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Greenpeace, Political Purposes – "There and back Again"; Reflections on New Zealand Charity Law

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Abstract: The political purpose doctrine, a key part of the charity law landscape for many common law jurisdictions, has been subject to much judicial and academic criticism over the years. Its continued influence on the charity sector in relation to whether or not charities can operate effectively, or indeed, whether they may lose their registered status, gives rise still to such criticisms. It is against this backdrop that this article critically assesses the doctrine in light of newly-emerging decisions from the New Zealand courts that have fundamentally changed the charity law landscape from a national perspective, and considers some of the issues associated with this newly-evolved doctrine. Thus, what can be said is that New Zealand charity law jurisprudence is evolving and this article provides some useful insights in to contemporary charity law issues predominantly through the New Zealand lens as but one legal approach, and also compares some of these issues against two international perspectives.

Keywords: charity, law, political purposes, advocacy

1 Introduction

This article considers the long standing charity law issue, that of the doctrine of political purpose, whereby entities will not be charitable if they carry out political purposes, or advocacy. It explores the doctrine mainly through the New Zealand charity law lens because of the lengthy legal journey, "there and back again", undertaken by the high-profile environmental activist group Greenpeace in relation to the political purpose doctrine. The article also considers two of New Zealand's international counterparts to

"There and back again" is the subtitle of JRR Tolkein's *The Hobbit*. *The Hobbit* was made into a trilogy of films, and all were filmed on location in New Zealand, hence the perhaps link to New Zealand, and thus an unapologetic title to this article.

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provide some comparisons of the doctrine as a way of understanding differences across jurisdictions that share an English common law heritage.

It has been a long journey for Greenpeace as it has battled its way to regaining charitable status in New Zealand, which it finally achieved in 2020, after previously enjoying "charitable status, under a regime administered through the Commissioner of Inland Revenue".[1] (*Re Greenpeace New Zealand Inc* 2011, para., 2). However, with the enactment of the Charities Act 2005 came the requirement for all entities that were previously regarded as being charitable to apply to the Charities Commission (as it was) for registered charitable status.[2] The Charities Commission rejected Greenpeace's application, stating that it did not have exclusively charitable purposes,[3] not least in relation to its political purposes. This was because the historical approach to the political purpose doctrine was that if an entity's main purposes were political, this would render the entity not charitable because a court would not be able to ascertain the benefit to the public of political purposes (*Re Greenpeace of New Zealand Inc* 2014 (*Greenpeace* 2014), para., 34.)[4] The public benefit requirement is the issue at stake and will be addressed in more detail later in the article.

Then in 2014, the majority of the Supreme Court in *Greenpeace* 2014 created a new charity law landscape in relation to political purposes, culminating in the 2020 High Court decision, *Greenpeace of New Zealand Inc v Charities Registration Board*,[5] (*Greenpeace* 2020), which returned Greenpeace to being a legal charity, where its journey first began. In essence, the majority in the 2014 decision confirmed that original doctrine of political purposes, whereby if an entity's main purposes were political then this would render an entity not charitable, was neither necessary nor beneficial. This was because, inter alia, the majority stated that the doctrine was a relatively recent development with little basis for authority; was difficult to interpret; and risked hindering the development of charity law to aid in being responsive to the needs of society (*Greenpeace* 2014, paras., 59–70) Rather, their Honours stated that the better approach was not a doctrine of exclusion of political purposes, instead

1 Re *Greenpeace New Zealand Inc* [2011] 2 NZLR 815, para., 2.

2 Inland Revenue Department was responsible for charitable entities in New Zealand. Then the Charities Commission was created in July 2005 pursuant to the Charities Act 2005 and took over those tasks, inter alia, from the Inland Revenue Department. The Commission was responsible for registering, monitoring and managing charitable entities. It was wound up and replaced by the Department of Internal Affairs – Charities Services in 2012; see Chevalier-Watts J (2020) *Law of Charity* 2nd ed, ThomsonReuters, pgs., 19–23.

3 Re Greenpeace New Zealand Inc [2011] 2 NZLR 815, para., 2–3, a requirement under Charities Act 2005, s 13.

4 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, referring to *Bowman v Secular Society* [1917] AC 406 (HL), pg., 442.

5 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 [10 August 2020].

a political purpose may be charitable if it advances public benefit in a way that is recognised as charitable. They did this by introducing a requirement that the assessment for whether the advocacy or political purpose is charitable is to consider whether the end being advocated, the means promoting the achievement of that end, and the manner in which the cause being advocated are said to be of public benefit (*Greenpeace* 2014, para., 76). This new method of assessing advocacy, or political purposes, was confirmed as being more appropriate because recognising political purposes as charitable would help ensure that charity law is flexible enough to be responsive to the way in which society operates and ensure that the law does not hinder charities being able to respond to societal needs (*Greenpeace* 2014, para., 70). In other words, the new interpretation of the doctrine might enable charities to operate without any chilling effect that this doctrine may have imposed historically because advocacy may provide a public good and will help keep charity law fit for purpose (*Greenpeace* 2014, para., 62). The implications of this new approach are worth noting because there are arguments that progressive societal change within democratic society have its basis in advocacy and public political debate, which ultimately leads to political changes that can benefit communities. Thus, this process of change is oftentimes rooted in charities advocating for causes. Indeed, it is said that charities have long played a role in civic engagement through their advocacy and in doing so have supported vulnerable persons and communities and protected civilians and their rights[6] (Mosley J., et al. (2020) pg., 335 and LeRoux, K., et al. (2020 pg 349). Indeed, the common law reflects this consideration as demonstrated firstly in the Australian High Court case of *Aid/Watch Incorporated v Commissioner of Taxation*,[7] whereby the majority of the Court confirmed that the system of law within Australia relies upon the agitation of politics, thus benefiting the public. Secondly, *Greenpeace* 2014 itself observed that advocating for legislative change can keep the law fit for purpose and thus act as a public good (*Greenpeace* 2014, para., 62). As a result, discussions pertaining to advocacy and political purposes from a charity law perspective are critical in understanding the role that charities play in democratic society. Consequently, any changes to charity law that enable greater advocacy from a charitable perspective might be thought to be beneficial overall for civil society, although there are some limitations on the doctrine still. For example, advocating for causes that are discriminatory will not be charitable (*Attorney-General v Family First* [2022], paras., 137–138),[8] and the advocacy must be rooted in altruism and without

6 Mosley J., et al. in (eds) Anheier H.K and Toepler S., The Routledge Companion to Nonprofit Management (2020) Routledge, London, pg., 335 and LeRoux, K.,et al. in (eds) Anheier H.K and Toepler S., The Routledge Companion to Nonprofit Management (2020) Routledge, London, pg., 349.

7 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42), para., 45.

8 *Attorney-General v Family First* [2022] NZSC 80.

disproportionate personal benefit to the advocate, nor too self-referential (*Family First* 2022, paras., 170–172; 178–179). An additional limitation of this doctrine is that advocacy for purposes that are determined as illegal will not be charitable, which would likely include promoting hate speech, or violent protests (*Greenpeace* 2014, para., 109).

Of note also is that whilst *Greenpeace* 2014 did appear to grant greater freedoms to the charity sector to support communities by removing advocacy restrictions, in fact this decision may have made the law doctrinally more complex thus by implication, may not have provided any more additional freedom for charities to carry out advocacy. It should be made clear, however, that the "chilling effect" that the original doctrine may have imposed on the charity sector by restricting advocacy is only a part of the focus of this article. Thus, this article considers the newly introduced test of political purposes and the issues as to whether this test makes charity law any clearer in respect of political purposes, and it also makes reference to the associated point that this newly-derived 3-stage test also may grant greater freedoms to charitable entities to advocate for causes. This latter point does need to be considered because not only was such an impact addressed in the *Greenpeace* 2014 decision but also because the law does not sit in isolation from society, and notably charity law should operate for the benefit of society. Thus, it is important to acknowledge these implications to the charity sector as a result of the 2014 decision and the interrelationship between the doctrinal element of political purposes and the benefits, or otherwise, that this new test might bring.

