IN THE SUPREME COURT OF NEW ZEALAND SC 97/2012

[2013] NZSC Trans 15

BETWEEN GREENPEACE OF NEW ZEALAND INCORPORATED

Appellant

AND CHARITIES BOARD

Respondent

Hearing:	1 August 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	D M Salmon, K L Simcock and D E J Currie for the Appellant P J Gunn and D Baltakmens for the Respondent

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CIVIL APPEAL

MR SALMON:

May it please the Court, Salmon with Ms Simcock and Mr Currie for Greenpeace.

ELIAS CJ:

Thank you Mr Salmon, Ms Simcock, Mr Currie.

MR GUNN:

May it please the Court. Counsel's name is Gunn. I appear with Ms Baltakmens.

ELIAS CJ:

Thank you Mr Gunn, Ms Baltakmens. Yes Mr Salmon?

MR SALMON:

May it please the Court. We have both filed reasonably detailed submissions on what is a fairly tidy and narrow set of issues.

ELIAS CJ:

Yes, excellent submissions from both parties, if I may say so.

MR SALMON:

I thought so too, your Honour. One more than the other, but unfortunately it's not mine.

The, the submissions set out in, in what seems to me to be reasonably complete detail the, the competing issues and if the Court's had a chance to look through you won't want me going through them in detail.

WILLIAM YOUNG J:

Can I ask you one question? Have the rules been changed or not?

MR SALMON:

Greenpeace's rules? The change referred to in the Court of Appeal has been approved by the Board of Greenpeace last month, last – in June, Sir, but there's not yet been a new application filed following the approval. It had to go back to the Board.

WILLIAM YOUNG J:

So is it – does that – to what extent, assuming those changes go through, to what extent are your arguments moot? In relation to this particular case.

MR SALMON:

In relation to this particular case they're never completely moot in the sense that they will have impact on the ongoing operation of Greenpeace and a, and a range of other charities. I rather intended to approach this case though, Sir, by, by distancing myself from the case on appeal in large part because I don't see this Court as needing to grapple with Greenpeace's specific facts on the two issues on which

you've given leave to appeal today. So if your Honour's asking, "Are we needing to look at Greenpeace's specific circumstances?" in my submission, no.

ELIAS CJ:
Sounds very much as if the question is moot then, Mr Salmon.

MR SALMON:
No, your Honour, because the Charities Commission, absent this being resolved, will determine Greenpeace's application having regard to the Court of Appeal's finding that effectively the advocacy prohibition or political prohibition has been codified. So firstly is there – secondly, to the extent it was moot, it was moot when your Honours gave leave, and I don't mean that in a, in a discourteous way, but you've given leave to have an issue heard today that is publicly important and which does govern numerous charities across New Zealand and, and is of importance, as noted in the leave application, not just to Greenpeace but to every charity that engages with the legislative and policy machinery of Government. So, so in that sense it's not moot.

It's also not moot for Greenpeace specifically because the Charities Act 2005 involves an ongoing supervision and monitoring role for the, what's now called the Board such that the position taken on whether in New Zealand we continue to have some form of prohibition on anything political or whether we go more down the route taken in Australia and some other countries now and recognise the changed democratic environment will, will affect the way in which Greenpeace is monitored and its charitable status, maintained or not, as time goes on.

And, without taking the Greenpeace example of how that may be because I, I do intend not to get into the detail of Greenpeace's specific facts – my friend's asked to have everything in the case on appeal. Fine. But I don't think these issues require you to look at the –

ELIAS CJ:
It does mean though that our decision – that you are really inviting us to consider the matter very broadly and we have to bear in mind a number of possible applications which are not the Greenpeace application.

MR SALMON:

That's quite right, your Honour. In fact, though, that was a problem that confronted the Courts even when they had the more specific details of Greenpeace's application, and I say this because it was I think almost common ground that the Court wasn't looking at everything that might be relevant. It couldn't be. One of the, the only affidavit on file says what the Commission looked at is far from a complete representation of what Greenpeace does, and so, but the Commission, the High Court and the Court of Appeal were deprived of the full qualitative and quantitative sense of Greenpeace's operation. So it was always, in that sense, slightly abstract. And that's one of the reasons the Court of Appeal said, "Well we will deal with those issues but we will refer it back." So as things stand, it is going to be referred back and dealt with by the Commission, by the Board, and thus not moot in that sense. As things stand the Board has the, in my submission, unenviable task of trying to work out what exactly is prohibited under the current law. And one of my submissions is if it's right that in some way or another the Act locked in a prohibition on advocacy, it's done so in a way that's alarmingly clumsy and incapable of a precise definition.

And so what I intended to do today was to go through what was pre the Act, the state of the law on the political advocacy prohibition such as it was. Because it's much less than the Commission has taken it to be. Look at what the Act might have done to that or not and then look at the issues that perhaps are the most interesting ones, which are, is what was really a short-lived prohibition on political or advocacy engagement, short-lived in Charities Act or charities law terms, viable in our modern environment?

ELIAS CJ:

100 years?

MR SALMON:

100 years. Which is –

ELIAS CJ:

Yes. Blink of an eye.

MR SALMON:

Well, by charities terms, when one looks at the, the preamble, which your Honours will be familiar with, this is old stuff. And it's a fascinating area of law because it changes all the time. One of the ironies of the, of my friend's position is it's acknowledged that the Act didn't stop that wonderful development of charities law. It continues to evolve. But it is submitted, I think, one part of it has somehow been frozen in, in the small bracketed phrase in the Act. So I'll, I'll come to that.

But the reason we're here, and it's a rare chance for a senior appellate court to look at these issues – I, I think it's the, the first time that they've reached any sort of senior appellate level in 30, 30 years, and it's rather unusual and it's a rare chance to revisit what is, ironically, one of the richest judge-made areas of law and one that constantly evolves and benefits from being refreshed by being in front of the courts, so it's a rare chance to look at quite important issues and ones which govern and affect the behaviour of thousands of entities, most of which can never afford to, are unable to, have these issues litigated. So it's a rare chance we have today to look at, to look at what, what are not really moot issues.

The recent changes in the Charities Act have resulted in a, in a suite, a wave of declinatures of applications such that a lot of entities that were effectively given charitable status when the IRD used to administer matters have been declined. And a lot of the reasons for declinature that applied to Greenpeace have fallen away because they've been resolved on appeal. But in broad terms what seems to have happened is the Charities Commission, now the Board, has taken a view of the case law, the same case law that the IRD was looking at, that differed and declined charitable status for a lot of entities. So there was a flurry of High Court decisions where entities that had been regarded as charitable were declined charitable status and appealed it and so on. This is the only one that's come this far. The impression one has when one looks at how the Commission has addressed applications, and a particular example arises on this public purposes, or sorry political purposes in an advocacy context, is that the Commission's treated cases from different jurisdictions, and in particular certain English cases, as if they were almost statutes. So comments from judges from different times, different contexts, about one's ability to engage with the political machinery as somehow laying down eternal and strict laws that would bind New Zealand now. And to some degree that's been addressed by the Court of Appeal which is correct in some of the Charities Commission's approaches on issues that were once seen as controversial – disarmament issues or

whatever – and are now seen in a more nuanced light. But that hasn't happened on the advocacy and political purposes point, which is the core issue for today. There's a small ancillary matter –

ELIAS CJ:

Can we avoid, though, looking at some of those other matters, because you are inviting us to look at this in a fairly abstract way. I am just wondering whether you are safe to assume that this Court will necessarily follow what has been decided in lower Courts.

MR SALMON:

No, I'm not necessarily assuming anything. I anticipate your Honours will ask me if you want to hear from me on other issues. Perhaps if I can frame what I'm saying about this in this way, a core component of my submission today will be this proposition. Charities law changes continuously and always had. What was charitable once is no longer charitable. For example, it used to be that charitable purpose to build bridges to help farmers get to market. Now we've got the *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) case in which exactly that sort of charity was prohibited and that's the sort of purpose that was specifically recognised in the preamble, building bridges right there, things change a lot.

A fairly recent change has been this political purposes prohibition and I've called it that. It has never meant quite what it's been taken to mean, and it's meant something in fact and the original English case from 1917, the *Bowman v Secular Society Ltd* [1917] AC 406 (HL) case, from a very different era, but nevertheless said a lot less than the Commission has really taken the prohibition to mean. What it said was some issues are so contentious that we can't judge who's right and who's wrong. And the core examples since in the case law illustrate the problem the Court was recognising, which is if there are two sides of a competing debate such as abortion law reform or vivisection or in the *Bowman* case in 1917 the proposition one should get rid of the Church.

The Court is not placed to say, well that side's right and that side's wrong and that's the nature of the concern, the mischief that underlies the prohibition on political positions. It's been taken to mean more than that, and it's been taken to mean that an entity cannot engage in the consultative process, the Select Committee process,

the lobbying process, anything like that, to advance an issue which is plainly in the public interest.

So if I can take an example that's not this case to illustrate the point I'm making. The City Mission feeds, shelters homeless and poor people and it's plainly charitable. Every year it engages with local Government in what is advocacy in a lobbying context to talk about planning issues. Where can they go? Those sort of things. My friend would say, "Well that's advocacy and that's out." But that highlights a very important distinction between a political purpose of the nature the Courts were originally concerned about. We can't judge who's right and who's wrong and participation in a modern legislative or decision making or policy process to advance a purpose which is plainly charitable.

ELIAS CJ:
I had thought, well I have not understood that that was the Board's position. I had understood that ancillary advocacy, advocacy that is ancillary to its charitable purposes is all right?

MR SALMON:
Yes, my friend does accept that if it's ancillary, it's all right. But the way that the legislative framework and the common law works is to say one works out first what's charitable and what's not and the Act says you must have exclusively charitable purposes. My friend says, "Advocacy's not a charitable purpose and cannot be." Thus it can only be advanced to the extent that it's ancillary. Now, one would say "Well, problem solved, ancillary advocacy is fine," but the problem that every charity faces is they do this every day in the modern environment. The City Mission, does it respond? Greenpeace gets invited or requested to come and make submissions to assist Select Committees to bring data on non-proliferation. Does it refuse? Because it's worried, they'll all be worried, that at some point they break whatever qualitative and quantitative threshold there is to be more than ancillary, if your Honour follows.

But the distinction I was hoping to begin with is one that distinguishes between the political, in the sense the cases we're concerned about, and the more benign where the Courts are able to judge because the core first submission from me is that the cases were only ever about saying some things are too political to judge, and I can go through the cases, but that is what they say. Once one recognises that some

things are too political to judge, that is the root of the prohibition on political purposes. One can see that –

McGRATH J:
That means too political to judge whether they are for the public benefit?

MR SALMON:
Correct.

McGRATH J:
That's the shorthand, yes.

MR SALMON:
Correct.

ARNOLD J:
But that really goes to the purpose, doesn't it, the objective, rather than the means?

MR SALMON:
Correct, that's exactly right, Sir, and that was –

ARNOLD J:
So if the objectives are clearly charitable, in your point of view the, given section 5 subsection 3, the only real issue is the uncertainty created by the use of the term ancillary, that is what it comes down to, isn't it?

MR SALMON:
Sir, it's twofold if I may, and perhaps I'll take the Australian example. Let us envisage that we find a charity that's plainly charitable in its purposes, helping promote the feeding of the poor, and it devotes its charitable energies entirely to providing information to the legislative machinery to help make sure that funds are distributed correctly.

ELIAS CJ:
What, public funds?

MR SALMON:

Yes. Now that, *Aid/Watch Incorporated v Commissioner of Inland Revenue* [2010] HCA 42, (2010) 241 CLR 539 was that with foreign funds. It was saying, "Good, send money to Africa, wherever, but make sure we do it right." And in Australia they've said, "Yes, all you are doing is lobbying."

ELIAS CJ:

Well, but apart from the Australian approach, which I imagine you do want to take some time over, where else is that view taken?

MR SALMON:

The view that that sort of engagement is legitimate?

ELIAS CJ:

Yes, that engagement in the political process is charitable, effectively.

MR SALMON:

Well, there are two steps to *Aid/Watch* and one is fairly, more mundane or less exceptional. One part of what *Aid/Watch* seems to say, the less contentious part, is engaging in lobbying or in the legislative process to advance a plainly charitable purpose, so the means that Justice Arnold identified, that's not non-charitable.

So if one takes an indisputably charitable entity that says, "I think the best way I can make sure that violence against women stops is by engaging in this particular reform process to make sure that the Government has good data." The first part of *Aid/Watch* would say, "What's the problem with that?" Because the reason we didn't like that sort of engagement was because in all the cases it was on an issue that was highly contentious, stop abortion or stop the Vietnam war. But the idea that we should stop violence against women, settled, fine. Or in the *Aid/Watch* case, that we should feed the starving millions. Fine, *Aid/Watch* was helping provide data and make sure that it went to good places.

So in that sense, the purpose is feed the poor or stop violence against a minority or an oppressed group. The means –

ELIAS CJ:

But the body itself is not feeding the poor. The body itself is simply advocating better ways in which governments can ensure that aid is going to the right place. That's a different, it seems to me that that is a possible distinction that you have to address.

MR SALMON:

Yes, it is a distinction and I will address it. What I'm seeking to do at first is to clarify, I suppose, a couple of points of terminology. And maybe I can do it in this way, Justice Arnold has identified an important distinction between what is a purpose and what is a means of delivery. And it should be tried that the first question and the statutory question for qualification as a charity is what is the purpose of the charity. And we know that presumptively one's in if it's poverty, religion or education and otherwise it's got to be for the public benefit. That's the fourth category of *Commissioners for Special Purposes of Inland Tax v Pemsel* [1891] AC 531 (HL). That's the hard one. If the purposes promote the feeding of the poor or promote the abolition of torture which is now accepted to be charitable, wasn't once in England, is now. That purpose in abstract terms is charitable, we accept that now. The question then is, what are the means of achieving it? And the first part of *Aid/Watch* recognises, I submit it recognises, that there's nothing incongruous or inconsistent with a charitable purpose that one entity might say, "The best way I can advance this is to do something someone might say is advocacy."

To take an extreme example, the reason that in, in what I will submit is the high-water mark in the UK, the prohibition in *McGovern v Attorney-General* [1982] 1 Ch 321 (Ch) on Amnesty International being a charity. Very much a high-water mark and I think my friend will say, or at least the Charities Board did say, applies here, although it's never been adopted. Such a high-water mark is no longer the case. It's no longer applied in England, rejected in Australia, and, in my submission, bad law. But in that case it was said it's advocacy or too political to even criticise a despotic regime on the far side of the world.

And this is a discussion we had with the Court of Appeal about the non-proliferation treaty because there was a discussion about the extent to which the Court could judge whether certain non-proliferation positions were for the public benefit or not. And the submission ultimately accepted was, well, once upon a time that was controversial, but we've signed a treaty and enacted good law, legislation, which says definitely this is good.

WILLIAM YOUNG J:

But why does the law, as enacted at a particular time, set the standard? For instance, those who challenged the provisions of the Crimes Act 1961 in relation to homosexual activity could have said, "Look, we're in the right. The law is this and we just want to adopt a position that's sanctified by the law." I do not think anyone would have said that that was a charitable purpose.

MR SALMON:

Well they –

WILLIAM YOUNG J:

That that meant that the public purpose argument was, as it were, trumped by the current provisions of the statute.

MR SALMON:

No. I accept that absolutely, but they would, that would have been a classic example of the problem, recognising *Bowman*, and what I submit is the only real nature of the prohibition. I've said in my submissions and I'll say it now, the prohibition on political purposes is just a recognition that, as in that case, a Court can't be asked to judge which side of the debate is right.

WILLIAM YOUNG J:

But it cannot be controlled by what the current predominant view is, can it?

