—contractual co-optation and the appointment of government authority trustees—the different approaches taken by English and Canadian law evidence the different levels of government influence and control that each regime is willing to countenance. The common law tradition imposes a number of duties on charity officers, requiring them to adhere strictly to the terms of their charitable instrument and to always act in what they perceive to be the best interests of their charity. However, in light of the significant obstacles to enforcing these rules in the emerging contract culture, the UK Parliament and the Charity Commission have supplemented and operationalized these rules, increasing their impact by associating them with regulatory remedies and publicizing them in language that charity trustees can understand. In contrast, the Canadian registered charity regime is, again, largely silent, and to the extent it does speak, it is to allow government bodies that contribute the majority of a registered charity's capital to also control them.

All of these features of the Canadian regulatory landscape are consistent with the growing evidence that Canadian charities face pressure to align their programs with the policy agenda of the incumbent government, and feel powerless to resist. If we are to defend the independence of the Canadian charitable sector from government, as I have suggested we should, England's more robust regulatory landscape may allow us to begin imagining the legal reforms we might undertake.