In order to provide some context to this legal journey, the article provides an overview of the key principles of charity law, and within that the doctrine of political purposes, and then considers the historical position of political purposes within New Zealand, which will contextualise the path upon which Greenpeace set itself when it initially lost its charitable status. The article then considers the changing narrative of political purposes in New Zealand, and some contemporary Australian and Canadian approaches to provide a comparator to the New Zealand lens.

2 Overview of Charity Law and Political Purposes

The Preamble of the long-repealed Statute of Charitable Uses 1601, also known as the Statute of Elizabeth 1601, provided the foundations of current charity law for many jurisdictions, including New Zealand, Australia and Canada. Thus, the comparators between these 3 jurisdictions later in the article are important. This is because their historical jurisprudence reflects an evolution of the political purpose doctrine in relation to their own social and political context. As a result, this presents a more comprehensive picture of the doctrine. The Preamble contained a non-exhaustive list

of purposes that were recognised as charitable. With the enactment of this statute, courts would find a purpose charitable if it fell within one of the purposes set out in the Preamble, or if it fell within the spirit and intendment of the Preamble, an expression still utilised in charity law terms, and the purpose in question met the public benefit requirement.[9] (O'Halloran K., et al. (2008), p. 11 and Chevalier-Watts J (2018), p.11) This list of purposes set out in the Preamble was later refined by Lord McNaghten in *The Commissioners for Special Purposes of the Income Tax v Pemsel* (*Pemsel* (1891), p. 583) as follows:[10]

> Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

These 4 heads of charity are still to be found in the law of many jurisdictions, including s 5 of New Zealand's Charities Act 2005. Amongst the general requirements pertaining to charitable purposes is that a purpose must be for public benefit.[11] (Breach L (2019), p.163) Generally-speaking, public benefit is presumed for the first 3 heads of charity but must be explicitly demonstrated for the fourth head of charity.[12] (Breach L., (2019), p.168) A further generalism is that there are two aspects to the public benefit test. The first aspect is that the nature of the purpose must be of benefit to the community. The second aspect is that the beneficiaries of the purpose must be sufficiently numerous, or constitute a sufficient section of the community.[13] (*Independent Schools Council* [2011], para. 44]). This means that a purpose cannot be charitable unless it meets this public benefit requirement, which as noted, is at the heart of the issue in relation to political purposes.

In relation to the English position, a "trust for political purposes is not charitable",[14] (Picarda, H (2010), p. 225) and the variety of cases, and range of academic commentary attests to the complexity of this matter. The political purpose doctrine is most closely associated with *Bowman v Secular Society*[15] (Glazebrook S (2019), pgs.

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9 O'Halloran K., McGregor-Lowndes M., and Simon K.W. (2008) *Charity Law & Social Policy: National and International Perspectives on the Functions of Law Relating to Charities*, p., 9; Chevalier-Watts J., *Charity Law International Perspectives* (Routledge, Abingdon, 2018), p., 11.

10 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL), p., 583.

11 Breach L., *Nevill's Law of Trusts, Wills and Administration* (13th ed, LexisNexis, Wellington, 2019), p., 163.

12 Ibid, p., 168; the Charities Act 2006, s 3(2) (UK) removed this presumption of public benefit for all charitable purposes.

13 *Independent Schools Council v Charity Commission for England* [2011] UKUT 421 (TCC), para.,44.

14 Picarda H (2010) *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional)., p 225.

15 *Bowman v Secular Society* [1917] AC 407, relying on *De Themmines v De Bonneval* (1828) 5 Russ 288; Glazebrook S., "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melb U L Rev 637–638.

637–638) where Lord Parker stated that "a trust for the attainment of political objects has always been held invalid … because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit."[16] (*Bowman*, p., 442) It was with this case that it was confirmed that political purposes "can never be supported as being legal charities"[17] (*McGovern v Attorney-General*, p., 334) because their public benefit would not be established. Therefore, in summary, the key concern relating to political purposes is the requirement of public benefit because if a charity has political purposes as its main purposes, it is not creating a public benefit because political purposes do not create such a benefit (Devlin, R. (2017) "Charities and Political Activities (A Tempest in Teapot)", Canadian Tax Journal, 65 (2), 372)

3 Political Purposes in New Zealand up Until 2014

New Zealand charity law jurisprudence historically reflected its colonial heritage, including when it came to the doctrine of political purposes. Thus in *Molloy v Commissioner of Inland Revenue*,[18] the Court approved the relevance of *Bowman's* principle in relation to political purposes not being charitable, that being "the inability of the Court to judge whether a change in the law will or will not be for the public benefit".[19] (*Molloy*, p., 26] The majority of the Court in *Greenpeace* 2014 confirmed that *Bowman* was adopted in New Zealand charity law,[20] (*Greenpeace*, paras., 39–48) resulting in a "blanket exclusion … that advocacy … can be undertaken … only when ancillary to charitable purposes."[21] (*Greenpeace*, para., 37) A key consideration for the majority in addressing this "blanket exclusion" of political purposes was the impact of s 5 (3) of the Charities Act 2005 whereby:[22]

16 *Bowman v Secular Society* [1917] AC 407 at 442.

17 *McGovern v Attorney-General* [1982] 1 Ch 321, p., 334; see also *Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

18 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688; see also *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522; *Re Wilkinson (dec'd) v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC); and *Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20–032 (HC).

19 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, p., 696.

20 Ibid, paras., 39–48, referring to inter alia, *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522; see also *Re Wilkinson (dec'd) v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC); *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688.

21 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 47.

22 Charities Act 2005, s 5(3).

> To avoid doubt, if the purposes of a trust … include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust … the presence of that non-charitable purpose does not … the trust … from qualifying … as a charitable entity.

The Court of Appeal *Greenpeace* case treated this section as legislating for a prohibition on non-ancillary political purposes because of reference in that section to "advocacy", which was determined as an example of a non-charitable purpose.[23] (*Re Greenpeace*, para., 52)

However, the Court in *Greenpeace* 2014 determined that this approach was incorrect, stating that the "latitude granted by s 5 (3) is in respect of advocacy that cannot itself be characterised as a charitable purpose."[24] (*Re Greenpeace* 2014, para., 58) In other words, advocacy is merely cited as an example of when a purpose may not be charitable, it does not represent a blanket exclusion on non-ancillary advocacy not being charitable. This meant that the Supreme Court could consider whether the promotion by advocacy could be considered charitable, even if it were non-ancillary, which was the next key consideration for the majority, to which we turn now in order to explore this evolving charity landscape.

As noted earlier, Elias CJ, for the majority, confirmed that the political purpose doctrine was neither "necessary [n]or beneficial",[25] (*Re Greenpeace* 2014, para., 59) for the reasons set out before and thus the majority could not support the continued blanket exclusion for political purposes as being charitable.[26] (*Re Greenpeace* 2014, para., 59) Of importance for the New Zealand context, Elias CJ noted that the political purpose exclusion risked stultifying the law, which would be contrary to the requirements of charity law because the law should respond to the needs of society, as was evidenced in New Zealand in the case of *Latimer v Commission of Inland Revenue*[27] where assisting Maori[28] in the researching, planning and negotiating of claims before the Waitangi Tribunal[29] was recognised as charitable,[30] (*Re Greenpeace* 2014, para., 70) leading to a development in the 'blood tie' limitation within the public

23 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 52, referring to *Re Greenpeace of New Zealand Inc* [2012] NZCA 533 [2013] 1 NZLR 339, para., 56.