MR SALMON:

Well I'm not sure that it should be, but certainly some of the cases have said that it can. So there are some American, Canadian cases and, I think, some in the Commonwealth in which they've said seeking to promote the enforcement or advancement of legislatively recognised goals could be charitable. As opposed to seeking to change them. Now, other English cases have said otherwise. There's even one suggestion in a case that trying to promote the advancement of a trend in legislation is a positive thing, and that was some of the human rights discussion because human rights promotion did not meet the charitable purpose test at one point. It does now. So a lot of the debate was, to what extent can one agitate to have an end to apartheid, for example, where that involves criticising some governments and commentators, and I think some judges said, well, one can deduce such a trend, such an inevitability, that the Courts can comfortably take a position.

But on your Honour Justice Young's example, the gay marriage issues, or, for example, take something truly contentious from older times, whether or not the Springbok tour should happen, the Court would rightly say, as per *Bowman*, should we get rid of the church? Too hard for me to judge.

ELIAS CJ:
But too –

WILLIAM YOUNG J:
Of course the problem with *Bowman* is of course the churches are entitled to say you should not get rid of us because they are sort of presumptive charities.

ELIAS CJ:
Well they are charitable too –

MR SALMON:
Yes.

ELIAS CJ:
– in advocating that.

MR SALMON:
And, and we don't know who's right and, and no one should be asking the Court to judge. But the first part of *Aid/Watch*, and I've, I've moved slightly off the beaten track on that but I do want to address the Chief Justice's point about *Aid/Watch* now.

ELIAS CJ:
Well I should flag with you that I am not persuaded that it is the right way to look at this, to look at prohibitions. I am still hung up on, "What is a charity?" and one would have thought that public benefit takes its colour from the purposes that are undoubtedly charitable. And they all do seem to have in common assumption of responsibility for provision that would otherwise fall on the, fall to the public to do.

MR SALMON:
Yes. Perhaps that's right.

ELIAS CJ:

And advocacy for change, however laudable it may be, does not really fit readily within that sort of framework. So I hope you will also go back to the definition of charitable purpose before you, before concentrating simply on prohibitions on it.

MR SALMON:

Absolutely. And I've perhaps put up the word "prohibition" as my own straw man.

ELIAS CJ:

Yes.

MR SALMON:

It's the way it's been presented by the Commission. But I've done that for a reason, and the reason is I think it's wrong. What I've put in my submissions, and it's agreeing with your Honour's point, is this: when one looks at what I've called the prohibition, and it is a straw man, and looks at it in a nuanced way, in the cases one sees that actually all it was was a facet of the definition of charitable purpose. And so that's my first core submission: the definition of the charitable purpose under the fourth head of *Pemsel* is whether it's for the public benefit, the benefit of the community, in a way that's consistent with the preamble. Your Honour, your Honours know that law. The Court simply said there are some things that are too hard to judge. So there are some things that the courts can say, yes, those are definitely charitable. Animal welfare's now one. The courts have said, "We're now comfortable saying that is". Not mentioned in the preamble but now there's some public benefit. There are some things that definitely aren't. Some extreme causes, some nutty things. And somewhere in the middle there are some things where society is in hot divide over. Either in the, in the legislative context because there's a reform issue going on – and the law's clear, when there's a finely balanced reform issue neither side can be clearly found to be in the public benefit. But that is, as, as I say, not really in terms of prohibition it's a reflection or a feature of the test. Can the Court deduce or conclude that this is in the public benefit? So I'm not taking issue with your Honour's description of the sort of general purposes that meet the charities test. The areas where this political prohibition or advocacy prohibition have arisen are in those areas where the Courts have just said, "Too hard to judge."

ELIAS CJ:

But “too hard to judge,” is a very difficult test for a Court to apply, and it’s a flickering test, because as has been put to you and as you acknowledge, it changes.

MR SALMON:

Yes. Although, your Honour, that is unfortunately the problem the court has with all charities questions. There is always some new issue that science didn't once tell us was –

ELIAS CJ:

Well unless you look for a purpose that actually would fall to the public purse to address if the charity did not step in. So education, poverty, looking after aged and infirm horses or whatever now. You know. It is that sort of standing in the place of the community, doing what the community would otherwise have to do which seems to me to be, to arise out of the preamble and to be consistent with the way the term “charity” has generally been applied.

MR SALMON:

Yes, although it might go slightly wider than, than “the community” in some narrow sense because it’s, it’s been accepted to mean matters right outside our local community hasn’t it? It’s included work in foreign jurisdictions. A New Zealand charity could have as its sole purpose stopping child soldiers being conscripted in Sudan.

ELIAS CJ:

I have a query about that. I mean you would need to convince me that that is something that is a charitable purpose.

MR SALMON:

Well the Board may too, your Honour, because that’s –

ELIAS CJ:

I know. I know that.

MR SALMON:

– that's accepted as, as common ground. And, and I think for hundreds of years it hasn't been a disqualifying factor that charities look outside their own boundaries. It's not a problem I have for Greenpeace today. I'm merely –

ELIAS CJ:

If ancillary, no problem.

MR SALMON:

Well, it only raises the question whether it's ancillary if it's a purpose that is not charitable.

WILLIAM YOUNG J:

A trust for the relief of poverty would, would permit money to be given to relieve poverty in other countries.

MR SALMON:

Yes.

GLAZEBROOK J:

And the church has quite clearly – that is one of their major charitable aspects. Well, charitable in the sense of promoting religion but usually also in the sense of aiding those communities as well.

MR SALMON:

And Aid/Watch itself was focused on, on foreign aid, and that, that part wasn't in issue.

To park Greenpeace to one side for a moment in this way if I can, nothing in its purposes is now contended in this hearing to be non-charitable, except to the extent that that final paragraph in its purposes, which you've read – I can go to it if you like – refers to advocacy. So nothing in its primary purpose. As I always said, well that's an ancillary provision. But we disagreed about that in Courts below.

But *Aid/Watch* is the same. *Aid/Watch* was about aid that is indisputably charitable. But the Board of Aid/Watch believed the way to advance that, and, and the purpose

of Aid/Watch was, the best way we can help, best use of energy, is to help make sure informed and good decisions are made about where that should go.

And so I've said the first core submission is, is the one I've, I've echoed back to your Honour, which is that there's not really a prohibition. There's an incident of the test which is, "Can we decide this contentious issue?"

GLAZEBROOK J:
Can, can I just –

McGRATH J:
Well isn't it the, aren't you really rather saying that if a stage is reached where there is no longer a contentious issue because community perspectives have developed and come down on one side of the issue then the underlying reason for the political purpose of prohibition no longer exists?

MR SALMON:
Correct.

McGRATH J:
And so the fourth ground is, is not impeded by it?

MR SALMON:
Correct. That's right, Sir. And, and that's an important way of – that's a useful way of putting it but it's an important point because the Commission, the Board, rather took any statement of what could not be charitable as, as a fiat. So for example, in an old case there was a position taken that a particular trust, this is *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) I think from memory, an anti-Vietnam War trust, had purposes that ran foul. The Judge said, "Well peace as a purpose is probably okay," we know it now is; everyone agrees it's good in terms. Judges have said and commentators have said, "That's one thing, but if you get down into whether a specific war should be fought in a certain way," or in the *Re Collier*'s trust which Justice Hammond to deal with, statements in the trust deed that it was to persuade soldiers to down their arms. One is becoming contentious again. So quite often there've been cases taken slightly out of context because they were deemed quite a contentious position, and *Bowman* itself was one of those, get rid of the Church, highly contentious thing to say.

The dicta that's cited frequently about political purposes was in the context of dealing with a problem that was just incredibly contentious and the Judge said in terms, "We can't judge this". But it's been rather taken to mean we can't actually go anywhere near anyone who says anything to the legislative or policy making machinery.

And I do just want to briefly come back to *Aid/Watch*, I'll come back to it properly, but that's the first part of *Aid/Watch*, was the proposition was accepted that if one's purpose is charitable, feed the poor, there's nothing –

ELIAS CJ:
But was that Aid/Watch's purpose?

MR SALMON:
Or aid to needy people. If I can put it this way as a general proposition, and this is –

ELIAS CJ:
Well it was not providing aid.

MR SALMON:
It wasn't providing it, it had the purpose of ensuring that aid reached people.

ELIAS CJ:
I am quite concerned, Mr Salmon, that because this case is not grounded on specific facts, or you are ranging beyond them, that you are in fact asking this Court to give an imprimatur to a lot of decisions, some of them first instance decisions, that may not be contentious between the parties, but I am not sure that we would want to necessarily adopt without consideration.

MR SALMON:
Findings by lower Courts as to what is and is not charitable.

ELIAS CJ:
Yes.

MR SALMON:

I absolutely agree, your Honour. I was rather hoping to deal with it in, not an abstract way, but in this way if I may. If I park what *Aid/Watch* specifically was and deal with the ratio of the first part of *Aid/Watch*, which is in my submission this. The purpose of the charity was charitable in a conventional sense and the *Aid/Watch* decision said, "There is nothing inconsistent with that, in seeking to advance that purpose through what might be called advocacy". Does your Honour follow that as a summary of the first limb of *Aid/Watch?*

ELIAS CJ:

Well, I still have a query as to whether there was not quite a powerful argument that Aid/Watch was not a charity.

MR SALMON:

Right and I'm not seeking –

ELIAS CJ:

Irrespective of the advocacy point.

MR SALMON:

And I'm not for a moment, your Honour, seeking to litigate Aid/Watch's charitable status, if it was pursuing its purpose through other means. But if one accepts that, at least in Australia it was accepted that, the purpose, putting aside the means, was charitable. The Court said, "If your means of achieving that purpose is engagement –"

GLAZEBROOK J:

Well what do you say the purpose was that was charitable? The purpose was to ensure that aid went to those people who needed aid rather than getting siphoned off in some way that was less than optimal.

MR SALMON:

Yes.

GLAZEBROOK J:

Is that – so you say that purpose itself –

MR SALMON:

Yes.

GLAZEBROOK J:

And indubitably, if you accept the foreign aid being charitable, if they went out and drove a truck to ensure that it got to a particular community as against stopping at the government level or whatever, then that would be indubitably charitable. Is that the submission?

MR SALMON:

Yes, and –

GLAZEBROOK J:

And then the issue then is means. I suppose my problem is that, and I am slightly worried about this contentious idea because it is almost like if it is majority it is okay, if it is not it's not and that tends to mean that you're looking at majoritarian values rather than possibly minority values that might come into play, especially in the human rights area. But the, even if you are looking at that as a test, and I'm just parking the fact I am not very happy about that, if you are looking at that as a test, you can have means, you can have indubitable charitable purposes but means that are contentious. For instance, well we get rid of the poor by introducing a eugenics programme, or in the extreme, a genocide programme.

MR SALMON:

Yes, and –

GLAZEBROOK J:

And those means are going to be, well one certainly hopes, with those last two controversial.

MR SALMON:

Yes, well the last means would have a number of hurdles, I would hope.

GLAZEBROOK J:

Yes, I think so, one would hope so.

MR SALMON:

And if I was having an easy day advancing a case about that here, I'd be alarmed for a suite of reasons. But your Honour is right, a lot of those problems, and the ones the Chief Justice is noting, are problems that are the bread and butter of charities and your Honour is right, it's not majority rules, there will be unpopular charities in the sense that a lot of what was in the preamble was doing things and looking after people that most people just didn't and wouldn't and it wasn't the majority's view that we should help the old maids or build bridges, it was a select few doing something good for them. And so I don't think it's tyranny of the majority, I don't think there's a risk of that, but again that's not this case.

GLAZEBROOK J:

It is the lack of contentiousness that worries me in terms of the advocacy, because it is basically saying, well if you fit within community values, and there is some indication in the charities law that you do look at community values and public benefit, but nevertheless it is a slight concern.

MR SALMON:

But it is not, your Honour's right, it's not a democracy, it's whether one is charitable. It's the elephant, we know one when we see one in a sense and the spirit of the preamble to the Statute of Elizabeth, judges have been quite candid of late and said, "Really, it's just whether someone meets the modern Chancery judge's conception of what's charitable on the day." And it's hard to be too prescriptive about what –

ELIAS CJ:

Well I would not like that to be the law of New Zealand if we can avoid it. Maybe it cannot be avoided but it doesn't seem to me very intellectually satisfying.

MR SALMON:

No, it's, if one looks at 400 years of charities law, there is no formula and I don't think one could ever posit one that's more useful than public benefit in the sense that that was always understood to mean in the charitable context, phrasing like that. As I say, it is a little bit like the elephant, we do tend to know one when we see one.

WILLIAM YOUNG J:

Can I say, you talk about 400 years, until income tax became a serious impost briefly in the Napoleonic Wars and then probably from the late 19th, early 20th centuries, the

only significance of being a charity, practical significance, was that you didn't have to worry about the perpetuities rule.

MR SALMON:
I think that's right.

WILLIAM YOUNG J:
So there has been, there is really about 100 years of practical law in the context of people wanting a, as it were, a tax break for a particular line of activities, where that is been the context more recently, hasn't it?

MR SALMON:
Yes, that's right, it has become in significant part a concern about tax, and that has resulted in more cases, your Honour is right. What I'm really seeking to highlight is, it's never been something that has been capable of a formula or a specific definition and it's not suggested, I think, in any of the reform attempts, that there be too much of an attempt to do that. Occasionally there'll be a reform process in which a specific enterprise is recognised as being charitable, sport might be singled out in some jurisdictions or whatever –

ELIAS CJ:
Well we have got marae, haven't we, in the legislation.

WILLIAM YOUNG J:
And sporting clubs, amateur sporting clubs.

ELIAS CJ:
Yes, sporting clubs and things.

MR SALMON:
But lest it seem like the Court's being asked to deal with something too abstract, I would like, if I can just close off on it, to explain what I think are the two propositions from *Aid/Watch* because one I think is quite challenging and I don't need to push it today and don't. The first I've said is if one envisages a charity with a purpose that is indisputably charitable, take one that fits the Chief Justice's view of charities if we wish, helping ensure that no one in New Zealand starves to death of poverty. That would be indisputably charitable. *Aid/Watch* has said if the –

ELIAS CJ:

Well, I am not sure, because you say, "helping to," does it not depend on what form the help takes? Because if it is simply lobbying for governmental change, then it might not be charitable. If it is actually taking around food to the needy, then it may be.

MR SALMON:

Yes, well that is stating the issue for today I think, rather, and all I'm seeking to say is *Aid/Watch* represents a finding in Australia that it does not cease to be a charitable purpose if the means of effecting it is engagement in the legislative machinery.

WILLIAM YOUNG J:

I think perhaps the point the Chief Justice may be hinting at was captured, I think, in the Charities case about the Carmelites who are a contemplative order and one of the Law Lords said rather acidly that they were paid to be good and not do good and didn't think they were charitable. And I think the scent of what I get from the Chief Justice's questions, she's looking for people actually doing stuff.

ELIAS CJ:

Yes, well it may be that that is not where the law has ended up, but you see I am now looking at the objects of the society and you say, "Well it's not contentious, that all, apart from the two that the Board takes issue with are not charitable." But it is not self-evident to me that that is right. Promoting a philosophy doesn't immediately strike me as within the, the spirit of the preamble.

MR SALMON:

Yes. And we both avoided, I think, burdening this Court with the various cases and reasons why it was common ground for most of that either is or, without being disrespectful to my client, there's a bit of verbiage in there too. But, but the core purposes, of protecting the environment or enhancing protection –

ELIAS CJ:

But all of these seem to be advocacy purposes really.

MR SALMON:

Well that's – I'm jumping around a bit and, and I was going to come to this point as well. There are a couple of definitional points that, that matter here and advocacy is

one of them. Almost anything any modern charity does that involves speaking to people is advocacy in one sense or another. It's an incredibly broad term. Advocacy to the extent that it's ever been seen as a problem, because remember educating people is a positive thing in charities law, to the extent advocacy has ever been a problem, the cases have meant political advocacy in a lobbying sense. So your Honour's right that in a broad sense advocacy might encompass a lot of this, but not in the sense that's been found to be offensive in charities law, if your Honour follows?

ELIAS CJ:
Well –

MR SALMON:
And that's, that's an important distinction, in my submission.

ELIAS CJ:
Well what is your best authority on advocacy for good purposes being charitable?

MR SALMON:
Well –

ELIAS CJ:
Non-contentious purposes?

MR SALMON:
Advocacy for non-contentious purposes, it would be –

ELIAS CJ:
Because that is really what you are saying, is that if it is – that there is an area where it is contentious where the Courts say, "We can't decide whether this is for the benefit or not." But what is the best authority for saying that advocacy for purposes which are not contentious is charitable?

MR SALMON:
And your Honour's talking political advocacy?

ELIAS CJ:

Yes.

MR SALMON:

As opposed to, say –

ELIAS CJ:

Well all of this is –

MR SALMON:

– seeking to encourage the public to behave in a kinder way to people. A lot of what the Church does, for example, is advocacy. It's not offensive in charity law terms. So –

WILLIAM YOUNG J:

But what about the Amnesty –

GLAZEBROOK J:

Well you say it comes under education, don't you? So that – and there are a couple of cases, I think, in the bundle that make the distinction between educating the public and advocating for particular political or policy changes.

MR SALMON:

Yes. Correct. And, and –

GLAZEBROOK J:

I cannot remember, I think it was the seamstress one, wasn't it?

MR SALMON:

Yes. But –

GLAZEBROOK J:

And then they have – that case they flicked over because of the last...

MR SALMON:

Yes. So – and that's right, it's a fairly well-trodden acceptance that general speaking to the public about a charitable purpose is absolutely fine. The concern is –

ELIAS CJ:

About a charitable purpose?

MR SALMON:

Yes. Yes. So at all points –

ELIAS CJ:

Oh, I see. So if you are – yes. I see.

MR SALMON:

So if one is saying – if, if one has a –

ELIAS CJ:

You do not have to be doing. You can be saying, "Do."

MR SALMON:

Yes. So if you've got an elder care charity that says, "Look" – that has as a purpose, ensuring that elderly people are cared for well, there would be nothing offensive about it using charitable funds for a TV campaign promoting the idea that grandchildren should check on grandpa.

ELIAS CJ:

Even if it itself does nothing beyond the advocacy?

MR SALMON:

Because – advocacy in that broad sense, yes.

ELIAS CJ:

All right. And what is your best authority on that?

MR SALMON:

Well I don't want to sound evasive, we haven't come here to argue that, but it's, it's well-trodden ground.

ELIAS CJ:

Well it seems to me you are arguing everything.

MR SALMON:

No, no – well can I please perhaps narrow the –

ELIAS CJ:

Yes.

MR SALMON:

– sense of what I'm arguing? The only extent to which I face a hurdle about advocacy is not on that issue. It's on political advocacy in the lobbying sense. And I think my friend would agree with me on that. The rest is seen as educative and the textbooks that I've copied in my submissions, any charities textbook will make that clear. So my hurdle is in relation to political advocacy.

ELIAS CJ:

So it is the distinction between education and political advocacy?

MR SALMON:

Yes. I'd go rather further and say the only problem has presented itself in relation to seeking to influence Government policy or legislation. And, and I can come to cases that say that. Justice Hammond summarised them in *Collier*. He said there are three broad areas which are no go: one is seeking to change policy or legislation, Government policy or legislation; the second is a charity that seeks to support a partisan political position – a charity – you can't be a charity and support a political party as your purpose; and a third were a narrow creature, what he called "propaganda trusts".

So the problem we're dealing with today is the lobbying-type advocacy. That's the only one that's ever been said to be bad. And, and if your Honour says, "What's the best authority for that being legitimate when advancing a charitable purpose?" I would say *Aid/Watch* is the best. Because it hasn't been considered here.

ELIAS CJ:

Well I would like you to give me an authority that is not Australian. Because it is so tied into their freedom of political speech as an aspect of the Constitution. What outside Australia?

MR SALMON:

Your Honour, you won't find a New Zealand authority for this proposition, but you won't find one clearly against it –

ELIAS CJ:

What is the English –

MR SALMON:

– other than, other than on the way up to this hearing.

ELIAS CJ:

Okay. What is the English authority?

MR SALMON:

The, the English position is slightly vague, your Honour, in the sense that we've got the original *Bowman* position saying don't be political, but that wasn't an advocacy prohibition. We've got a few cases that went further. The *McGovern* case is the high-water mark. So that's the worst case for me. But in my submission it's just not good law even there. That case said seeking to take a position that's contrary to the UK legislative or policy positions or those of any other country on Earth presents you from being a charity.

McGRATH J:

That case is?

MR SALMON:

McGovern. 1982.

ELIAS CJ:

McGovern. The Amnesty one.

MR SALMON:

It's the Amnesty International one. And, and I think – I can't point to a specific English case that's said in terms that that's wrong, but the cases since have shown that it's regarded as a thing of the past. In, in –

ELIAS CJ:

Well certainly some of the expression in it one recoils from, but it is really the result, whether – it is not so much the reasoning, it is more whether the result is clearly wrong.

MR SALMON:

Yes. And, and, respectfully, I think the result is clearly wrong in *McGovern* and that's reflected by the fact that Amnesty International is now recognised to be charitable there and here. And when one takes your Honour's –

ELIAS CJ:

So I am only asking about authority because I am quite interested in looking at the reasoning.

MR SALMON:

And so there is not an authority other than *Aid/Watch* and, and something from North America perhaps, but in the Commonwealth there is not an authority other than *Aid/Watch* which definitively says that advocacy in the political lobbying sense is acceptable to advance a charitable purpose if it's more than ancillary.

ELIAS CJ:

Yes. Thank you.

MR SALMON:

There's not one authoritatively that says to the contrary, if your Honour follows me.

ELIAS CJ:

Yes. Yes, I see.

MR SALMON:

There are things I could bring your Honour's attention to. For example, in Scotland, the stated position from their equivalent of the Charities Board on their independence census – they're now deciding whether to break away. They have been told by the Charities Board, you can take a position on that and you won't be imperilling your charitable status. Which is interesting, but not an authority in any sense that I can put forward to your Honour.

ELIAS CJ:

But it sounds as if it is also an ancillary purpose.

MR SALMON:

Well, it may be, depending on what the charity's primary purposes were. But also the ancillary test has been accepted to be breached once one spends more than a certain percentage of energy on it. Some cases said 10 per cent, others have said 30. Not hard to do.

ELIAS CJ:

Hard to measure, I would have thought.

MR SALMON:

Really hard to measure. And that's one of the problems we had before the Court of Appeal is that there was no substantive sense of – there's some because I put in an affidavit from the Chief Executive saying the time we spend on this is minimal. All of our staff are doing other things bar, I think, one person out of all of New Zealand.

ELIAS CJ:

One in 40.

MR SALMON:

Yes. Yes.

ARNOLD J:

I must say that is a difficulty I have with this, because I mean the Act and the authorities and then the law itself recognise that the mere existence of what was described as a political purpose did not preclude recognition as a valid charity providing the activity was incidental or subsidiary or something to a charitable object. Now, once you accept that you then say, well, what does ancillary mean? And your problem seems to me to be that some Courts have said ancillary has a sort of a time limit component to it so that if it is more than, as you have said, 10, 15, 20, 30 per cent, it is not ancillary. But I must say, for myself, that does not follow.

MR SALMON:

No. And, and Sir, my, my primary – it's not a problem for me in the sense that the Court of Appeal has made a decision on the, the extent to which the Greenpeace advocacy purpose is no longer a problem in the ancillary test sense. So that part of it is not a problem for me in the sense that it is going to trip up Greenpeace.

ELIAS CJ:

It might be a problem for us though –

ARNOLD J:

That is exactly it.

ELIAS CJ:

– if we are being asked to go along with it.

MR SALMON:

It may be.

WILLIAM YOUNG J:

I mean you may have opened a Pandora's box.

MR SALMON:

Yes. Well I'll find out. I'm finding out. But, but that is a question of the extent of ancillary purpose and rather highlights why this is quite important for a lot of charitable organisations. And they're all, they're ringing me and saying, "What's going to happen?" They're probably hoping I was saying this better today because none of them know whether they're breaching it and they all, not all, most of them, because of the nature of what they do, interface with the policy and legislative process. And I'm seeking to make a few distinctions so that we converse about this in a careful way. One is between advocacy in the very generic sense and advocacy in the political lobbying sense, because it's only the latter that was ever a problem. The second –

ARNOLD J:

Well, just on that –

ELIAS CJ:

Well there is no difference is there?

ARNOLD J:

Yes, I was going to say that, for myself, advocacy would incorporate political advocacy. I do not see a distinction.

MR SALMON:

The distinction I'm seeking to make is never, at least yet, has a Court said there is a problem with talking to the public at large and advocating certain behaviours consistent with a charitable purpose, not a problem. To the extent there's a problem, it's only ever been with the political advocacy if I can put it that way, in the sense of lobbying for change. And I can go to the cases but they're pretty clear.

ARNOLD J:

Yes, I know some of the cases say that, but the reality is we are working within a statutory framework which specifically says, "Advocacy is fine if it's incidental to a charitable purpose". And for myself, I do not see why that one would limit advocacy to advocacy that is non-political. Why would one read that into the statute?

MR SALMON:

I'm not seeking to read it that way, I'm rather saying this, Sir. When that section was passed, the only thing charities lawyers understood and the drafters understood advocacy to mean was that particular form of lobbying advocacy that was questionable in its legitimacy for a charity. So to the extent that that reference means something, it means that narrow form of advocacy. Don't lobby a Minister and don't campaign on the streets to change the Abortion Act, not don't talk to the public about how to treat grandparents better. Does your Honour follow that point? So I'm saying understanding what advocacy meant to the drafters is an important first step.

ARNOLD J:

And, well just make sure I do understand, you are accepting that advocacy means all forms of advocacy, even political advocacy?

MR SALMON:

No, I'm not Sir, I'm saying the opposite and I'm sorry if I'm being obtuse. I'm saying that as used in that Act, advocacy means only that political form of advocacy.

ARNOLD J:

Only?

McGRATH J:

Lobbying, not talking to the public?

MR SALMON:

Correct.

GLAZEBROOK J:

Well advocacy is a slightly strange term perhaps to use to say, "Go and check on your grandparents daily," or, you should be aware that there's poverty in New Zealand and there are a whole pile of things you can do to alleviate that. Or there is child abuse, make sure you do not ignore the screams, or –

MR SALMON:

Yes, well turn your lights off to save electricity or something like that. Yes that's right, but the answer to why we know that that's what's being talked about is in part the Select Committee makes clear the reason for that reference to advocacy was simply that submitters, charities, ironically breaching, risking breaching their charitable status by talking to the Select Committee, were saying, "We're worried that doing exactly what we're doing now," and the Select Committee report records this, I can go to it, it's in my friend's casebook, we've both quoted it I think, "We're worried that this might trip us up and we're worried that the ancillary protections under the common law aren't recorded in the Act." So the purpose for that reference, which happens to have the word advocacy in brackets, was actually to make clear that for the ancillary purposes test lives on.

ELIAS CJ:

Yes, but that provision also makes it clear that advocacy of itself is a non-charitable purpose.

MR SALMON:

Well, I do challenge that, as you will have seen in my submissions, and –

ELIAS CJ:

Yes, but looking at that provision, what else can it mean, "Or an institution include an non-charitable purpose (for example advocacy)"?

MR SALMON:

Well the first question is, what did they mean by advocacy at all, and that's the discussion I've been having with Justice Arnold.

ELIAS CJ:

Well is that not the distinction that really I think Justice Glazebrook was putting to you between advocacy and education?

MR SALMON:

Well I rather go further than that your Honour and this is the problem, it's been a topic we've dealt with in the High Court and the Court of Appeal but also other cases have too. In the modern political environment, charities deal with the legislative and executive branches of government, with the policy making branches of government in ways that aren't lobbying in the traditional sense. So the cases talked about don't do advocacy in the sense of going and saying, "Abandon the abortion laws," or, "Stop fighting in Vietnam," that's a specific policy engagement, a head to head engagement. A lot of what's done is, for example, Greenpeace has asked to come and bring data to help a Select Committee on some non-proliferation issue or something like that. It's not lobbying in any contentious sense.

ELIAS CJ:

Well, why isn't it advocacy though?

MR SALMON:

Why isn't it?

ELIAS CJ:

Yes.

MR SALMON:

Well that is one of the issues for today, when the drafter said, "advocacy" and didn't define it, and I'll come to why, I've said in my submission but in my submission that's not codifying the advocacy issue as a prohibition at all. But to the extent it is, one

has to understand what it was beforehand. And your Honour expresses disquiet about the state of the common law such as it was from inferior courts, we to some degree can't have our cake and eat it. If that is codifying something, then it's codifying what it was in those lower Courts, if your Honour follows me.

ELIAS CJ:
Yes.

MR SALMON:
And so one of my propositions is the law in those lower Courts was actually a very narrow prohibition and it was the one about not tangling with contentious policy or legislative debates.

ELIAS CJ:
So does that mean you are relying on *Bowman?*

MR SALMON:
No, I'm explaining *Bowman* as being narrower than it is. Shall I summarise my core propositions briefly –

ELIAS CJ:
Yes.

MR SALMON:
– and then I'll work through them.

ELIAS CJ:
Yes.

MR SALMON:
The first is, this is a highly changing area and Parliament chose to keep it fluid and judge-made. The second is that to the extent there was a judge-made prohibition –

McGRATH J:
Now just –

MR SALMON:
Certainly.

McGRATH J:
Do this at a pace that we can write. Parliament chose to keep it fluid?

MR SALMON:
Yes.

McGRATH J:
Right.

MR SALMON:
And it would be striking if Parliament chose to freeze one prohibition while keeping every other aspect of charities law fluid. So it would be surprising if this was a bracketed, non-defined codification. It would be surprising to me. The Act has defined terms for ancillary and so on, but not for advocacy. So, as I'll come to, that was put there as an example of something that at the time had an understood meaning.

The second is that its understood meaning was very narrow. So am I seeking to depart from *Bowman?* I'm not really your Honour, I'm seeking to explain *Bowman* for what it really was, which is the exact reaction your Honour would have if I asked you to decide whether something was for the public benefit that had protesters in the street marching on each side of the issue. Gay marriage. Your Honour would say, "I can't decide who's right about that, it's improper for that to be subject to an analysis because we can't judge it," and that's all *Bowman* was. So my second proposition is, let's understand what *Bowman* really was.

And connected with that is understanding what the courts and we all mean when we're talking about political or advocacy. And I've probably seemed slightly pedantic in coming back to what advocacy means, but it is important. There's a distinction to be made between purposes and means and Justice Arnold mentioned that and we've had this discussion in the lower Courts too. But there's also an important correlation between what the Courts and we really mean by political and what we mean by advocacy in both cases. We're not saying merely by having some sort of political flavour in the generic sense is a charity, because they're all political. Church is highly

political, all sorts of issues are political. All sorts of purposes of charities overlap with contentious issues in the House and so and so forth. We're talking about when they take a position, the cases are talking about when they take a position on highly contentious.

So I mentioned peace before, the dialogue with the Court of Appeal, and I think it's fairly settled, the textbooks suggest it is –

ELIAS CJ:
Sorry, so your definition of advocacy is something that is highly political, is that it?