24 Ibid, para., 58.

25 Ibid, para., 59.

26 Ibid, para., 59.

27 *Latimer v Commission of Inland Revenue* [2002] 3 NZLR 195 (CA).

28 The indigenous peoples of New Zealand.

29 "Set up by the Treaty of Waitangi Act 1975, the Waitangi Tribunal is a permanent commission of inquiry that makes recommendations on claims brought by Māori relating to Crown actions which breach the promises made in the Treaty of Waitangi." The Waitangi Tribunal 16 Sep 2020 https://waitangitribunal.govt.nz/.

30 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 70, referring to *Latimer v Commission of Inland Revenue* [2002] 3 NZLR 195 (CA).

benefit principle within New Zealand. Such a nexus historically rendered a purpose non-charitable, as recognised in *Oppenheim v Tobacco Securities Trust Co Ltd*.[31] However, New Zealand charity law now recognises that such purposes can be charitable, even though the beneficiaries will likely be related by blood as a result of their whakapapa.[32] Consequently, charity law supports "the machinery or harmony of civil society",[33] (*Re Greenpeace* 2014, para., 70), in other words, charity law must respond to changing social and cultural dictates as society evolves. Thus, to be restrained by a doctrine that obscures the real focus of whether or not a purpose is charitable is surely contrary to the role of charity in society generally. Elias CJ's dicta is important because it underpins the construct that strong political advocacy is vital for progressive societal changes and that is because such advocacy is invariably based on public debate that then leads to political activity. Such activity and debate is supported by advocacy from independent charitable entities such as Greenpeace. As a result, the *Greenpeace* 2014 decision paved the way for charity law to respond to the "changing circumstances of society",[34] (*Greenpeace*, para., 70) therefore supporting the aforesaid "machinery or harmony of civil society" through political advocacy.

However, that is not say that this *Greenpeace* 2014 decision has been the panacea for all political purpose ills, because as the Supreme Court observed, not all purposes will be charitable. The reason being is that when considering an advocacy purpose, this should be assessed as "simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth."[35] (*Greenpeace* 2014, para., 72) This means that from a New Zealand perspective, advocacy and political purposes will often not be charitable because it will not always be possible

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31 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 AC 297 (HL); see also *Re Compton* [1945] 1 Ch 123.

32 See also s 5 (2) (a) of the Charities Act 2005 which states: "(a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood". "Whakapapa" means, inter alia, genealogy, see "Story: Whakapapa – genealogy" Te Ara – the Encyclopaedia of New Zealand accessed at 16 Sep 2020 https://teara.govt.nz/en/whakapapa-genealogy/page-1?__cf_chl_jschl_tk__=047e6399db389ffdfa082668c3358f42c662a2b7-1600216149-0-ASV_nBDNv_oRILJKAjhPx_bif8w5eNrYagQQMWbN_TZafuiD99AemQC_qAsbbSyIqa41WB3VR8IxftK-s6HwA8CxvVhHj5Fpb8HTCtOO3wxzfcBvfqO8fiQ_hDqYzPmK6R4I9I2TIBJMM41m2eJQ1fDxRMsqZH4ScIl45K7jWOCWSmpOTioLbYDgcci4fYIhPgVW5vPdrPx2C6JdnlM7fGXvyp0UjmNZTpC8Oft_jm4K1okkoGNuLR8kWyxVarkoV7uOCtXxmHnh0usZL026yaBMxjf88Xt3eoR_B99EwAV_CZZdtz4t3GkPOpmqWTmbVA

33 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 70.

34 Ibid, para., 70.

35 Ibid, para., 72, citing LA Sheridan "Charitable Causes, Political Causes and Involvement" (1980) 2 The Philanthropist 5, p., 16.

to determine the public benefit of those particular views.[36] (*Greenpeace* 2014, para., 73) Thus, in order to determine if such a purpose will be charitable, the majority formulated the aforementioned three-stage test to determine whether or not the advocacy, or the cause being promoted, or the change in law, will be charitable in New Zealand, that being "the ends, the means and the manner". In assessing these factors, a court will be able to determine whether the object has public benefit within the spirit and intendment of the Statute of Elizabeth.[37] (*Greenpeace* 2014, para., 76)

Many might reflect that this new strand in the evolution of political purposes would be a welcome addition. Certainly, it would aid in such situations where many good causes have fallen foul of this doctrine, which cannot necessarily be said to be beneficial for the charity sector, and thus society generally. However, the reality is that the *Greenpeace* 2014 case has been a double-edged sword.[38] (Chevalier-Watts, J [2020], p., 195) On the one hand, it may well enable good causes to obtain charitable status where previously they would have been denied such legal benefits, which will benefit society because such advocacy can lead to progressive societal changes. However, on the other hand, the majority in *Greenpeace* 2014 have formulated a test that is neither easy to elucidate nor to apply. This likely makes the doctrine more complex than its historical counterpart. In contrast, in England and Wales, if an entity's political purposes are more than ancillary, this will defeat its charitable status and this appears to be a relatively straightforward approach. However, as the *Greenpeace* journey reflects, the historical English approach was riddled with legal flaws, causing confusion for the law and thus for the charitable sector in turn. In contrast, at least now in New Zealand, the new three-stage test must be applied to assess the public benefit of such purposes. This means that, for example, even if the end being promoted does have sufficient public benefit, the means of that promotion might encompass a specific point of view that actually would negate the public benefit because the benefit could not be ascertained. However, in relation to the three-stage test, it has also been asserted that there seems to be no real difference between the "means" and the "manner", aside from in the context of the abstract test itself in relation to the issue before the Supreme Court. This may be because the Supreme Court did not intend to "wreak some fundamental change in approach or a move away from the fundament 'purpose' of the charities inquiry".[39] (Barker, S., (2020), pgs., 49–50) Indeed, the Court in the recent Supreme Court judgment of *Attorney-General v*

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36 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC); para., 72, referring to *Aid/Watch Inc v Commissioner of Taxation* [20,109] HCA 42, para., 82.

37 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 76.

38 Chevalier-Watts J [2020] "Post Greenpeace, Better Public Media Trust, and advocacy" New Zealand Law Journal June, p., 195.

39 Ibid, p., 50, citing *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328, para., 86.

Family First of New Zealand[40] appeared to conflate the "means" and the "manner" elements of the 3-stage test when assessing whether Family First's advocacy for or against law reform relating to abortion and euthanasia, inter alia, was in itself charitable. In answering this, the Court held that Family First's advocacy was not charitable because the views they were promoting were matters of opinion, thus reflecting the Supreme Court's determination in *Greenpeace* 2014 that advocating for a point of view will more often than not fail to be charitable because it is not possible to say whether those views being promoted have public benefit (*Greenpeace* 2014, para., 73 and *Family First*, para., 142). Perhaps then there is no real difference between the "means" and the "manner", although as will be considered later, one recent New Zealand High Court case does differentiate between each strand of the test. Such differing approaches reflect inconsistencies with the application of the new test, which may provide lack of clarity within the charity sector. However, what the introduction of the new test does perhaps suggest is that the majority in *Greenpeace* 2014 merely provided another tool with which to assess whether or not political purposes being propounded meet the public benefit test. However, there does not yet appear to be a conclusive answer on this [41] and thus the complexities of the new doctrine in New Zealand are revealed. This then leads us to considering the journey that political purposes have taken from the Supreme Court decision, where we will consider not only the most recent High Court *Greenpeace* decision, *Greenpeace of New Zealand Inc v Charities Registration Board* (*Greenpeace* 2020),[42] which is the current incarnation of political purposes, but also how the Supreme Court *Greenpeace* decision has been applied in other circumstances.