MR SALMON:
It's lobbying on a contentious, partisan, or otherwise contentious policy or legislative issue. And I'm not saying anything too controversial there if one accepts that that *McGovern* case is the high-water mark. I'll come to the cases, but that is what they show. So once we see that political and advocacy are properly housed as being quite a narrow concern, not about talking to all of New Zealand, not even about interface with Government but about an old, fairly fair conception of something that the Courts can't judge. Once we realise the problem is the courts can't judge it, then my third proposition is the one I echoed back to the Chief Justice which is, there is no prohibition. There's just some areas that can't meet the public benefit text because we can't judge them. So that's the third proposition.

The fourth is that, if those propositions are accepted, and in my submission they're right, if they're accepted, then it becomes difficult to identify reasons why the first part of *Aid/Watch* shouldn't apply in terms in New Zealand. There's nothing in the Australian constitutional features summarised by the Australian High Court that one wouldn't expect to see in a summary of core constitutional values here. The Bill of Rights values echoed and recorded in *Lange v Atkinson* [2000] 3 NZLR 385 (CA) or wherever else ensure, as does our constitutional framework, all the same participative rights that the Australian High Court was concerned about. So that one would say, I would submit, that if a purpose is charitable, then there is no objection per se in the means of delivering it being to interface with the legislative or policy limbs of Government.

McGRATH J:

Mr Salmon, I am just losing a bit of clarity as to when each proposition begins and ends.

MR SALMON:

You're not Sir. That, that's me. The, the proposition there was, if I'm accepted on the former ones then there is no coherent reason or principled reason that I can identify why the *Aid/Watch*, the first limb of *Aid/Watch*, would not apply in terms here.

McGRATH J:

That is essentially the third proposition?

MR SALMON:

Yes.

McGRATH J:

Okay, so we are now –

GLAZEBROOK J:

What about the means being contentious in themselves rather than merely the purpose?

MR SALMON:

Yes. And, again, that distinction between purpose and means matters, not least because the Act has confirmed that there's a distinction, and even the reference to advocacy comes in under the wording, "purpose". The Act makes clear in other provisions, I'll come to some of them in some we inadvertently both missed out of the casebook, so I'll hand them up later on that illegality point, but the Act distinguishes between the job of looking at purposes and the job of monitoring ongoing behaviour. And –

GLAZEBROOK J:

Well the trouble is, can you really distinguish means and purpose in a – because if you're looking, say, just take the Greenpeace example, if you are looking at peace as being a purpose, then disarmament is a means in respect of that is it not?

MR SALMON:
Yes.

GLAZEBROOK J:
And –

MR SALMON:
Well the disarmament –

GLAZEBROOK J:
Or you could say disarmament itself is a charitable purpose, but I would think it is nevertheless a subset of the larger one. But one of the difficulties is that there are a number of purposes that are motherhood-apple-pie charitable but you can posit, and my positing of eugenics as a means to reduce poverty is certainly one of those that you can posit as being a means that is certainly highly contentious, one would hope.

MR SALMON:
Yes. One might almost say that eugenics would actually be a purpose dressed up as a means if, if your Honour follows.

GLAZEBROOK J:
Well it is possible in that circumstance and I am taking the extreme example, but –

MR SALMON:
The, the courts have grappled with, with distinctions such as the international community sign treaties agreeing peace is good. Great. That's not contentious. It's really contentious to say how we achieve peace in the Middle East. And if I started stepping in as a charity that helped promote tolerance and took a position on the Gaza Strip then I would be being too controversial, if your Honour follows. But that, again, is a purpose, advancing the purpose of this solution to the Middle East. If your Honour follows that point?

The, the means distinction arises more –

GLAZEBROOK J:
I suppose my concern is nevertheless this contentiousness – because it is going to be a majoritarian concept.

MR SALMON:

It – but is it?

GLAZEBROOK J:

Well...

MR SALMON:

I, I think not if, not –

GLAZEBROOK J:

So I suppose if the majority decide that it is okay to help the minority then it is not a contentious purpose, but...

MR SALMON:

Well I, I would hope that the test does not become at any point majoritarian. It's, it's never been said to be in, in the cases and I don't, I don't sense an enthusiasm for saying that in, in this Court today. I, I think rather the, the principles are ones that, that meet the analogies to the original spirit. As, as the Chief Justice was saying, things that reflect her Honour's sense of what the spirit and intent were meant to be back then. Looking after things that we might hope the state would do but can't. Or other states would do but can't.

GLAZEBROOK J:

Just as a test, contentiousness does not seem particularly to capture the spirit of the preamble.

MR SALMON:

Yes, and I'm not, I'm not –

GLAZEBROOK J:

Something other than that, I would have thought, would not –

MR SALMON:

I'm not suggesting contentiousness is a test. I am saying the test is, can a putative charity persuade the Board, or, or now the Court, that it has a purpose that is charitable? That is for the benefit of the community? Sometimes it can, sometimes the Court can say that's definitely not, and sometimes it just can't get there on the

burden of proof, so to speak. That's the contentiousness issue. Too contentious to judge; can't get there.

McGRATH J:
Well it is really a justiciability issue, is it not?

MR SALMON:
Yes. Yes.

McGRATH J:
And I think what I understand you really to be saying with terms like "majoritarian" and even "unanimity" are not that helpful.

MR SALMON:
Correct.

McGRATH J:
It is really whether the issue is one that is still not justiciable.

MR SALMON:
Yes.

McGRATH J:
Because of community attitudes.

MR SALMON:
That's right. And, and –

McGRATH J:
It has got to be looked at in a broad way.

MR SALMON:
And so I accept today that if there is a purpose that comes before the courts – I don't argue this is wrong. It's right. The *Bowman*, in its narrow sense, position makes sense. If there's an issue that comes before the courts that's highly contentious the courts would rightly say, "I'm sorry, we can't give you charitable status because we can't judge that to be in the public benefit. We don't know which side of the

Springbok tour protest debate is right and we should not be asked to judge. It's not justiciable."

That's not taken issue with. We're rather in a different category here with the *Aid/Watch* proposition because it's dealing with areas where the purpose is justiciable but entities are saying, "Why can't we engage? Why can't we exercise our guaranteed rights of participation in the democratic machinery?" Now the Court of Appeal accepted that time had moved on in that way and, indeed, Justice Hammond did in *Collier*. Said, this is – to the extent this is prohibited it's inconsistent with the way we work. And, indeed, in a 1917 case saying, "Don't lobby to get rid of the Church," is hardly – women couldn't even vote then. It's hardly justification now for saying that parties can't appear before a select committee. But also we've come a long way in the sense that these days not every policy or interface with Government issue is so didactic as to be yes or no regarding abortion. A lot of it is nuanced assistance within a reform package, consultation on the details of long and difficult pieces of legislation. So a really didactic rejection of any sort of interface and, and saying that it's inconsistent with a charitable purpose is, is quite uncomfortable in the modern environment.

So that, that was *Aid/Watch* saying if you're indisputably charitable in your broad purpose and your means are delivering is interface with Government, that's okay now. And I would say that's the less controversial part of *Aid/Watch*. The commentators haven't been upset by it. There's been a lot written about it. And, indeed, as I've said in my submissions, if one had followed the Australian case law, and I have because when we argued this in front of Justice Heath the Australian High Court's hadn't come out, one could predict which way it was going to go because the seeds of disquiet, Justice Santow had written about it in quite some detail, and I've put his article in the casebook – it's a terrific article, quite prescient – you could predict where the High Court was going to go. It was going to say, it's not inconsistent with our modern conception of charity that you might interface.

But that's the less controversial part. It was predictable and one could see it coming, with hindsight. The more controversial part of *Aid/Watch*, and so I'm clear, I don't need to and don't advance this as necessary for today, but it had been taken by a number of commentators to say something rather more and something that in the States has been taken to be, to be right, to some degree at least, which is the mere fact of agitating for change is charitable. And I want to note that, because I don't

know if your Honours picked that theme up from *Aid/Watch*, but a number of the Australian commentators have and they've, they've raised their eyebrows a little about it. I don't today advance the proposition that that should be the law of New Zealand, don't take a position on it either way. It's only the first of those two parts of the *Aid/Watch* decision.

So to the extent the *Aid/Watch* decision says the second part, that mere agitation is a good thing, I've cited the passages in, in my submissions, but it is clear from the judgment, it does seem to say that. Commentators have disagreed about the extent to which it was intended to. That's not part of today's case. Today's case is really more about whether it's inconsistent with charitable status to engage to advance clearly charitable purposes.

And I can, I can understand the Court's concern about how any of those purposes would be judged and, and the harsh reality is that they get judged as they arise on the day. But if there is a prohibition it does stop, or stultify at least, the ability of indisputably charitable entities, like the City Mission, from doing what they do daily, which is engaging with local government.

ELIAS CJ:
No one – I really do not think that example helps because that just is clearly an ancillary purpose to its principal purpose of doing. What I am still concerned about is charitable status that simply advocate.

MR SALMON:
Right.

ELIAS CJ:
Maybe for good purposes, although how is that to be judged? That is the issue.

MR SALMON:
And I think your Honour's take on the meaning of the word "ancillary" is remarkably similar to mine that didn't necessarily get traction with my friend or the Courts below, which is when one is doing that as part of, or the suite of things one is doing to advance a purpose which is plainly charitable, by definition it's ancillary. I was saying in the Court of Appeal, for example, that final paragraph of Greenpeace's saying,

"We'll advocate to advance the above," was plainly ancillary because it was meaningless without the above. But I –

ELIAS CJ:

But if one looks at Greenpeace's objects, the first two are advocacy objects. The second, the third may have some – because that is about researching and monitoring – that may be more debatable. The next one, the promotion of education is only through giving financial and other support to Greenpeace New Zealand Charitable Trust, so the educational aspect seems to be being done through that charitable trust. And then the sixth object is to abide by this Stichting Greenpeace Council so far as it is lawful to do so. Well that does not seem to be a charitable object at all. And –

MR SALMON:

Well it's, it's neither way and, and if I may, your Honour, the Charities Commission dealt with some of these and put some in boxes of being really just words and neither here nor there.

ELIAS CJ:

Well I am not sure that they are words. I do not know that I would want to accept that. I mean, what is – if you had to encapsulate what is charitable about these objects, what is your answer to that?

MR SALMON:

Well I can, I can go through it in detail if your Honour wishes, but I rather understood we weren't litigating that today. The, the – it's settled across a –

ELIAS CJ:

Well, I do not know. You are setting it up in a way that we may not be able to confine ourselves to.

MR SALMON:

Well let me try and set it up better then because, two things, firstly your Honour says those first two are advocacy and again that brings back into sharp relief the point I'm seeking to make, which is your Honour's reaction to what is advocacy is not the meaning that was applied in the case law and certainly not the meaning that Parliament understood people were talking about when passing section 5, so –

ELIAS CJ:

Well you will need to go back to that.

MR SALMON:

I will, I will. And I will do that your Honour, but I'm respectfully right about that, it was a much narrower meaning of the word advocacy, so that can to some degree be parked. In many jurisdictions now it's pretty well settled that environmental courses and so on can be charitable and the Charities Commission decision recites that in great detail, I can go through it, but that hasn't been litigated in the High Court or the Court of Appeal or indeed was not, no issue was taken with it by the Charities Commission, I've bolded the only words that even the Charities Commission took issue with when summarising those rules in my submissions. So I can spend time doing that, it will take rather a little time, but –

ELIAS CJ:

Well I do not need you to take time on, what I would like you to do is to take me to the authorities that you say establish that advocacy has the very narrow meaning that you have to rely on. That is all.

MR SALMON:

Yes, and I will do that. Might I, before I move on, just catch one aspect of what your Honour said? I accept what you're saying that your Honour doesn't find the City Mission example helpful, I was seeking just to find one that was in that box of areas that your Honour might understand. The problem of ancillary is that your Honour's reaction, "Well that's clearly ancillary," is not the reaction that is necessarily consistent in the lower Courts or elsewhere. Justice Arnold's comments about the difficult of applying a time-based focus or a money-based focus on ancillary is, with respect, right. It's an incredibly hard term to give a meaning to in any qualitative or quantitative sense and lower Courts have grappled with it and said, "Does it mean 10 per cent of one's time or more or less? Thirty's too much," and judges have said that. So your Honour might instinctively say, "Well that's fine because that's ancillary," and I might have that reaction too, but for a lot of the charities out there, they're not –

ELIAS CJ:

Well I am basing that on the, I am basing that on the legislation, that there has to be some meaning given to that.

MR SALMON:

Yes, and my first reaction to the legislation is that most of these entities are doing something ancillary but I'm just wanting to bookmark that's not how it's necessarily being read by others and thus most charities are concerned that there is a threshold, a quite amorphous ancillary threshold that they might be approaching. So I just note that, your Honour. But your Honour, the point as to whether the law is as I say, I'll go to that now if that helps. And it begins with *Bowman.*

ELIAS CJ:

Where does it end? Just to tell me where it ends, after *Bowman* what are the other authorities you need to refer us to?

MR SALMON:

I was going to say it ends today, your Honour. I'm going to go briefly to *Bowman* and *McGovern,* I'll try to limit what I go to and if this is sufficient, I hope it is, *Bowman* and *McGovern* because *Bowman* is the classic statement and the one that was adopted in New Zealand, that's what matters. *McGovern* is a high water mark that is, in my submission, is soundly, clearly not good law, but I note it because it's part of the genesis of this problem so to speak and that the Commission's read it as being good law. I'll go very briefly to *Aid/Watch* if that will assist the Court to show the Australian position because it's summarised and the rejection of the, in particular *McGovern* high water mark. The *McGovern* high water mark's criticised in detail in that article by Justice Santow, your Honour nodded when I mentioned it so I anticipated you might've read it?

ELIAS CJ:

I have read it, yes. I knew Justice Santow and had a lot of respect for him. I am not sure that he was prescient in the article. I think the High Court, which also had a lot of regard for him, probably read and absorbed his article, so it was influential I think.

MR SALMON:

Yes, well it was and indeed he decided one of the key decisions which was a harbinger of the Aid/Watch position, so perhaps I put that badly, but it's certainly part of the genesis of that. I can go to *Aid/Watch* if that will help, and will. And then for New Zealand purposes, I think again I can be reasonably brief and really just highlight what's in my submissions, I can go to the cases, but the two would be the adoption of *Bowman* in New Zealand in the first place by the Court of Appeal and

then Justice Hammond's discussion of it because Justice Hammond is, his judgment has a little bit of our Justice Santow's article, it in a sense could be read –

ELIAS CJ:
It is – yes.

MR SALMON:
– with the same hindsight.

ELIAS CJ:
Expansive.

McGRATH J:
Any articles other than the Santow article that you, in particular from England, that you would point to particularly, or other texts that you'd point to?

MR SALMON:
I think the Santow is the most helpful article, Sir, and I can go through it now if it'll help your Honour, I've read it reasonably carefully. Ironically it hadn't been something they've focused on in the High Court and it was some comfort at least to see that some of his criticisms reflected the way it had been argued on the day, so maybe that's why I like the article, it just, it lined up to some degree, but it's a thoughtful and careful article about the difficulty of these didactic rules existing in modern times –

McGRATH J:
That is the article that best suits your argument.

MR SALMON:
I think so, I think so, Sir. I've included some commentators addressing the *Aid/Watch* decision at the back end of my casebook, they'll be of some use, but, I won't tire you by going through them now, unless that will help.

McGRATH J:
That is the Susan Barker article is it that you?

MR SALMON:

Yes, but also some Australian ones, Sir, on the *Aid/Watch* decision. I might say there hasn't really been uproar about at least that first part of *Aid/Watch* so the proposition I'm advancing today has not been regarded as introducing turmoil in Australia as a general proposition that one can engage in the legislative or policy machinery without only needing to make it ancillary or less if that makes sense.

ELIAS CJ:

Yes, I should say Mr Salmon if those are the only authorities you intend to take us to, I think we are all generally familiar with them, so you will not need to do other than highlight the passages and so on that you rely on. I think we did understand the argument would be based on those. I was really trying to elicit whether there were other authorities that I had not, in reading for this, considered.

MR SALMON:

No, there will be some authorities, and we could both find them, in which casual or broad language has been used summarising what *Bowman*'s good for, for example. Or there'll be some cases or commentators who have summarised and would govern us if it's good law here. What I rather intended to do was define what the test is in *Bowman* and I can do that against my submissions if it's quicker and comforts your Honour that I won't spend a long time reading case law to the Court.

ELIAS CJ:

No, no, take us to the cases, I think, if they are important to your argument.

MR SALMON:

Well at tab 6 of my casebook, which is the yellow covered one, is *Bowman.* I don't intent to spend long on that because it's a narrow point and I've cited the relevant passage from page 442 in my submissions on page 13 but that is –

ELIAS CJ:

Tab 6 was it?

MR SALMON:

Yes.

ELIAS CJ:

Mine starts at nine of the yellow one.

GLAZEBROOK J:

Mine is not yellow, but...

MR SALMON:

My friend's showing me that his is pink.

ELIAS CJ:

Mine is orange. I think it is, what do they call it when it is random coloured?

MR SALMON:

Well that's Greenpeace for you, your Honour, a rainbow of casebooks. We've tried to make today fun. So the relevant passage is on page 442, I've paginated them, it's pagination number 61, but it's the passage cited at 5.6 in my submission –

ELIAS CJ:

Sorry, I am still not finding it.

GLAZEBROOK J:

It is purple, that is why.

MR SALMON:

I've never had this before, I'm just going to gaze at my juniors for a bit while your Honours work out the colours.

ELIAS CJ:

I see, yes it is six, yes I have it, thank you.

MR SALMON:

So I'll call that my casebook now, rather than the yellow one I think. It's at page 442 of the casebook, tab 6 – 442 of the case, pagination 61, and it's that passage about a third of the way down, it's cited in most of the authorities and it's the definitive statement, "A trust to the attainment of political objects has always been held invalid not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging

whether a proposed change in law will or will not be for the public benefit and therefore cannot say that a gift to secure the change is a charitable gift."

So just to put that in context, it's clearly talking about political objects being changing the law and that's not my interpretation of this alone, the commentators have noted it repeatedly and Justice Hammond summarised, as I'll come to, in *Collier* that view of it. It is about saying where you're seeking to change a specific law as a purpose, then that's out.

Now at the back of my submissions I've summarised the key, what I think are the key cases on objectionable political purposes –

ELIAS CJ:
Sorry, sorry, you said a specific law in your submission, but this passage is about changing the law a little bit more generally, so.

MR SALMON:
Well I think he's seeking to describe a general proposition, but if I come at it this way, the case is, that one was dealing with a specific and incredibly controversial bequest. All of the ones since have been the same and if I pause here and go briefly to the, an excerpt in my submissions, there's an appendix, the second to last page. And what I've done here is put that passage from *Bowman* at the top because I anticipated your Honours would have the series of concerns that we're talking about now. Exactly what does that mean, this political objects? Am I right to say it's really just contentious changes in the law?

And I've just summarised the brief guts of seven of the key cases below that illustrate, or said in key cases that illustrate it, the first two are New Zealand ones, abortion law and whether or not there should be reform. Just a highly contentious issue, exactly the sort that is not justiciable to use Justice McGrath's terminology.

Re Wilkinson [1941] NZLR 1065 (SC), during the Second World War, seeking to advance the cause of the doomed League of Nations, highly political, highly contentious, and during wartime.

Re Collier (Deceased) and we focus on this one a bit more in the Courts below because the question of what, to what extent is peace political and so on came up.

The Commission took this as a sort of prohibition in its own decision on any peace purposes but it wasn't, it was someone in a will trying to stop a specific war by challenging New Zealand's public policy and persuading soldiers to put down their arms, incredibly contentious thing to do. Persuading soldiers actually to commit a crime and risk all sorts of consequences. So again highly, highly contentious and I've noted there, I'll come to the decision properly, but Justice Hammond accepted that the general propositions might be acceptable but telling someone to lay down their arms during a war was just attacking our foreign policy directly.

And so on down the *National Anti-Vivisection Society v Inland Revenue Commissioner* [1948] AC 31 (HL) case. *McGovern* is the Amnesty International case and I'll come to that in a moment. *Re Koeppler's Will Trusts* [1986] Ch 243, meddling in foreign policy and *Southwood v Attorney-General* [2000] EWCA Civ 204, [2000] WTLR 1199 was about specific challenges to the UK's position in NATO, again, just a politically controversial policy issue that the Court should never be asked to grapple with.

So this is a sample, but I point to it, your Honours, because –

ELIAS CJ:
Sorry, this is probably a, this is very naive question, but is it the case that the case law about trusts being charitable is exactly the same as charitable purposes under this, for tax purposes?

MR SALMON:
Is your Honour saying, does the IRD accept and adopt –

ELIAS CJ:
Yes.

MR SALMON:
– the same classification?

ELIAS CJ:
Yes.

MR SALMON:

More or less we think, but –

ELIAS CJ:

I see, I will ask Mr Gunn that.

MR SALMON:

I think the broad answer, Ms Simcock can probably answer better than me, but the broad answer is that they tend to accept registration as a charitable entity as therefore co-opting you into charitable status for tax purposes. I think that's the answer. One of the things my friend says is the Court of Appeal, and I'll come to this too, was right to say, "Oh, we should be careful before giving any new charitable status because of tax concerns, we don't want to affect the tax take. That's just plain wrong, there is no basis and no justification for introducing a concern about the tax take into the charities test, it's never been a test, never been part of the test. Even with the IRD was in charge of the whole test, it wasn't regarded as a relevant factor, but I just note that now because we'll come to it.

But this page I was on, I've endeavoured, because I know you won't want me to spend a long time on individual cases, just to set out what I think paints a picture here, which is each time a charity's fallen foul, until our new charities regime, and remember all of these entities were happily charities until the new Charities Board came along. All of the ones that are trying to litigate now, or most of them, certainly Greenpeace, the cases actually show just that narrow concern about contentious political positions on contentious policy or legislative issues, ones that divide a nation. Should we fight Vietnam, should we have abortion? There actually isn't a basis in the case law for saying that there's a prohibition on just engaging in the legislative and policy machinery. And frankly it would be surprising if there now was because those are rights that are not just guaranteed but encouraged by the state itself. But these cases show quite a different flavour than one might get if one just heard, "You can't be political."

And I dwell on those because your Honour asked, "Is there an authority for my proposition that this is the distinction? Well, I would answer that by saying there, there are a lot of authorities. They've, they rather reveal the nature of the prohibition once one goes through them. So there are more but that's, that's the most helpful

way I could think of to present a reasonable pile of case law to your Honours. They're all in the casebook.

So that's how *Bowman* has in, in general terms been, been applied, in my submission, and that's how it should properly be applied. Charities can't have as a purpose the entanglement on major contested policy and legislative issues and that's the extent of *Bowman*. The – in my submission, I won't go to the case, but at paragraph 5.8 I cite a passage from *National Anti-Vivisection Society v Inland Revenue Commissioner* where Lord Simonds' comments on Lord Parker's language from *Bowman* and makes the same point. His passage, "Lord Parker uses slightly different language but means the same thing, when he says that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. It is not for the court to judge and the court has no means of judging." Again, no real problem with that. If someone had as their stated purpose in a trust deed to change our social welfare regime, well that would be too hard for the Court to judge.

McGovern is the, I submit, high-water mark, and respectfully just, just not right and would, would in fact mean a number of just indisputably charitable entities, churches and so on, would fall foul of it because, as cited in my submissions at 5.9, I won't go to it, Lord Justice Slade treated the prohibition as going to be a prohibition not just to further the interests of political parties –no problem with that, that's right – "to procure changes in the laws of this country" – that's more questionable – "to procure changes in laws of a foreign country" –

ELIAS CJ:
Sorry, where are you now?

MR SALMON:
I'm in my submissions at the bottom of page 13.

So you'll see he, he goes so far as to say, "to procure changes in laws of a foreign country; or to procure a reversal of Government policy or of particular decisions of governmental authorities in this country; or", at (v), over the page, "to procure such changes in a foreign country." And that's been pretty heavily criticised by commentators and judges since and, indeed, just doesn't represent good law now because a suite of charities, in, in both practice and substantive terms, a suite of

charities criticise despotic regimes in the corners of the world and nothing about that can in any civilised sense be said to be contrary to a charitable purpose. Child slavery or torture or whatever it might be, numerous charities, churches and other indisputable charities criticise the behaviour of those –

ELIAS CJ:
Are those charities that are advocacy charities though?

MR SALMON:
Well –

ELIAS CJ:
Or is – again, it gets back to the ancillary issue, doesn't it?

MR SALMON:
Well –

ELIAS CJ:
Because at least Lord Justice Slade is being even handed. You cannot do it here and you cannot do it there.

MR SALMON:
Well, I, I would, I would rather criticise it more strongly than with any faint praise of him. It must, with respect, be wrong to say that our Courts can never say that something is for the public benefit just because there is a country in the world that disagrees. There will always be a country in the world that does something abhorrent.

ELIAS CJ:
No, isn't the point that he is making that is that if you are – once you are into policy advocacy, stripping aside where you are advocating it, once you are into policy advocacy that purpose is not charitable.

MR SALMON:
He is saying that, your Honour, and he was saying it specifically about Amnesty International, so I'll take that example if I may. Because

Amnesty International does that. It sends letters to foreign governments saying, "Let out Mr X." He's saying that's disqualified.

ELIAS CJ:

But –

MR SALMON:

That is not the case in England any more, so there's been a retreat in that because Amnesty International still does that. But I'm rather saying, again, if one accepts that the proposition is, "Can the Courts judge?" it does not prevent the Courts from judging whether Amnesty International is doing something for the public benefit merely because it happens to be saying that the treatment of someone in Somalia is wrong.

ELIAS CJ:

The – I see that this is a first instance decision, so he is not Lord Justice at this stage, but in *McGovern* if one looks at the headnote it is about the charitable trust that Amnesty International set up which had the purposes of the relief of needy persons who had been prisoners of conscience and their families, attempting to secure the release of prisoners. There was – it is not the advocacy arm of Amnesty that is in issue here. It is a body that was specifically set up. Is that right?

MR SALMON:

Well, whether or not it was, he, he declined them charitable status because he saw them as tangling with foreign policy, with foreign entities' policy and, amongst other things, said, well that might undermine –

ELIAS CJ:

But that case could be criticised on the basis that he got wrong the ancillary aspect. It is not necessary to say that he was wrong and if that had been the sole object it wouldn't be charitable.

MR SALMON:

I – that may be right, although, your Honour, I imagine it would be hard to describe Amnesty International's activities such as would offend Justice Slade's definitions as being only ancillary. It's all about political prisoners.

ELIAS CJ:

Well that is the parent volley. Perhaps.

GLAZEBROOK J:

Well, no, because if advocacy is wrong, to say, "Free Mr X because he's a political prisoner," and that is all you do because you do not manage to free him, that would then come within the prohibition in *McGovern* would it not? And that seems rather odd, because how else are you going to get Mr X out?

ELIAS CJ:

I am not defending the judgment. I am just trying to work out whether this was a trust in which it could be said that that advocacy was ancillary.

MR SALMON:

Yes. Possibly. Not an argument I think that was taken, I'd have to read through it again, but not an argument that was taken there, but that's possibly right, your Honour. We know now, of course, that times have moved on for Amnesty International and there's no longer this objection and that reflects, again, as, as I would say, our change in democratic times would suggest we should change other aspects. That reflects changing international environment because the treaties that have been signed up by countries means it is no longer, there's no longer any doubt. An English judge faced with the question, "Can I judge whether it's right to condemn the use of child soldiers in the Sudan?" would say, "Well I can because our public policy statements published by our Government and our legislation makes clear that it's abhorrent." So Amnesty International hasn't changed what it does but it's ceased to be controversial and is thus justiciable, if that makes sense.

McGRATH J:

And how was that given effect in relation to Amnesty? I think I read some –

MR SALMON:

I think they were just granted status.

McGRATH J:

It was the Tax Act – was it tax legislation or was it charities legislation?

MR SALMON:

No, I think they've – I, I don't, I don't think –

WILLIAM YOUNG J:

Well there is a Charities Commission in the UK which must have granted them status.

MR SALMON:

Yes, yes. That's right.

GLAZEBROOK J:

There is a statement from them in any event.

McGRATH J:

They have sort of transformation provisions, don't they?

MR SALMON:

Yes.

McGRATH J:

Yes. That is right.

MR SALMON:

And, and I think it's accepted that this – these decisions don't bind anyone because times change and charities law, so it's not a situation where the Charities Commission is bound forever by *McGovern*. Once it felt that it could judge that Amnesty International was acting in the public benefit it was completely free. And, and that's the nature of charities law. It changes all the time. So they weren't bound by this and it didn't require another decision to be appealed up, if, if your Honour follows.

But it again highlights the, the point I'm seeking to make which is that which is controversial once may no longer be. The type of engagement that one can have now with our legislative machinery would have been unheard of and unimaginable in 1917.

ELIAS CJ:

Why isn't it, the assessment, a matter that the legislation envisages will be taken by the Board? Why should the Courts really enter into it? If it is a movable feast...

MR SALMON:

Well, someone's got to supervise the decisions of the Board, and it's the courts.

ELIAS CJ:

Yes. They can be –

McGRATH J:

But isn't the position in New Zealand that the Board does not have the sort of powers to adjust the common law that in fact the English body has? Isn't that –

MR SALMON:

That may be right.

McGRATH J:

Isn't there a difference of power here?

MR SALMON:

That may be right, but I, I'm not sure it's right to frame it as – it's not right, respectfully, to frame it as changing the common law. I would say that this is –

McGRATH J:

Well adjusting the common law.

MR SALMON:

Well even – it's not really adjusting it. It's – the test remains the same: can we judge this today and, if we can, is this in the public benefit today? It's not overturning *McGovern* because what *McGovern* said is in 1982, maybe the Falklands War was happening at the time, maybe things were heated, "It's too sensitive to criticise anyone's foreign policy. I decide I can't judge that right now." But it's not changing the common law to say, today, "Well I decide I can." If your Honour follows. And it sounds like a cute distinction but it's an important one. This is, this is a rich and interesting area of law but the, the principles that bind the lower Courts are very broad ones about public benefit test and not much else that applies to this case.

So one of the things I'm trying to say, and I'm saying it very badly and I apologise, is I'm not saying anything revolutionary here today at all really. Except for the question, has there been a codification of the advocacy test? All I'm trying to do is identify some key principles that explain these cases and apply them now. If that makes sense.

COURT ADJOURNS: 11.05 AM
COURT RESUMES: 11.22 AM

MR SALMON:
I was rounding out on the *McGovern* case and wanted just to make two very brief closing comments on what it might suggest about the law. One is that, as well as the passage I've cited over on page 352 of the judgment, the Judge perhaps deals with the Chief Justice's query as to, well doesn't deal with it perhaps, but makes clear the extent to which he wasn't distracted by the ancillary point, noting that the challenge to the death sentence in the UK in itself would be disqualifying but notwithstanding that, this is the bottom half of the first paragraph on page 352 of the judgment, "I prefer to base my conclusion in relation to the trusts of clause 2(c) on the wider grounds that they include the procurement, not only of changes in the law of the UK but also changes in the law of foreign countries and the reversal of particular decisions of governmental authorities and foreign countries. They are therefore political trusts within the second, third and fifth heads."