4 Journey from the Supreme Court Greenpeace Decision

Prior to the 2020 *Greenpeace* High Court decision being handed down, the High Court of New Zealand had an earlier opportunity to apply the ends, the means, and the manner test, and this arose in *Better Public Media Trust v Attorney-General (BPMT)*,[43] and it will be demonstrated how this test should only be cautiously welcomed.[44] (Chevalier-Watts, J [2020], p., 195)

40 *Attorney-General v Family First of New Zealand* [2022] NZSC 80 [28 June 2022].

41 See Barker S., (2020) "Advocacy by Charities: What is the Question?" 6 CJCCL, pgs., 1–57 for further discussion.

42 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 [10 August 2020].

43 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [2 March 2020].

44 Chevalier-Watt, J [2020] "Post Greenpeace, Better Public Media Trust, and advocacy" New Zealand Law Journal June, p.,195.

4.1 Better Public Media Trust

In *BPMT*, Cull J noted that the 3-pronged test "requires more complex considerations" (*BPMT*, para., 54) thereby creating, no doubt, more confusion within the charitable sector, which confirms my view that the Supreme Court *Greenpeace* case in fact added more layers to determining the charitable nature of advocacy. However, whilst this test may be more complex, Cull J sought to assist in that matter, and set out the distinctions between the end, the means and the manner. Consequently, the "end" is the essential aspiration of the entity; that which they are aiming to achieve. Oftentimes this will be stated abstractly, for example, ending slavery, promoting human rights, or protecting the environment.[45] (*BPMT*, para., 53) In contrast, the "means" is more tangible. This is the way in which the entity promotes the way in which the end will be achieved. These can be practical ways that the entity supports being undertaken in order to achieve its end.[46] (*BPMT*, para., 53) Lastly, the "manner" is the way in which the entity carries out its advocacy. This is different from the "means" because the "manner" refers to the concrete path the entity utilises to promote its cause as opposed to the steps that it states that should be taken by others to achieve the end.[47] (*BPMT*, para., 53) As a result, this formula is unique to political purposes, at least in New Zealand, because generally speaking, entities with political purposes will not necessarily be carrying out the charitable acts themselves. Rather, they are advocating for others to carry out those acts. This means that the threshold for advocacy to be charitable is high, and likely high threshold will not be met if an entity promotes its own views, or an academic merely agrees with the entity's point of view (*BPMT*, para., 55) Consequently, for political purposes to be charitable, the cause that is being promoted must be charitable, and it must be promoted in such a way that is charitable.[48] (*BPMT*, para., 54) This is why this evolved doctrine raises more complex considerations than for other types of purposes, not least because the entity concerned is a step removed from the overall charitable result, and intrinsically there is a degree of ambiguity in advocating for a particular purpose (*BPMT*, para., 54) Overall, therefore, whilst the *Greenpeace* 2014 case "set out a narrower test, or at least a much more rigorous test",[49] (Chevalier-Watts J [2020] p., 195) Cull J's

45 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [2 March 2020], para., 53, referring to *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 71.

46 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [2 March 2020], para., 53.

47 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [2 March 2020], para., 53.

48 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [2 March 2020], para., 54.

49 Chevalier-Watts, J [2020] "Post Greenpeace, Better Public Media Trust, and advocacy" [] New Zealand Law Journal June, pg.195, citing "The Supreme Court's Greenpeace Decision" Simpson Grierson August 27 2014 https://www.simpsongrierson.com/articles/2014/the-supreme-courts-greenpeace-decision accessed 17 September 2020.

assessment of this test in *BPMT* has perhaps gone some way to providing some clarity, and indeed, tangibility to the test in relation to applying each limb of the test. In doing so, it might be argued that her Honour has blunted "one edge of that double-edged sword, specifically the edge that appeared to retain just as much difficulty in obtaining charitable status if an entity has substantive advocacy purposes."[50] (Chevalier-Watts J [2020] p., 195) Nonetheless, there is no doubt that this new 3-stage is still challenging and it is expected that it will be difficult for entities to meet the high bar that has been set by this test, and likely future cases will turn on their facts, thus Cull J's examples may not be pertinent. However, that does not diminish the value of her Honour's construction of this challenging area of law, because it might be argued that actually the *Greenpeace* 2014 case did little to clarify in reality what would be required in terms of applying the three-stage test. Thus, Cull J's endeavours have shed some much-needed light on the test and its application. Further, I would argue that the original position of political purposes was ripe for change because in its own right it was challenging for courts and the charity sector to interpret. Indeed, my view finds support in the majority consideration of *Greenpeace* 2014, whereby Elias CJ stated that this doctrine was a relatively recent development and based on little authority. Further, defining "political" and "political activities" is fraught with difficulties, and excluding all advocacy from being charitable actually risked stultifying the law. Therefore, there are times when advocacy will be for the public good and as such a rule to relegate all advocacy as non-charitable was hard to justify.[51] (*Greenpeace* 2014, paras., 60–63) It was perhaps difficult, therefore, to continue to justify the doctrine when Elias CJ suggested the possible damage that it was likely doing to the charitable sector through its complexities and possible stultification of the law through its continued application.

Nevertheless, even though the doctrine has been criticised over the years, the *Greenpeace* 2014 decision has also been criticised and that is, inter alia, because it has been argued that a court has yet to set out what is the ultimate public benefit of an issue, irrespective of how controversial that issue maybe.[52] (Glazebrook S (2019), p., 666) Therefore, questions still remain as to where a court may draw the line on controversial matters. In addition, it has been asserted that gathering evidence to meet this test will be difficult and rather those resources would be better spent engaging in actual charity work,[53] (Glazebrook S (2019), p., 668) which suggests that

50 Ibid, pg., 195.

51 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), paras., 60–63.

52 Glazebrook, S., "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melb U L Rev, p., 666.

53 Ibid, p., 668.

the charity sector may not necessarily feel the benefit of the new iteration of the doctrine.

We now turn the High Court *Greenpeace* 2020 case to assess the position of advocacy and what appears to be the end of the long journey for Greenpeace, as it travelled "there and back again" in jurisprudential terms,[54] and whilst it is acknowledged that the 2020 case did not answer the aforementioned criticisms per se, Mallon J's judgment has gone some way in confirming additional aspects of the new political purpose landscape.

4.2 Greenpeace 2020

The objects at the time of this case included promoting and preserving the environment, and one of the key principles that Mallon J in *Greenpeace* 2020 had taken from *Greenpeace* 2014 was that advocacy for environmental protection can be charitable and the ends invariably necessitate wide-ranging backing and efforts, which can occur through political and legal means.[55] (*Greenpeace* [2020], para., 46) Nonetheless, her Honour confirmed that even though *Greenpeace* 2014 made sea changes within charity law, the issues of applying the newly-created three-stage test lay in its application, thus this case is instructive from the New Zealand jurisprudential point of view in a hope that it can impart more wisdom to the charity sector in relation to that test.

One issue for Mallon J was that the Supreme Court in *Greenpeace* stated the advocacy for the environment was charitable, although this would depend on the nature of the advocacy itself, and this was not addressed in relation to Greenpeace because that was not considered an issue by the Charities Commission when it was returned to the Board to reconsider.[56] (*Greenpeace* [2020], para., 50) Mallon J, however, did have to address that issue and without assistance as to what is meant by "the nature of the advocacy." Consequently, she was required to elucidate on an obscure requirement that had not been expressed previously in charity law. In addition, she confirmed that there are theoretical issues associated with distinguishing between the "end", the "means" and the "manner". However, following Cull J's guidance, Mallon J stated that in Greenpeace's situation, the "end" would be their advocacy for environmental protection, and whether or not that progresses public benefit would rest on what is being promoted, thus the "means", and the "method" were how the

54 For the purposes of this article I concentrate on advocacy for the environment.

55 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 [10 August 2020], para., 46.

56 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 [10 August 2020], para., 50.

promotion was being conducted.[57] (*Greenpeace* [2020], para., 51) This rationalisation of the three-stage test, therefore, provided some early structure within the decision and aids clarity, as well as demonstrating how it may be applied in a novel situation.

In considering how advocacy for the environment as an end goal may comply with public benefit, Mallon J distinguished that type of advocacy from advocacy for peace and nuclear disarmament, which was an earlier legal consideration in the Greenpeace *journey*, and echoed the approach of the Supreme Court. This was because advocating for the end of nuclear disarmament and the promotion of peace would require complex state policy decisions, and the consequences of such decisions meant that public benefit was not inherently set within that end. In contrast, advocacy for the environment "often requires broad-based support and effort"[58] and has already been confirmed as being charitable, although this is not a carte blanche guarantee that such advocacy will be charitable. It will depend entirely on the nature of the advocacy.

As part of the assessment of the nature of that advocacy, her Honour noted that one aspect of that advocacy related to the avoidance of catastrophic climate change and this was a "classic example of an environmental end that requires broad-based support and effort."[59] (*Greenpeace* [2020], para., 89) Examples of such broad-based support and efforts were reflected in, inter alia, New Zealand ratifying the United Nations Framework Convention on Climate Change and national school lobbying that resulted in single use plastic bags being removed from supermarkets. As a result, her Honour concluded that if protecting the environment was charitable, by association, so must be avoiding catastrophic climate change, and Greenpeace's advocacy was a component of that debate.[60] (*Greenpeace* [2020], paras., 89–90)

In relation to Greenpeace's advocacy for the oceans, Mallon J noted there was public benefit in ensuring sustainable fishing, and sustainable fishing is a "measure towards protecting the ocean environment."[61] (*Greenpeace* [2020], para., 92) Indeed, advocating to protect oceans requires broad-based support and efforts in an attempt to prevent over fishing, and also to prevent damaging fishing methods. This was equal to advocating for the protection of the environment. Interestingly, her Honour helpfully aligned this type of advocacy with the type of advocacy that occurs in court or before a select committee.[62] (*Greenpeace* [2020], para., 94) Such alignment will

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57 Ibid., para., 51.

58 Ibid., para., 84, citing *Re Greenpeace of New Zealand Inc* [2015], para., 71 and referring to *Re Family First New Zealand* [2018] NZHC 2273, para., 16.

59 Ibid., para., 89.

60 Ibid., para., 90.

61 Ibid., para., 92.

62 Ibid., para., 94.

surely be of benefit for future cases when assessing if a particular advocacy meets public benefit requirements.

In addition, and also usefully in providing more tangible construction of how advocacy may be of public benefit, Mallon J confirmed that Greenpeace's advocacy for preserving freshwater was equally as charitable as protecting the oceans. In the absence of such advocacy, damage to rivers, as might occur from some dairy farming practices, is unlikely to be fully understood, nor given due gravitas. Thus, in essence, this type of advocacy provides a method of understanding issues that would not otherwise be comprehended, and this would benefit humankind. Consequently, her Honour determined that Greenpeace was charitable because, inter alia, advocating for the environment is a charitable purpose.[63]

Thus, what can be said about Mallon J's detailed consideration is that advocating for the environment developed earlier environmental protection cases, which have been historically less expansive in setting out how environmental protection may be charitable, and certainly in relation to the issue of advocacy. As a result, in some of these cases there had been some reluctance to recognise environmental protection as being charitable, as evidenced in *Kaikoura County v Boyd*,[64] where protecting the land from invasion by the sea was said to stretch the analogies within the Preamble of the Statute of Elizabeth.[65] (Dal Pont, G (2018) p., 317) Other cases have refused to acknowledge environmental protection as being charitable[66] although later cases, including *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,[67] confirmed that environmental protection was a broadly-held public benefit. Nevertheless, what Mallon J has now achieved in relation to environmental protection is ensuring that advocating for such protection may also now fall within the charitable rubric of protecting the environment. As a result, this develops charity law in alignment with the "awareness and concern over environmental protection and preservation",[68] (Chevalier-Watts, J., p., 287) not least because such awareness and

63 Ibid., paras., 121–128.

64 *Kaikoura County v Boyd* [1949] NZLR 233 (CA).

65 Dal Pont, G (2018) "The History and Future of the Law of Charity" in Harding M (ed) *Research Handbook on Not-For-Profit Law* (Edward Elgar Publishing), pg., 317; Chevalier-Watts, J (2020) *Law of Charity* (2nd ed, ThomsonReuters), p., 287.

66 *Re Glyn's Will Trusts* (1953) The Times 28 March; *Re Grove-Grady* (NSW) [1929] 1 Ch 557 (CA); and *Re Green (deceased)* [1970] VR 442 (VSC).

67 Chevalier-Watts, J (2020) *Law of Charity* (2nd ed, ThomsonReuters), p., 288–289, referring to *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [2000] 2 NZLR 325 (HC), para., 40, in reference to *Re Verrall* [1916] 1 Ch 100 (Ch); see also *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 71.

68 Chevalier-Watts, J., (2020) *Law of Charity* (2nd ed, ThomsonReuters), p., 287, citing Dal Pont, G., (2018) "The History and Future of the Law of Charity" in Harding, M (ed) *Research Handbook on Not-For-Profit Law* (Edward Elgar Publishing), p., 305.

concern having been "heightened with the passage of time, in a fashion unheralded, whether at the time of the … Preamble or indeed into the twentieth century."[69] (Chevalier-Watts, J., p., 287) Indeed, I would argue that protecting the environment and thus preserving humankind falls squarely within the requirement of charity law, thus supporting the earlier mentioned "machinery or harmony of civil society".[70] (*Greenpeace*, para., 70). Consequently, it is difficult to see how this type of advocacy could *not* be charitable.

Of course, not all future advocacy claims will be related to environmental protection but this in itself may not be an issue for the courts. This is because other analogous ends being advocated may fall within the remit of this type of advocacy and that being so, charity law will be responsive societal changes. Therefore, this newly constructed doctrine may be beneficial because it will underpin the fact that a "modern, outsourced and contracting state may throw up new need for philanthropy."[71] (*Greenpeace* 2014, para., 46) Indeed, it is arguable that the historical doctrine did not enable charity law to respond to new needs for philanthropy so robustly, not least because "admirable objects too often f[e]ll foul of "[72] (*Re Collier*, p., 90) of the historical approach. Consequently, I assert that whilst *Greenpeace* 2014 may not have made it any easier for entities to obtain charitable status in light of their political purposes, Mallon J has shed some light on circumstances in which advocacy will be charitable, and how that might be achieved. Indeed, this view finds support in the aforementioned 2022 Supreme Court *Family First* decision, where Williams J confirmed the evolution of charity law has been problematic because there has been little guidance as to its evolution in response to societal growth, and the political purpose doctrine has highlighted this issue. This is not least because of the increase of advocacy-based entities to support the varying needs of society (*Family First*., para 164). Nevertheless, and importantly in relation to this article's doctrinal discussions regarding the new political purpose test, the *Family First* decision confirmed that purposes that advocate against any law reforms that would be beneficial non-heterosexual "traditional" forms of family were actually discriminatory, and discriminatory purposes were self-evidently not of public benefit thus not charitable. This is because the detrimental effects of advocating against law reform that would protect vulnerable or minority groups would outweigh any possible benefits to supporting "traditional" families. "Traditional" families being the marriage between heterosexual men and women, as promoted by Family First (*Family First*, paras., 136–139). Thus, *Family First* confirmed that whilst

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69 Ibid, p., 287.