That's both probably no longer good law, there or here to the extent that it suggests that courts can never tussle with a trust issue if it involves the challenge of any government anywhere on earth as opposed to a contentious law change in the specific jurisdiction one's tasked with. But also, respectfully, it makes clear the point I was seeking to make to the Chief Justice earlier which is that the cases, even this high-water mark, and *McGovern* is without doubt the high-water mark, are talking about political advocacy in the very narrow sense that I'm suggesting, law change. And your Honour asked could I go to cases that showed that, I think that may at least show that in the English context, that's where they were at.

As I've said, *McGovern* is questionable for various reasons, I've summarised those reasons at paragraph 5.10 of my submissions and just noted there it's been criticised, both in the texts and in that Santow article, and noting again the areas I've

said there is a real question to be asked about whether the Courts really cannot find justiciable certain questions just because they might run counter to the foreign policy of, or internal policy of, an unusual rogue regime.

The final point at 5.10 is possibly the most significant one which is, I can't really see any context in which *McGovern*, the high-water mark, has been authoritatively adopted in New Zealand, I'll come to where Justice Hammond comments on it in passing, but there's a real question as to whether it ever represented the New Zealand legal position or whether we were really just settled on that more measured *Bowman* statement. And that is, of course, relevant when we come to look at whether the Act codified what was the law on that point before that.

Dealing with the New Zealand position, it's perhaps most efficient to go briefly through this by reference to the few paragraphs on it in my submissions, at the bottom of page 14 and go briefly to the cases. The first is the case in which *Bowman* was adopted in *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) and the relevant passages, this is at tab 9 of the, I think, pink casebook at the paginated page 115. And halfway down the right-hand side of that page, page 695 of *Molloy*, the Court cites that same passage from *Bowman* that I've already been to and goes on to say at line 44, "The cases so far mentioned involve trusts having as their leading object a change in the law. So too did the passage in *Tyssen* specifically mentioned by Lord Simonds in the *Anti-Vivisection* case. *Tyssen* observed that the law 'could not stultify itself by holding that it was for the public benefit that the law itself should be changed'". So again, the New Zealand experience seems to be adopting that concern about express purposes of changing the law, and that's what I've tried to highlight in that annexure to my submissions.

Over the page, the inability to judge or the justiciability point is made at the top of page 696. "The inability of the Court to judge whether a change in the law will or will not be for the public benefit must be applicable to the maintenance of an existing provision as to its change. In neither case has the Court the means of judging the public benefit." In other words, it's not just if one's seeking to change a law, it's if one's on the other side of the debate, the Court cannot judge it.

And then over at the bottom of page 697 at line 43, the Court applies those principles to the abortion argument which was at issue in *Molloy*. "We are unable to accept that either their expressed reasoning or any implications to be drawn from them convey

the present case to the terminus which the taxpayer must reach. That is, that the public good in restricting abortion is so self-evident as a matter of law that such charitable prerequisite is achieved. The issue in relation to –"

GLAZEBROOK J:
Whereabouts are you reading from now?

MR SALMON:
The right-hand side of the paginated page 116, line 43. "The issue in relation to abortion is much wider than merely legal. And the fact, to which we have already referred, that this public issue is one in which there is clearly a division of public opinion capable of resolution (whether in the short or long term) only by legislative action means that the Court cannot determine where the public good lies and that it is relevantly political in character." So again adopting that concept of relevant and political as being on where there's a contentious, legislative programme issue in which someone's purporting to grapple and yet seeking charitable status.

And so that's where *Bowman*'s adopted and it is, with respect, an adoption that shows that that narrow conception of *Bowman* is what the Court was adopting, that when one tussles with a contentious legislation programme, takes a position on that, that's not justiciable.

And so where I'm really starting from, I said what I'm submitting in core is not that revolutionary. *Aid/Watch* went further but if one sees the real nature of that prohibition, or the justiciability point, and houses it more as just an illustration of the test, can we say whether this is in the public benefit? The issue's easier to resolve.

And the next case to go to briefly is that at tab 13, *Re Collier*, and the relevant parts begin on page 89, the paginated number 164. I referred to this in passing and so I'm coming to it now where Justice Hammond identified three ways in which categories of political trust could fall foul and this is on page 89 at line 26, he says, "This in turn raises the question, why are political trusts said to be unlawful? There are three different categories of political trusts." The first one he deals with in the following paragraph, which is the one I've been talking about. The next one is over on the facing column at line 10 which is where a trust is formed to support a political party, obvious why that fails. And the third are what he calls "propaganda trusts" in the paragraph beginning at 17.

And he goes on to say at the next paragraph, line 23, “This, too, has to be a contentious category. All would surely agree that a bequest for bring about revolution or outright disobedience of the law, must be illegal, and hence it could not be charitable. But once Courts are beyond those concerns, the debate becomes much more difficult. The thrust of academic concern, it has to be said, is that in making decisions in an area like this, Judges are, in reality, making decisions about the ‘worth’ of a particular bequest. The argument is that Judge’s views on, say, temperance, birth control or euthanasia, do reflect an assumption as to ‘worth,’ and that affects outcome.” And so he’s talking again about highly contentious issues that one would only expect a decision on what’s good or bad to be made through the house

And concluding at the bottom he refers to *McGovern* so I’m not sure it’s ever become part of New Zealand law but I note that he addresses it there. “As only one instance in *McGovern* two of the objects of a trust established by Amnesty International were held to be not charitable. The non-charitable objects were an attempt to secure the release of prisoners of conscience, and to procure the abolition of torture, and inhuman,” and so on and so forth, and “It was said that they were likely to prejudice United Kingdom relations with other countries.”

So, he mentions there *McGovern* in a way that makes it unclear to me whether he was accepting it as the laws of New Zealand but as I’ve said, I don’t think it represents them now. And his Honour went and dealt with some of the Bill of Rights issues and concerns that the Court of Appeal noticed, noted in this case, which, from which parallels can be drawn between here and the Aid/Watch circumstances in Australia.

So I don’t want to go over the New Zealand position too briefly, but those are probably the two most helpful cases that give us a sense of what, if anything, the –

ELIAS CJ:
Sorry, what do you say, through, are the Bill of Rights issues that you, or how do you use the Bill of Rights?

MR SALMON:

Well perhaps, shall I go to the way Justice Hammond did, while we're on it, which is on the same page I was on, paginated page 164. His Honour on the left-hand column at the bottom begins discussing the view that these rules are too strict, noting in the final paragraph on that page that it is, after all, "Commonplace for even Judges to make suggestions themselves for changes in the law today," it goes on with an example there. And then at the top of the right-hand column, "We do, after all, live in an age which enjoys the supposed benefits of section 13 (freedom of thought, conscience, and religion), and section 14 (freedom of expression)," in the Bill of Rights Act. "Should not all the benefits be real in all respects, including the laws of charity? Finally, why is it that the law allows existing charities to make 'political' statements, yet it impugns ab initio those who are proposed to be set up to campaign for reform?"

Now, it's worth pausing there for two reasons. One is, again, it shows clearly, in my submission, that in New Zealand as in the UK there was no prohibition on political statements that were outside that very narrow context of lobbying or taking a position on reform and that's what his Honour meant by the final paragraph. The Bill of Rights, I put slightly less weight on it in express terms than his Honour might and more come at it this way. When one reads the principles that the High Court of Australia identified as justifying the decision in that case, the constitutional principles, it's hard to see that we would say out constitution regards as less important any of those rights or participation.

ELIAS CJ:

Well, what is the connection though with charitable status?

MR SALMON:

I think the connection is that it's not a coherent set of rules to prohibit charities from participating in a democratic environment where we regard –

WILLIAM YOUNG J:

It does not prohibit, well, sorry, I suppose it's definitional, isn't it? I mean, it doesn't prohibit the institution doing whatever it wants to. What it just says is, "Well, if you do that, you don't get a taxpayer funded leg up".

MR SALMON:

Yes, or to put it another way, because the test is, are they for the benefit of the community? If we are going to say that that will deprive one of charitable status, we are in effect saying that participation is not beneficial to the community, if that makes sense, because otherwise they must meet the test. So all of that assumes that your Honours accept my broad proposition that there isn't really a prohibition but instead the definition contains the reasons why certain political purposes are too contentious, we can't judge them.

Once one accepts that, if one does, then one accepts that a charity that genuinely wants to advance the causes of the poor or feed the homeless or whatever it might be is not acting contrary to that general charitable purpose by participating. So why would participation deprive them of charitable status, and the answer should be in the test, because participation raises doubts as to whether they're benefitting the community.

And that's why I talk about *Aid/Watch* in the way that I do. In *Aid/Watch*, and they went further there, the High Court said, "It's good that people participate," and we say the same thing. Participation's encouraged, charities are asked to come along to select committees, asked to engage. This is a very real problem, not just for my client, but for a number of them, they are contacted by the policy arms of government. We're encouraged to engage in local meetings, select committees.

We are also dealing with a prohibition, if there is one, that applies not just to the national government level but to local government and in all sorts of ways charities interface all the time with local government in a way that is far removed from those cases I've summarised, the, should we abort or not? They're about cases like, where should we zone to achieve this common goal of an end? It's not really contentious at all, it's helping make good decisions.

So can I give an example, I was talking with my junior about this outside, and talking in particular about this idea of whether it's the tyranny of the majority at risk here, and I submit it's not. It's not whether something's controversial in some broad, public sense, it's whether it's controversial in that justiciable sense. But examples can be posited of some of the areas where good is plainly being advanced for plainly charitable purposes but in ways which a didactic view of advocacy would prohibit.

And one example is this, let's imagine a less confrontational version of Aid/Watch. Your Honour the Chief Justice I sense had some reluctance to see Aid/Watch as so clearly charitable. In the instinctive sense we have, in Australia it is, maybe it wouldn't be here. But what if Aid/Watch, instead of agitating for the allocation of aid, was a charity that had as the purpose ensuring that good data was before government aid committees as to where aid was most needed, just good data? It's clearly helping get money to the right places, clearly helping the public good in ensuring it's efficient. It's not really lobbying.

But my friend would say, "Well that's interfacing, that's dealing with Government, it's out". And my submission is this, we don't –

ELIAS CJ:
Well I do not think that he does, because he does not object to, although I queried it, although I, I think, indicated that the collection of data might be within charitable purposes, but that is not objected to in Greenpeace's objects.

MR SALMON:
I'm stepping back from the specifics of Greenpeace's object, because those have been referred back. I'd rather taken the view that those haven't been referred back to the Board and the Court of Appeal having –

ELIAS CJ:
No, but I am just querying whether you are right in attributing to Mr Gunn the view that collecting data would not be charitable.

MR SALMON:
I'm not talking about the collecting of data, I'm saying if one had a charity. I'm dealing with - your Honour has said, "But that might be ancillary," a number of times when I've come up with hypotheticals.

ELIAS CJ:
Yes.

MR SALMON:
So I'm looking for a hypothetical that's not as extreme as Aid/Watch but in which it's not ancillary, it's the sole purpose. So I begin a charity concerned that aid is going to

bad pl – the wrong places, or inefficient and taxpayer money's being wasted. And my charity's goal is just to assemble data to deliver to a select committee or an aid programme within Government and say, "Here's some data on where the hungriest people are." I am lobbying them in a sense. I am presenting information to the Government to influence policy, but it's really not controversial if your Honour follows. It may be if it was biased or motivated by controversial politics or view on –

ELIAS CJ:
Well I am not disagreeing with you on that. I mean I think there are difficult aspects of it, but, yes.

MR SALMON:
Yes, well I'm putting it up as an example of the dangers, and my friend may not be saying this here, but one of the discussions we've had in each of the Courts below is one that confronts the problem that we no longer live in a world where the only way you might engage with Parliament, other than running for it, is to carry a placard on a single big issue, contentious, reform package. It's a very real problem for my client and others and McDiarmid talks about it in her affidavit. They liaise with Government, often at governmental request, all the time. It is, if one uses an amorphous and broad term of advocacy, it is a form of advocacy, but again it's a good mirror to hold up to the cases and say, "Well what was the truly objectionable form of advocacy and I don't want to repeat that unduly, I've said it enough, but it was that narrow contentious lobbying in the picket sign contentious reform package sense.

The High Court in *Aid/Watch*, I'm sensing the Court's read that judgment, and I've summarised the key paragraphs at page 516 of my submissions, it's at tab 16 if you want to go to it, but I won't take your Honours through it unless you find it helpful, I accept it doesn't bind the Court. The key point I've already made that I wanted to make again is that there are two strands to it, and the former is the one that I submit is important today, which is the determination that, to the extent it was ever a rule, it no longer is in Australia, that it's contrary to a charitable purpose to engage in political advocacy to advance a charitable purpose.

So unless the Court would be assisted by me going through it, I won't in detail. Perhaps the one point to dwell on is the focus the High Court had there on the constitutional principles and participative democratic ideals that underpin modern

Australian society. I just make the obvious submission that we have the same set of values and principles. We may not have a written constitution, but that doesn't mean they're not there, and that is an answer to the submission my friend will make that the Australian constitution's different. It's different in that it's written down, but that's really not an answer in the charities context, where most of the values that each Court and the Charities Board is charged with giving effect to are not written down, they're cultural and temporal values that, by their nature, are more amorphous.

On page 16 of my submissions I've noted the decision of Justice Santow and the article and noted that it's also been picked up and that Justice French's decision in the *Victorian Women Lawyers' Association Incident v Commissioner of Taxation* (2008) 170 FCR 318 (FC) case – I won't go through those again unless it's going to assist the Court. What I did want to note is paragraph 5.23 and 5.24 of my submissions. In the initial opening phases of the day I endeavoured to summarise my key points and spoke too fast for Justice McGrath to take full note. I realised over the break I should probably just have gone to these paragraphs. I've endeavoured to boil it down as simply as I can into some core proposition.

So 5.23 represents my summary of what I think the case law shows. (a), is that narrow concept of what is political, the partisan or contentious legislation area. Not generally contentious issues and not generally political issues, but just those, should we have abortion or not type issues. Then I've sought to sideline *McGovern* at (b), noted that advocacy might not usefully mean as much as one might first think it does when looking at the Act, that is only means something by reference to purposes and is otherwise just an abstraction. As I'll come to in the Act, that's important because the Act fits advocacy, however it's meant in the Act, as being part of purposes, not means, so I'll come back to that. At (d) I've noted what I've already said and endeavoured to show, by reference to that annexure of cases – the cases where it's actually been a disqualifying factor are those where people are engaging on those polarising issues that require reform, and that point is expanded on in (e), with the gloss that times have changed significantly in the last hundred years, especially in the UK, in that the majority of the UK at that time couldn't vote. But here, because our participative democracy would literally have been unimaginable back then – and that's an important point because we expect and benefit from participation. So as the Australian High Court said in –

ELIAS CJ:

But this is an argument for doing away with any limit on the charitable status of political groups.

MR SALMON:

No, I'm not arguing for that, your Honour, I'm endeavouring to be clear about that, and I'm obviously not. I accept that if something is plainly not in the public benefit it won't get charitable status, and I accept that if something is of the nature that it's not justiciable, one side or other of the gay marriage debate, the Court cannot judge it. So I'm not saying, do away with that. What I'm submitting is it's been misunderstood, that restriction, and that's all it is. And the restriction is actually an incident of the test, the public benefit test: some can't be judged and therefore you don't get charitable status. And my submission is, once it's recognised that that's all Lord Parker was ever really saying in *Bowman*, it's a justiciability problem, then one can retreat from the idea that there's an absolute prohibition of some sort and just come back to the proper test, which is public benefit, in the charities sense, by analogy with the spirit of the Statute of Elizabeth. Does your Honour follow that point?

ELIAS CJ:

Yes.