70 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 70.

71 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 [10 August 2020], para., 46.

72 *Re Collier (deceased)* [1998] 1 NZLR 81 (HC), p., 90.

Greenpeace 2014 might have eradicated some of the barriers to advocating for a cause by removing the blanket exclusion on political purposes, it also narrowed the gateway for purely advocacy-based purposes. In other words, those purposes that advocate for a cause that is too self-promoting, or advocacy where there is insufficient consensus as to that purpose's benefit to the community, will not be charitable, and this is now recognised through the conceptual framework provided by the new 3 stage test instead of the problematical and much criticised original doctrine (*Family First*, paras., 178–179). It should be noted that whilst the *Family First* 2022 did address the political purpose doctrine, the case was also strongly focused on the advancement of education as a charitable purpose, which is beyond the scope of this article.

As a result, it could be argued that the 3-stage test is a welcome addition to the political purpose discourse. However, what then can be said about New Zealand's approach in relation to other jurisdictions? In considering that, we turn to Australia and Canada in order to consider international trends, which echo in some way New Zealand's own legal journey. Although as will also be demonstrated, political purposes present challenges not just for the New Zealand courts, and questions pertaining to political purposes still remain in other jurisdictions regardless of recent evolutions. Thus, even though these jurisdictions have not adopted a conceptual framework like New Zealand to assess public benefit, what these comparative discussions demonstrate is the aforementioned difficulties that the modern growth of advocacy-based entities have emphasised within the charity law narrative. It should be noted that the purpose of assessing other jurisdictions is not to suggest that New Zealand's approach is better doctrinally or socially. Rather, the benefit of this comparative approach is to provide a more complete picture overall of the political purpose doctrine, and its evolution, in the context of various jurisdictions. Indeed, what these discussions suggest is that no matter the approach of a jurisdiction, the political purpose doctrine remains a thorny challenge regardless of its iteration. As a result, perhaps it is more appropriate for each jurisdiction to decide on its own interpretation because that way the doctrine will be more likely to reflect the inherent social and legal frameworks appropriate to its own jurisdiction. We begin with Australia.

5 Australian and Canadian Approaches

5.1 Australia

The Australian High Court made a sea change to the doctrine in 2010 with the case of *Aid/Watch Incorporated v Commissioner of Taxation*.[73] In this case, Aid/Watch, an

73 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

organisation concerned with promoting effective national and international aid provided in foreign countries through, inter alia, campaigning for effective policies and programs, argued that even though its purposes appeared political, it was charitable. The majority of the Court determined that the *Bowman* line of authority was not directed to the Australian system of government that was established and maintained by its Constitution, and that this Australian system of law promoted agitation of its legislative and policy changes in order to operate effectively. It was in this method of constitutional processes that the public benefit was found. Consequently, the Court concluded that generating this type of public debate in relation to foreign aid to relieve poverty was beneficial to the community under the fourth head, meaning that there was no longer a general doctrine that excluded political purposes from being charitable in Australia.[74] (*Aid/Watch*, paras., 45–48) The Charities Act 2013 then gave force to this decision[75] (Turnour M., and Turnour E (2014), p., 49) under s 12, which in essence meant that charities could engage in certain political activities,[76] (Beard J (2018), p. 256) with some notable exceptions, including a charity promoting or opposing a political party, or election campaigning.[77] (Beard J (2018), p. 252 and Charities Act 2013, s. 11 (b)) However, whilst the Act did limit some political purposes, it has been noted that these exceptions should be read narrowly, taking in to consideration human rights and application of the common law.[78] (Turnour M., and Turnour E (2014), p., 48) Also of note is that whilst s 12 of the Act itself does not refer to "activities", only "purposes", "purposes" have been interpreted as including "activities". This may be the correct approach and echoes the consideration of the dissenting Judge Kiefel J in the *Aid/Watch* case, where her Honour concluded that Aid/Watch's activities were not directed to its purpose of promoting public debate. It has also been confirmed by s 18 (3) of the New Zealand Charities Act 2005 that an entity's purposes may inferred from its activities (*Greenpeace* 2014, para., 14). However, it should be made clear that there is a distinction between "purposes" and "activities". This is because "[t]he purpose clause in a charity's governing document must reflect the charity's activities"[79] but activities will not always be assessed when determining the charitability of purposes. However, it is not always evident that

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74 Ibid., para [45]-[48].

75 Turnour, M., and Turnour, E., (2014) "Archimedes, *Aid/Watch*, constitutional levers and where we now stand" in Harding, et al. (eds) *Not-for-Profit Law* (Cambridge University Press), pg., 49.

76 Beard, J., (2018) "Charity law and freedom of political communication: the Australian experience" in Harding, M (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar), p., 256.

77 Charities Act 2013, s 11(b); Ibid., p., 252.

78 Turnour M., and Turnour, E., (2014) "Archimedes, *Aid/Watch*, constitutional levers and where we now stand" in Harding M., et al. (eds) *Not-for-Profit Law* (Cambridge University Press), p., 48.

79 Australian Charities and Not-for-profits Commission "Charitable Purposes" https://www.acnc.gov.au/tools/templates/charitable-purpose-examples.

courts distinguish between the two matters and this lends weight to the consideration that the political purpose doctrine, regardless of its national form, is still a complex and challenging doctrine.

Nevertheless, Australia appears to have embraced what might be deemed a more liberal approach to the political purpose doctrine, which is likely to be welcomed in the charity sector as it may reduce the chilling effect on charities concerning negating charitable status in relation to political activities. Even so, whilst this change indicates a significant departure from the traditional approach, it is acknowledged that *Aid/Watch* has left the political purpose landscape in Australia with some uncertainty.[80] (Synge M (2018), p., 373) Some of that uncertainty arises because the Court in *Aid/Watch* chose not to explore the margins of public debate,[81] (Beard J (2018), p. 259) meaning that, inter alia, it might not be possible to ascertain the full extent of the limits of charitable purpose.[82] (Turnour M., and Turnour E (2014), p., 49) Consequently, it has further been asserted that as a result of the majority of the Court's application of constitutional and charity law principles, this resulted in the doctrine being left "sufficiently vague that it may be read broadly or narrowly."[83] (Beard J (2018), p. 259) Such ambiguity may contribute still to a chilling effect for charities because of continued uncertainty as to whether their purposes may fall outside of the exceptions created by *Aid/Watch* or indeed the provisions of the Charities Act 2013. Nevertheless, what this decision has done is endorse freedom of expression and political debate within Australia,[84] (Glazebrook, S (2019), p., 662) and whilst it cannot be denied that the decision left a level of uncertainty in relation to political purposes, in reality, it heralded a positive change to the charity narrative because these values emphasised and underpinned human rights.[85] (Glazebrook, S., (2019), p., 667) Thus the decision might be seen as responding to the demands of contemporary society, albeit with the Charities Act 2013 providing some constraints.[86] (Turnour M., and Turnour E (2014), p., 59) Overall, one might conclude that the Australian approach is therefore to be welcomed by the charity sector for the

80 Synge, M., (2018) "Public benefit post-Pemsel" in Harding, M (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar), p., 373, referring to *McGovern v Attorney-General* [1982] 1 Ch 321.