MR SALMON:

So I accept, absolutely, and Greenpeace accepts, there are some issues that would be contentious. If it had a purpose saying, "We want to meddle in a particular foreign policy issue of the Government and its purposes list," well, we'd have to confront whether the Court could decide that, and probably it couldn't. But it doesn't. So I accept that there are those limits. I'm submitting they, properly analysed, are seen as quite limited and narrow concerns, not applicable in this case, but more particularly – and this is the issue on which you gave me leave – not issues that prevent participation to advance charitable issues. And I've endeavoured to say – I've probably said it badly – but I've endeavoured to say, the old cases talk about lobbying in a way which, when one reads them one can see what they meant, but a lot of what we do in the modern environment, a select committee process, is not about waving a placard and saying no to this war, it's far more nuanced and it's good, and that's the reason I'm banging on a little about our constitutional environment. We say it's good in our constitution and we behave as if it's good and encourage

participation, and that's important legally here because the test is, are we doing something that's contrary to the public benefit?

And that's where I come to the core submissions against that background of case law at 5.24, which is really the core of Greenpeace's case summarised, and I'm most of the way through that, and the point I'm trying to conclude on, I'll leave you to read that, is that it's just not consistent with our modern conception of what is good, including that it's good to participate in our democracy, to say that someone somehow fails the public benefit test by virtue of participation. And as your Honours have said, yes, we've got the ancillary protection, so if a charity can work out what that means and stay beneath it, well, that might be comfort to some, but I submit we can rather go further than that and acknowledge that if the purposes being advanced are charitable, it should not be regarded as contrary to the public good to interface with local or national government or the legislative process. We now say it's good. So that's what *Aid/Watch* really said, they said, "This is no longer a time when people stay away from Parliament and it's for only landed gentry, we participate," and there's nothing per se abhorrent about that.

And then that brings me to the issue at the bottom of my page 18, which is, does that section somehow codify whatever the prohibition was? If there was a prohibition, is it codified? And I submit it hasn't been codified. If it has, it's a pretty dangerous piece of codification, with all due respect to the PCO, because it's not defined advocacy and, as I've endeavoured to show, there isn't necessarily a clear, common view about what it means. I think it's clear once the cases are read properly. But the first question one has to ask if, when asking, "Did Parliament intend to lock in that prohibition?" is, "Well, why would they?" Why would they openly and expressly say that charities will continue to live and breathe, and the High Court of Australia said the same thing on Australia, it's intended to carry on and it will continue to change, it has not been locked in. I think it's common ground for my friend that the definition of "public benefit", the public benefit test, will continue to evolve. Why would Parliament have locked in one exclusion to it, for what reason, freezing one small component of an otherwise living and breathing legal organism? And the answer is, well, it wouldn't have. But it particularly wouldn't have, if I'm right, and if this Court accepts my submission that the advocacy concerns or political advocacy concerns, were really just an incident of the public benefit test. Because if it's accepted that that's right, then we're all on the ground, that no one was seeking to freeze the definition of

"public benefit" when passing the Act. And if that's right, then it's almost a tautology that the advocacy except wouldn't have been frozen.

GLAZEBROOK J:
What was it doing then?

MR SALMON:
Well, the answer to that is partly in the Select Committee report which is in my friend's –

GLAZEBROOK J:
Well, yes, except that I had understood that you accepted that advocacy was seen as in the narrow political sense, so what was it doing –

MR SALMON:
Yes.

GLAZEBROOK J:
– other than freezing that, or do you say it was doing something else altogether? But if that was actually taken back up into the public benefit, then what was the point of having the ancillary there anywhere, just as a sop to charities who were worried about it or…

MR SALMON:
Yes and let's again, I think it is clear but there is an important distinction between working out whether this provision, section 53, was about giving comfort on the ancillary purposes test or about the advocacy issue, if your Honour follows. Because the purpose of the section is actually, ignoring the brackets for a moment, to make clear that the ancillary purpose test survives the passage of the Act. In other words, charities could always do something that wasn't charitable, provided it was ancillary. The Select Committee report, it is my friend's bundle at tab 21, page 4 under the heading "Advocacy", deals with the concern about advocacy but in a context where the ancillary test was in people's minds. And what the select committee report says, partway down that paragraph is, "Given the level of concern raised by submitters concerning this issue, the majority does consider that it may be valuable if the legislation includes a provision qualifying the common law regarding secondary purposes." And then goes on to say that "It recommends amending the bill to clarify

the entity with non-charitable secondary purposes undertaken in support of the main charitable purpose, will be allowed to register with the commission and to confirm that advocacy may be one such non-charitable secondary purpose."

GLAZEBROOK J:
Sorry, what page was that?

MR SALMON:
This is page 4 of the Select Committee report, tab 21. And that explains why, why it is bracketed for a start. The real thrust of the section was to make clear that the ancillary protection survives, so that charities weren't going to get tripped up if they had one non-charitable incident to their activities. So it is a re-statement of the common law on ancillary.

GLAZEBROOK J:
But it does say it cannot have advocacy as its main purpose.

MR SALMON:
Yes and the select committee says that. The Act doesn't say that unless those brackets means it, but of course that was the common law at the time the select committee was writing so I would submit that what the select committee was doing and what the Act was doing, is saying for the avoidance of doubt you can have non-charitable ancillary purposes and then in brackets, here is an example of one that at the moment is non-charitable. And it is an illustrative example but it would be quite a step to say that the select committee or the drafters of the legislation believed that they were putting the freeze on common law development if your Honour follows the distinction. So it might have been, for example, if this had been passed in 1983, that it had said, you can have a non-charitable purpose (for example, lobbying a foreign government about torture), which at the time would have been an example of a non-charitable purpose. It wouldn't have been attempt to freeze this one singled out on charitable purpose, because we are all focussing on advocacy but it is actually just one of thousands, of non-charitable purposes, if it was non-charitable, that could have been put there as an example, and was put there because people were concerned about their ability to continue in their advocacy. So a two-part answer really. One, this is not how one expects a codification to take place. Two, it is not a workable one because the word is not defined. So if this Court finds that for whatever reason Parliament intended to freeze this one narrow area of the

development of charities law and let the rest grow, which I do submit is a striking intention to attribute to Parliament. But if that is what the Court finds, then we are back to my original proposition which is that advocacy in the way it is used there was a reference to the common law as properly understood which is that narrow *Bowman*, in a sense.

ELIAS CJ:

But this is not just an enactment of the common law. It actually reforms aspects of the common law. It makes it clear that sporting, arts and cultural organisational and gaming trusts, can come within this. So I am not sure why, given this legislation, you say that the common law goes marching on. Why should not – if it becomes a restriction that is no longer appropriate to New Zealand conditions, why should not Parliament be asked to change law?

MR SALMON:

Well, they should if they have codified it. If they have codified it, then my case becomes one of saying, well what did it really mean which is what I spent most of the day on.

ELIAS CJ:

Yes.

MR SALMON:

Your Honour is right, that it has codified certain things and amended common law in certain ways but I think it is common ground, my friend will tell me if I am wrong, that it has not codified the big issue for most charities cases which is what is meant by the fourth head of *Pemsel* or beneficial to the community and I think I am right about that.

ELIAS CJ:

Yes.

MR SALMON:

And that is why I have endeavoured to show, and I appreciate it has been slightly painful, but I have endeavoured to show that the advocacy issue, political advocacy issue, was only ever really an incident of that public benefit test. Does that make sense, your Honour?

ELIAS CJ:

Yes.

MR SALMON:

So if I can carry anyone with me on that, the first proposition there, the advocacy point is an incident of a general test, beneficial to the community. A justiciability issue there. The beneficial to the community test has not been codified and continues to grow. It is almost unworkable to have an incident of it frozen while the rest of it continues to change.

ELIAS CJ:

On your argument, just looking at it as a matter of statutory interpretation, public benefit is completely untrammelled by context. The only brake on it is justiciability.

MR SALMON:

Absence of other legislative ones, yes. But the relevant one for today, yes that is right. Now my friend will refer to a case, I forget which one it is he has quoted in his submissions where the courts, I think in Canada or somewhere, reacted badly to the idea that the test should be reframed. I can find my friend's submissions on it, I didn't want to spend undue time on it but that was a case in which someone was standing where I am standing, and saying, brief around the public benefit test completely, step away from the historical sense of what it means, the preamble of the Statute of Elizabeth, the analogy and so on, just go with public benefit. I am not saying that either, just in case my learned friend gets some traction with that. I am saying continue with the good old fashioned analysis, a public benefit test by analogy with the spirit of the Statute of Elizabeth, whatever that means.

ELIAS CJ:

So what is the purpose? I know you do not want to get into what is the public benefit in the Greenpeace objects here. But just in a nutshell. Just what is it? Is it education, what is it?

MR SALMON:

Well take one, which is preservation of the environment which is now accepted to be charitable and I would anticipate that most would see as –

ELIAS CJ:

Well it is not – it is advocating; not advocating, it is not that word but it is promoting.

MR SALMON:

Well 2.2 is "Promote the protection and preservation of nature and the environment" and at no point did even the charities commission suggest that that was some prohibited form of advocacy and they looked substantively at what Greenpeace did, which is actual steps to protect. So there's an example of one that is accepted –

GLAZEBROOK J:

What do you say? Just give us an example of the active steps you –

MR SALMON:

Highlighting an endangered species in some forest that is about to be chopped down and making the public aware of it, seeking to protect it.

ELIAS CJ:

So where do we – do we find any statement of any of this. You said that the Board looked at it?

MR SALMON:

Oh sorry, Greenpeace's board.

ELIAS CJ:

Oh I see, yes.

MR SALMON:

Sorry I might have spoken too hastily there. The Court of Appeal gave, effectively, the green light to all of what you see there providing the wording was changed regarding the ancillary, 2.7, to make clear it is ancillary, and said go back to the Board and have it reconsidered. So that's why I am not seeking to have it litigated here. I just thought I would tire your patience rather quickly. In terms of what Greenpeace does, there is a reasonable amount in the bundle but that is going to be looked at by the Board.

GLAZEBROOK J:

So whereabouts would we find that in the bundle?

MR SALMON:

All of the bundle, after the pleadings, all of the case on appeal rather, is excerpts from the Commission's collection of material from a website. We have not included in the bundle a DVD that was provided to the Court of Appeal because it didn't seem to me you were going to want to look at it, which contained a snapshot of the website as it was. Ms McDiarmid says in her affidavit, it is an enormous thing, the Commission has cherry picked things. My friend has included in the bundle a selection of things from that DVD. I would have to say I can't imagine what issue it is that you need to resolve that requires this Court to look at those things. The Court of Appeal accepted that more evidence was needed by the Board and the Board would have to look at it. So I wasn't for a moment going to take you through any of it, unless it would help you and nor was I going to suggest that you need to decide anything about those details that the Board would look at. All I think we are looking at here, parking the small interpretative issue I'll come to in a moment is the question whether there is a restriction on political advocacy, under New Zealand law, and what it is. And I accept absolutely that the restriction prevents someone engaging on a contentious reform issue, for example, that the Court can't decide whether it's charitable or not. And my submission is that it is open to this Court to confirm, as was confirmed in *Aid/Watch*, that it's not contrary to a charitable purpose to facilitate or be involved in the legislative policy process to advance a charitable aim. And your Honour has said, "Well will I need to get into more than that?" and, respectfully, I don't think your Honour will. Because the question of whether each particular aim is charitable will be a case by case determination by the Board and that's fine. A poverty issue, a church issue, whatever it is. They just don't know right now what the definitive answer is to the question, "What if a charity goes beyond being ancillary in its engagement with the policy legislative machinery to advance its charitable goals?" If that makes sense.

If I was arguing that the second limb of *Aid/Watch* be adopted –

ELIAS CJ:

Well it is going back to the Board to consider. The Board has not determined it. Is that what you are saying?

MR SALMON:

The Board hasn't had a new application from Greenpeace.

ELIAS CJ:

Yes.

MR SALMON:

The Court has said – the Court has upheld certain aspects of the appeal which aren't before you today regarding disarmament and peace. Beyond that the Board has said – I've bolded in my submissions where I've quoted the, the rules. The only parts that tripped Greenpeace up in the first place are two words in paragraph 2.2 and paragraph 2.7.

ELIAS CJ:

Well can you tell me what is the result you want in this Court? What determination do you want from us?

MR SALMON:

A determination that it is not prohibited for a charity to engage in policy or legislative debate.

WILLIAM YOUNG J:

That goes beyond the ancillary?

MR SALMON:

Correct.

ELIAS CJ:

Sorry, that –

MR SALMON:

There is no prohibition per se on charities engaging with legislative or policy apparatuses.

ARNOLD J:

That goes beyond what is ancillary and relates to its charitable objects?

MR SALMON:

Yes. Well I was, I was putting it as –

GLAZEBROOK J:

Well, I am not sure that your submission was that goes beyond what is ancillary. Because was your submission not that if it was advocacy that was effectively for a charitable purpose then you do not even get into the question of ancillary?

MR SALMON:

Correct. Correct.

GLAZEBROOK J:

That is what I have understood your argument to be.

MR SALMON:

That is my argument. I might have misunderstood the question.

WILLIAM YOUNG J:

I think what you are saying is the ancillary purpose –

ELIAS CJ:

Goes.

WILLIAM YOUNG J:

– an ancillary purpose restriction does not apply to advocacy?

McGRATH J:

Yes.

MR SALMON:

One doesn't need the protection of the ancillary purpose provision. Correct.

ARNOLD J:

Yes. Exactly.

MR SALMON:

Correct. But I'm not saying that one can get into advocacy on a non-charitable purpose. In other words, if I wasn't – if I was here representing a party with a bunch of purposes, concrete purposes that weren't charitable –

ELIAS CJ:

If you were not here for the environment.

MR SALMON:

Yes. Yes. That's right. So there will always be a purpose which is charitable. There will always be a charity which seeks to lobby or engage or somehow to advance it. Right now the Board's interpretation is that the moment it goes past advocacy they're gone. Without any of us being quite sure how we judge advocacy. My submission is that they don't need to keep it less than ancillary. If that makes sense.

ELIAS CJ:

So does that really –

MR SALMON:

I think that takes me through the codification point. The, the other two minor points, one, one was a comment picked up by my friend that the Court of Appeal's judgment contained, which is that Parliament made a further minor amendment to the Act and didn't change section 5(3). With, with respect, there are a number of problems with that. I've addressed them in my submissions but I don't think much can be taken by the fact that Parliament didn't intervene in the meaning of the section that was subject to my litigation.

The other point was the, the tax one my friend makes, and I've addressed both of these at page 20 of my submissions. The Court of Appeal said, "Well, there are big fiscal consequences of widening the pool of charities. We should leave it to Parliament." And that's at their 58. That, that, with respect, has never been the law and, and is not any part of the charities test. As I said, my friend will refer to one case where the Court shied away from wholesale change but that was, with respect, wholesale change. As I've tried to say, really what, what is being advanced by Greenpeace is a much more evolutionary than revolutionary step and, in any event, it's not part of the charities test to look at the taxpayers. If it was that would be an exciting case when the looming one that the newspapers suggest is coming about Sanitarium comes. There are, there are arguments each side of that. If tax became a factor it would be a very strange area of law indeed, but it's just, it's just not a factor.

So that, that's all I intended to say on the advocacy, the political advocacy point. The, the second and very much more minor point arises from language used by the Court of Appeal that my friend says I might've misunderstood. If I have others have too, but, but if I have, it's easily resolved. This is dealt with at page 21 of my submissions and relates to what seems to be a finding that any illegality is disqualifying.

WILLIAM YOUNG J:
But they did not say that, did they?

MR SALMON:
Well...

WILLIAM YOUNG J:
Don't they say it all depends on how serious, to what extent it is adopted as part of its ratified, endorsed?