81 Beard, J., (2018) "Charity law and freedom of political communication: the Australian experience" in Harding, M (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar), p., 259.

82 Turnour, M., and Turnour, E., (2014) "Archimedes, *Aid/Watch*, constitutional levers and where we now stand" in Harding, M., et al. (eds*) Not-for-Profit Law* (Cambridge University Press), p., 49.

83 Beard, J (2018) "Charity law and freedom of political communication: the Australian experience" in Harding, M (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar), p., 259.

84 Glazebrook, S (2019) "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melb U L Rev, p., 662.

85 Ibid, p., 667

86 Turnour, M., and Turnour, E., (2014) "Archimedes, *Aid/Watch*, constitutional levers and where we now stand" in Harding, M., et al. (eds*) Not-for-Profit Law* (Cambridge University Press), p., 59.

reasons cited because the starting point now is that where there is lawful public political advocacy, or where a purpose engages in such activity, then that is for the public benefit. That means that in Australia, the focus on determining whether or not a purpose is charitable is on how the advocacy is carried out, in other words, and only the ends will be considered in exceptional situations (Murray I., (2019., 50) This can be contrasted with the New Zealand approach, where the Supreme Court in *Greenpeace* 2014 stated that political purposes will usually not be charitable, and it would be necessary to assess the ends, the means and the manner of the purpose without clear explanation as to how this should be approached (Murray I., (2019) This means that the New Zealand approach appears materially more onerous, not only because of the 3-stage test, but also because "if an entity asserts a particular view about how to achieve an end the court must enquire into whether adopting those means to achieve that end will result in a net benefit."[87] Although it must be recalled that, at least in relation to environmental advocacy, the 2020 *Greenpeace* case has provided some further clarity on just how such purposes can be assessed for their charitability. Nevertheless, whilst the 2020 *Greenpeace* case might have provided some lucidity in that respect, this does not resolve the still remaining ambiguity generally about political purposes in New Zealand in contrast with Australia. This is because, as has been asserted, a court may have to consider whether the advocacy in question is "consistent with a nation's system of government"[88] thus it may be that courts will have to assess in each situation whether achieving a political purpose by that specific means is beneficial. This is likely to be a complex undertaking in many circumstances, not least because there are likely to be direct and tangible, and indirect and intangible benefits, to the purpose being assessed. This is as opposed to, in Australia, the more traditional judicial approach of determining whether the advocacy is likely to be harmful (Murray, I., (2019, p 53–54). What then can be said about the Canadian approach and its impact on the political purpose debate?

5.2 Canada

Historically, Canada followed the same path as New Zealand, in that Canada prevented charities from pursuing political purposes because of the *Bowman* line of

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87 Murray I (2019) "Looking at the charitable purposes/activities distinction through a political advocacy lens: a trans-Tasman perspective" Oxford University Commonwealth Law Journal Volume 19, Issue 1, p.51.

88 Murray I., (2019) "Looking at the charitable purposes/activities distinction through a political advocacy lens: a trans-Tasman perspective" Oxford University Commonwealth Law Journal Volume 19, Issue 1, p.51, referring to Harding, M.,'An Antipodean View of Political Purposes and Charity Law' (2015) Law Quarterly Review 181, p.,183.

authority.[89] (Chan, K., (2020) p., 158) Nevertheless, with the handing down of the 2018 *Canada Without Poverty v Canada*[90] case, those longstanding rules "came to an abrupt and rather undignified end"[91] (Chan K., (2020) p., 158) With that judgement came a "happier charitable sector",[92] (Chan K., (2020) p., 153) but it also gave rise to more legal uncertainty.[93] (Chan K., (2020) p., 153) This then perhaps echoes the legal landscapes of both Australia and New Zealand, where the charity sector in Australasia is both more certain and more complex depending on the circumstances of the advocacy. However, the distinguishing factor with regard to the Canadian approach in the case in question is the focus on political activities as opposed to political purposes, and it is not necessarily clear whether there is a clear distinction between "purposes" and "activities". Indeed, the Canada Revenue Agency (CRA), which administers Canadian tax laws and is the governing body for Canadian charities, noted that the difference between purposes and activities is often uncertain but it stated that both are equally important in the assessment of the charitability of an entity.[94] Nevertheless, it is noted that the CRA does focus on activities because of the definition of "charitable organization" found within subsection 149 (1) (a.1) of the Income Tax, although it is asserted that this leads to complexity and contradictions in determining charitability.[95] (Juneau C (2016), p., 2; 9–12). Nevertheless, whilst Canada appears to focus on activities, it needs to be made clear that distinction between "purposes" and "activities" has been the subject of academic debate for many a year[96] and the issues raised are complex and beyond the scope generally of this article. Rather the purpose of considering the Canadian context is to demonstrate that even though Canada, like New Zealand, may have conducted changes to its political purpose framework, which might be considered public policy

89 Chan, K., (2020) "Constitutionalizing the Registered Charity Regime: Reflections on Canada Without Poverty" 6 CJCCL, p., 158.
90 *Canada Without Poverty v Canada (AG)* 2018 ONSC 4147.
91 Chan, K., (2020) "Constitutionalizing the Registered Charity Regime: Reflections on Canada Without Poverty" 6 CJCCL, p.,152.
92 Chan, K (2020) "Constitutionalizing the Registered Charity Regime: Reflections on Canada Without Poverty" 6 CJCCL, p.,153.
93 Ibid.
94 "Charitable purposes and activities" Canada Revenue Agency https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration/charitable-purposes-activities/questions-answers-about-charitable-purposes-activities.html#q4.
95 Juneau, C., (2016) "The Canadian Income Tax and the Concepts of Charitable Purposes and Activities" Occasional Paper, The Pemsel Foundation, p., 2; 9–12.
96 For examples, see Susan Barker "The Myth of Charitable Activities" The New Zealand Law Journal September 2014 340 and Murray, I., (2019) "Looking at the charitable purposes/activities distinction through a political advocacy lens: a trans-Tasman perspective", Oxford University Commonwealth Law Journal, 19:1, pgs., 30–54.

changes, as opposed to doctrinal changes, such changes also reflect the continued uncertainties that continue to abound within all the jurisdictions considered in this article. Indeed, in relation to the view that Canada may have made changes because of public policy, this may be because of its tax-based governance of charities, and it is this tax governance that is said to be greatly influential in determining charitability because charities are seen as a "tax loophole or 'fiscal cost'"[97] (Barker, S (2022), p 3). Such influence may explain why New Zealand adopted the doctrinal "3 stage test" in contrast to Canada although these differences are not easy to extrapolate. Regardless however of Canada's approach, its changes have not necessarily made that legal framework any clearer, thus echoing the construct that the doctrine remains challenging for the legal sector regardless of the form that it takes.

The Canadian case in question was an appeal by Canada Without Poverty (CWP), which sought a declaration that s 149.1 (6.2) of the Income Tax Act 1965 (ITA), which restricted political activities of charities, violated the Canadian Charter of Rights and Freedoms (Charter), in particular the right of freedom of expression under s 2 of the Charter.[98] The issue with s 149.1 (6.2) was that the CRA had historically permitted no more than 10% of a charities resources to be spent on such activities, but this limitation had been criticised not least because it was said to impose an "advocacy chill"[99] (Glazebrook S., (2019), p., 640) and thus restrict charities' activities. In the judgment, the Court confirmed that CWP's activities "were squarely within the charitable purpose of relief of poverty"[100] (*Canada Without Poverty*, para., 41) and it was not possible for it to carry out its purposes whilst restricting its activity to the 10% limitation imposed by the CRA under s 149.1 (6.2).[101] (*Canada Without Poverty*, para., 42) Further, CWP had a right to freedom of expression through its "unimpaired public policy advocacy"[102] (*Canada Without Poverty*, para., 47) and the restriction placed upon it by the CRA's interpretation of s 149.1 (6.2) was contrary to that right, thus contrary to its rights under s 2(b) of the Charter to freedom of expression.[103] (*Canada Without Poverty,* paras., 47–48) In response, the Government enacted

97 Barker, S (2022), "Family First – a gift to the forces of authoritarianism?" Capital Letter 15 July, p 3.
98 "Canada Without Poverty v Attorney General Canada" The Pemsel Foundation 15 March 2019 http://www.pemselfoundation.org/case-summary/canada-without-poverty-v-attorney-general-canada/.
99 Glazebrook, S (2019) "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" 42:2 Melb U L Rev 640.
100 *Canada Without Poverty v Canada (AG)* 2018 ONSC 4147 at [41].
101 Ibid., para., 42.
102 Ibid., para., 47.
103 Ibid., para., 47–48.

legislative amendments to the ITA[104] in the manner envisaged by the decision, meaning that charities can now "carry out unlimited public policy dialogues and development activities that further a charitable purpose."[105] (Chan K., (2020) p., 153)

Prima facie, this development appeared a welcome addition to the political purpose narrative because it meant that charities could engage in robust public advocacy to support communities without fear of being denied charitable status under the former "tyrannical"[106] s 149.1 (6.2). However, this decision left many unanswered questions, including what are the limits of freedom of expression and freedom of conscience and religion from constitutional and charitable jurisprudence points of view.[107] (Chan K (2020) p., 190) This case does not assist on those matters, leaving a sense of uncertainty as to how far the political purpose doctrine may be extended, or what its limitations may be, much as has occurred in Australasia since the *Aid/Watch* and *Greenpeace* 2014 decisions. Therefore, with change comes uncertainty but there may still be hope for further clarity in Canada, as "given the inherent flexibility within the definition of charity to adapt to modern conditions",[108] (Glazebrook S (2019), p., 669) as reflected in the *Canada Without Poverty* case, there may still be an opportunity for courts to clarify the extent of the doctrine.[109] (Glazebrook S (2019), p., 669)

6 Concluding Comments

This article began with discussions on New Zealand's political purpose doctrine journey, and I return to that now, noting that I recently commented that "New Zealand appears, generally, to be progressive in its approach",[110] (Chevalier-Watts, J., (2018) p., 171) to political purposes. Indeed, the Court of Appeal in *Family First New Zealand*[111] acknowledged with approval my thoughts on this matter (*Family First*, para., 150) further acknowledging my assertion that New Zealand charity law

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104 Bill C-86 Budget Implementation Act 2018, No 2, permitting charities to engage in unlimited public policy dialogue and development. Received Royal Assent 13 December 2018.

105 Chan, K., (2020) "Constitutionalizing the Registered Charity Regime: Reflections on Canada Without Poverty" 6 CJCCL, p.,153.

106 Ibid, p., 189.

107 Ibid, p., 190.

108 Glazebrook, S., (2019) "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melb U L Rev, p., 669.

109 Ibid.

110 Chevalier-Watts, J (2018) *Charity Law – International Perspectives* (Routledge), p., 171.

111 *Family First New Zealand* [2020] NZCA 355 [27 August 2020], para., 150, citing Chevalier-Watts, J., (2018) *Charity Law – International Perspectives* (Routledge), pg., 171.

underpins social progression due to the "close correlation between societal progression, requirements and charity."[112] (*Family First* [2020], para., 150) Thus it appears that New Zealand courts, echoing that of Australia and Canada, have amended the political purpose doctrine such that the doctrine has now been weakened,[113] (Harding, M., (2020) p., 574) and this has allowed charity law to evolve in line with demands of society, albeit with some question marks remaining as to the boundaries of that doctrine in each jurisdiction.

It is perhaps unsurprising that New Zealand has such a progressive approach to charity law. This is because firstly, it is a state that has previously been receptive to such changes, as reflected in *Latimer v Commission of Inland Revenue*[114] in relation to shedding the shackles of the blood-tie nexus determined in the English *Oppenheim* case, as mentioned earlier. That was because the Court in *Latimer* determined that nexus in question was not appropriate for the New Zealand charity law landscape because it would discriminate against the needs of Maori, which would in turn would undermine New Zealand society if historical grievances could not be resolved through the Waitangi Tribunal claims. Secondly, such an approach is nothing new socially for New Zealand, whereby, for example, "New Zealand can justly claim to be the first self-governing country to grant the vote to all adult women."[115] Indeed, further evidence of New Zealand's socially-progressive outlook was reflected in the referendum on whether to legalise the recreational use of cannabis and "whether the End of Life Choice Act 2019 should come into force, giving people with a terminal illness the option of requesting assisted dying."[116]

However, it cannot be argued that the new iterations of the political purpose doctrine are without issue and the New Zealand, Australian and Canadian cases discussed reflect some of those concerns. Nonetheless, I would suggest that at least in New Zealand, as the Greenpeace journey has reached its end, *Greenpeace* 2020 may have brought charity law in to the 21st century by recognising purposes that are at the heart of humanity, that is, advocating for the protection of the planet and thus protecting humanity. So whilst some of the boundaries of the political purpose doctrine may still be uncertain and indeed may have become more complex for the judiciary and the charity sector to ascertain, these cases may have "produced a

112 Ibid.

113 Harding, M (2020) "Charity and Law: Past, Present and Future" Singapore Journal of Legal Studies, p., 574.

114 *Latimer v Commission of Inland Revenue* [2002] 3 NZLR 195 (CA).

115 "Women and the vote" New Zealand History https://nzhistory.govt.nz/politics/womens-suffrage/world-suffrage-timeline accessed 23 September 2020.

116 https://www.referendums.govt.nz/accessed 23 September 2020; the Act received Assent 16 November 2019.

happier charitable sector"[117] (Chan K (2020) p., 153) by providing a "voice for the underrepresented and the vulnerable"[118] (Chevalier-Watts J (2018) p., 228) and supporting the aforementioned "machinery or harmony of civil society".[119] (*Greenpeace*, para., 70)

As a result, the new iteration of the political purpose doctrine within New Zealand, and likely its international counterparts, will reflect a more benignant approach towards charities which can benefit society generally because of the fundamental socio-economic importance of charities as advocates for the vulnerable and the needy, and for ensuring that law is fit for purpose through their advocacy. As a result, charities with political purposes, or that advocate for legal change, may be able to operate in a less restrictive manner to benefit the public without fear of the chilling effect that the historical doctrine may have imposed upon them. As a result, I look forward to seeing the future development of this doctrine in line with the demands of contemporary society.

117 Chan, K (2020) "Constitutionalizing the Registered Charity Regime: Reflections on Canada Without Poverty" 6 CJCCL, p.,153.

118 Chevalier-Watts, J (2018) *Charity Law – International Perspectives* (Routledge), p., 228, referring to Morris, D (2015–2016) "Charites and Political Activity in England and Wales: Mixed Messages" Charity Law and Practice Review 18(1), p., 128.

119 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC), para., 70.