MR SALMON:
They did go on to say that so, so I, I anticipated that the view might be taken by this Court that they hadn't intended to be definitive in, in the earlier statement saying that it was. But there's a secondary problem which is – and, and it's really just a point of tidying this up – this is an area that the Act did deal with.

WILLIAM YOUNG J:
But you are not saying that it is irrelevant, are you?

MR SALMON:
No. No, no.

WILLIAM YOUNG J:
So it must be relevant to registration.

MR SALMON:
I'm not suggesting for a moment that anyone would tolerate illegality. At all.

WILLIAM YOUNG J:

Yes. Sorry. Just a moment. Illegality may be a basis for taking away registration but it must also be a basis for refusing registration?

MR SALMON:

Well –

WILLIAM YOUNG J:

On what basis perhaps is unclear.

MR SALMON:

On what basis is unclear because the registration prima facie looks at purpose, although the Board is entitled to look at activities as well. But, but – I accept all that. What I'm seeking to highlight is the framework within which illegality is analysed. And it's just a really – not a housekeeping point, but the framework is the statutory one. The Court has said, well these are some factors, here are some factors, and, and seemed to at one point say it was common ground it would be disqualifying. What I said in the Court of Appeal and say again is this: the threshold has been set, which is more than ancillary. So one gets disqualified if one is doing anything non-charitable that is more than ancillary. There is a separate set of mechanisms in the sections I've mentioned in these two pages. Paragraph 6.7.

WILLIAM YOUNG J:

But so what? I mean, if you accept that illegality is relevant to registration, what does it matter that there are post-registration remedies where there is illegality?

MR SALMON:

What matters is that it depends whether one reads the Court of Appeal as saying more or less than, than your Honour thinks it did. But what matters is if, is if the Board takes the Court of Appeal as setting out the framework for analysing illegality when in fact the Act does.

GLAZEBROOK J:

Well how do you –

MR SALMON:

It's a, it's a minor point.

GLAZEBROOK J:

How do you say the Act does it? Because I would not have thought the Act would say you can have an ancillary illegal purpose and still remain charitable.

MR SALMON:

No.

GLAZEBROOK J:

An actual express purpose which you can say is ancillary because you do not spend much time on it. But I could not imagine that anybody could countenance the registration as a charity of, of somebody who says, "Well –

WILLIAM YOUNG J:

"We do a little bit of burglary."

GLAZEBROOK J:

– in our spare time we'll just blow up a few things."

WILLIAM YOUNG J:

"Yeah, hardly any. Only one of our 45 staff is engaged in burglary."

MR SALMON:

Well – yes.

WILLIAM YOUNG J:

But that would but not charitable.

MR SALMON:

And there's two parts to the answer. One is to – and I do want to be clear. I'm not for a moment saying that this will be tolerated. But, but rather we need to analyse it correctly. One is to note that your Honour's put, Justice Glazebrook, a question in terms of illegal purposes and if a set of purposes had a stand-alone purpose saying, "We will smash shop windows to scare off people we don't like," well that's not ancillary to any charitable purpose because "ancillary" doesn't just mean "sitting there with". It's just an unrelated, illegal and uncharitable purpose, so it will fail the purpose test. But the Court didn't just restrict its comments to purposes. It focused on activities, and that's why I go to the activities point,

because it was saying not just at registration but with ongoing monitoring illegal activities will trip up. And the, the answer is, well, if it's more than ancillary – if it's not ancillary we'll trip you up in the purpose test, and that's the point I made in paragraph 6.6. And 6.7 I've noticed the Act sets out a framework for monitoring misconduct expressly dealing with offences. And those sections are noted. I did note that as part of the superb performance on our bundle those sections are missed out from the bundle. I've got copies here which I can hand up but you may, you may have them available.

ELIAS CJ:
We will have them available.

MR SALMON:
You do. So it's a very minor point, that as, as Greenpeace saw the Court of Appeal's decision, it was likely to be read as saying this is where you go to understand how to monitor and govern misconduct, when in fact the Act has that framework.

If the Court of Appeal decision's is correctly read as saying nothing more than, the Act deals with it and we're not going to get into the details now because the Board needs more facts," then no problem at all. But it was open to their being read as, as saying more than that. So all I'm seeking to say on this very minor secondary point, and it is a minor point, is to the extent the Court of Appeal is saying more than a comment that it should go back, it's possibly failed to highlight that the Act deals with how these issues are dealt with. It deals with them at the front purpose end when applying and it deals with the monitoring and oversight provisions in sections 32, 50, 54 and 55. It's not the most groundbreaking point and that's why I spent so little time on it but, but I think I'm right.

I don't have anything more to add, unless you have any questions.

ELIAS CJ:
No. Thank you Mr Salmon. Yes, Mr Gunn.

MR GUNN:
Your Honours have my written submissions and I don't propose to take your Honours through those. I think many of the matters that have been discussed already this morning render that redundant.

If I my just begin by suggesting that from the Board's perspective the case really centres on section 5, section 5(3) of the Charities Act, that is the nub of the matter in the Board's submission. And it flows from that that one needs to adopt what the Board would say are conventional statutory interpretation measures in analysing section 5, and in terms of what that section, section 5(3) in particular, means, in my submission it is simply that a charity cannot have advocacy as a primary independent purpose. Now, there's been substantial discussion about what advocacy means, the scope of *Bowman* and the like. In my submission, your Honours, the purpose of section 5(3) really can be discerned very readily from the ancillary materials that are in front of their Honours, in particular the Select Committee report that my friend has already referred to, and as well the second reading speech from –

ELIAS CJ:
Before you get into the legislative history, is there anything else you want to say to us about the text?

MR GUNN:
Yes, there is.

ELIAS CJ:
Because presumably you make that submission just on the text in any event, do you?

MR GUNN:
I do, Ma'am, and on the test itself, the point that I think particularly your Honour was addressing with my friend earlier today, was about whether there needs to be something more than just public benefit, and in the Board's submission there does, there needs also to be a charitable element to the activities that are discussed here. There needs to be a falling within the spirit and intendment of the Statute of Elizabeth that's been referred to already by my friend.

If I can perhaps try and develop that submission by reference to *Aid/Watch*, and I'm conscious your Honour expressed some reservations about *Aid/Watch* in terms of whether the charity, as the High Court of Australia found it to be, was in fact charitable in the sense that was it performing good works, if you like, and it seems to me that one can analyse the *Aid/Watch* activities as being conducive to a good work, if you like, it was conducive –

ELIAS CJ:

There were two dissents as well.

MR GUNN:

Indeed, your Honour.

ELIAS CJ:

Was it on that – I cannot, I have not actually read the dissents, which I should have.

MR GUNN:

There were concerns, your Honour, in the dissent about a number of aspects, including the directness of the charitable activities of the *Aid/Watch* itself, and that's evident, I think also, in the some of the discussion that there was before the High Court with counsel. There was discussion about how direct does one need to be in terms of achieving a charitable objective, for example, do you need to be going out there delivering food to somebody who's hungry or money to somebody who's poor, or is it sufficient if you're in the background doing something that simply facilitates those –

WILLIAM YOUNG J:

Telling other people to do that.

MR GUNN:

If you're driving the truck or help build the road that leads to the delivery of aid, and that's my analysis of *Aid/Watch*, Ma'am, in terms of how it conceivably can be regarded as a charity. The substantial point, obviously, from the Board's perspective, is that there is no need to go to *Aid/Watch* because *Aid/Watch* makes it plain that if you have a statutory codification of the law, as the High Court of Australia referred to in terms of the Canadian situation, that covers the point –

ELIAS CJ:

And as you say we have.

MR GUNN:

And as I say we have, then *Aid/Watch* should be put to one side. But absent section 5(3), as I say, if you're looking to conceptually analyse *Aid/Watch*, then those are the

terms that I think it best can be put within a conventional charitable framework. The –

GLAZEBROOK J:

Can I just, if I understand you, you are accepting that advocacy per se is not necessarily prohibited by section 5(3) if it is advocacy that is centred on what is clearly a charitable purpose, is that –

MR GUNN:

Well, I –

GLAZEBROOK J:

And you say that *Aid/Watch* could be analysed in that way, is that…

MR GUNN:

I think, if I can try and break that question down into one or two constituent parts, in the context of section 5(3), I think what that provides is an ability for charities to operate in the political context, whether that be a select committee, whether it be by public press releases, the like, provided that activity is no more than ancillary. In the *Aid/Watch* situation, given the absence of any equivalent statutory provision, the High Court of Australia was able to determine that a charitable, activities in support of a charitable purpose – in this case the relief of poverty – were able to be, fall within the ambit of charitable activity, even if they weren't what might be accepted as conventional charitable activities, because they were facilitating the delivery of such purposes. And, as I say, it might be an extrapolation out from the actual providing of food or money, but it was activity that was conducive towards that end. But in New Zealand there is a statutory permission to engage in advocacy, and I don't say, your Honour, that the, while one might accept that, expect that the advocacy is in support of the charitable purpose, and that's no doubt where it would occur in the great totality of things –

GLAZEBROOK J:

Sorry, I am totally confused now. Do you say that – well, if somebody does something like *Aid/Watch* in New Zealand, do you say it comes within section 5(3) or not?

MR GUNN:

I –

GLAZEBROOK J:

If not, why?

MR GUNN:

If *Aid/Watch* was to come up in New Zealand, the first point I would say is section 5(3) covers the point, so that to the extent that the advocacy that *Aid/Watch* was engaging in was more than ancillary, it could –

GLAZEBROOK J:

But, well – but that does not answer my question.

WILLIAM YOUNG J:

Well, could you say, can you have a charity that only is an advocate?

MR GUNN:

No, your Honour, I –

GLAZEBROOK J:

So you say *Aid/Watch*, despite the advocacy being for a charitable purpose, would fall foul of section 5(3) –

MR GUNN:

On –

GLAZEBROOK J:

– or don't you?

MR GUNN:

– the basis of it's more than ancillary.

GLAZEBROOK J:

Well, but what is more than ancillary if it is only for a charitable purpose?

WILLIAM YOUNG J:

Are you saying that advocacy for a charitable purpose is not a charitable purpose? So that something that is set up for, the only purpose of the body is to lobby Parliament or to run a political campaign on a single issue, which is a good thing?

MR GUNN:

If I can –

WILLIAM YOUNG J:

It does not do anything, they do not do anything that's good, other than that, they do not hand out food or look after the sick, they just talk.

MR GUNN:

And in answer to that, your Honour, I say that the, you need to demonstrate, in order to be charitable, you need to be able to demonstrate a public benefit.

WILLIAM YOUNG J:

Yes, assuming everyone accepts –

MR GUNN:

But then the next aspect of that is that you need to fit within the spirit and intendment of the –

GLAZEBROOK J:

Well let us say it does. Let us say we have got an Aid/Watch in New Zealand and it is saying, well I want to advocate that aid in New Zealand, so we do not get any foreign thing, is distributed to the communities who actually need that and in order to do that I am collecting a whole lot of data, just to take Mr Salmon's example on where poverty is and I am then going to advocate that people actually give money to charities operating in that area or whatever it happens to be. So indutably a charitable purpose and absolutely poor and relieving of the poor. So their only role though is to advocate both politically and in –

MR GUNN:

I say under established law that that is not sufficient. You have to go further.

GLAZEBROOK J:

So *Aid/Watch*, so you are saying *Aid/Watch* would not apply in New Zealand, even if you can say it is conducive to the proper aspect of a charity. I was confused because you were trying to explain *Aid/Watch* in a different way which implied that you were accepting of it, but you are not?

MR GUNN:

No I am not, your Honour, and I am certainly not here to advocate for *Aid/Watch*. Looking to put it into a conceptual framework that might help but possibly may not as well.

GLAZEBROOK J:

Well it certainly did not help me because I was not –

ARNOLD J:

Can I just declare then. Are you saying that if the charitable organisation, the only activity it actually does, is advocacy. That is all it does. That that cannot be ancillary, so that 5(3) would not apply.

MR GUNN:

It has to be ancillary to something else, your Honour.

WILLIAM YOUNG J:

Was not the simple answer it cannot be a charity?

MR GUNN:

Yes.

WILLIAM YOUNG J:

If it is only an advocate, it is not a charity.

MR GUNN:

Because you can't have – if I may put it in an elegant way, your Honour. You can't have just sizzle and no sausage. You must have some charitable aspect to your activities and that I think is the question that the Chief Justice was directing to my friend earlier on, were designed to elicit that point. I am not sure whether that is –

GLAZEBROOK J:
Oh I had just been totally confused because I had understood that to be your submission and then when you started explaining *Aid/Watch* in a different way, I just got confused I am afraid.

ELIAS CJ:
Sorry without wanting to take time on it but is that what the minority positions in *Aid/Watch* were.

MR GUNN:
The minority positions are not able to be characterised I think as exactly one thing or the other. There was one person that took a fairly conventional view on what should or should not be a charity. That was another one that was rather more equivocal so it's – I don't think it is possible to discern from the dissents that there was a clear position by the minority. The majority certainly felt that they had got to the point where the ban and political purposes could be dispensed with in Australia.

Your Honours, the other point that I think I was looking to address was the context, if you like, of section 5(3) and I had mentioned already the social services committee report which my friend has taken you to. That's in the Board's authorities at tab 21. And the point that my friend took you to, I think, was on page 4 of that at tab 21. If I may just take you to an earlier page and that's under the heading of "Definition of Charitable Purpose" page 3. And the Committee talk there about the fact that the definition in the Bill had been based largely on the long-established definition of charitable purpose in the common law and talk to – further about the fact that submitters were concerned that this definition was too narrow, that it excluded sporting groups and groups that undertake advocacy work. And that is the, the genesis, if you like, of 5(3), and it goes on and, and talks about that over the page, as, as you heard from my friend.

The point from the Committee's perspective was to reassure the submitters before the Select Committee that they would be permitted to have non-charitable secondary purposes provided that those secondary purposes were legitimate ways to achieve the main charitable purpose. And, and the Select Committee said there, while a charity cannot have advocacy as its main purpose it can have another charitable purpose as its main purpose and then have appropriate advocacy in support of its

main purpose. So the Select Committee is talking there about the fact that this is a legislative proposal response to those concerns from submitters.

And then at the next tab, your Honours, we have the speech from – on Judith Tizard that I had referred to previously. In the second reading of the Charities Bill she discusses this issue again, and that's on the last page of the bundle, your Honours. At the second paragraph she refers to the fact that, "Throughout the select committee process the single biggest concern raised in relation to the charitable purpose test was the position of advocacy, and whether organisations that undertook advocacy work would continue to be classified as charitable and be able to register. The Committee has recommended changes that make it clear that the commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose."

And, and that is where –

ELIAS CJ:
Sorry, I have lost where it is.

McGRATH J:
If you could just pinpoint where it is.

GLAZEBROOK J:
First paragraph on the –

MR GUNN:
I'm sorry, your Honours. That, that's on the second paragraph –

GLAZEBROOK J:
– third – turn over the page.

MR GUNN:
– on that last page of tab 22. I think this is about the middle of the way through that second paragraph, your Honour.

So the submission, your Honours, in that respect, is that there is – there are two important aspects, if you like, to this particular submission. The first is that it gives a

clear pointer, in my submission, to the reason why we have section 5(3) in the law, and the second point of significance, in my submission, is that it is an indication that the Committee was listening to obviously a range of charitable submissions and, and addressing the concerns that were perceived there. And in my submission that goes some way to towards answering my friend's point about why would the legislation do it? And why would the legislature do it? The answer is because they were addressing a concern that had been expressed to them by many submitters and, and this was their answer.

To suggest that it is simply an example and an example that could be changed, should the courts or the community move on is, is, in my submission, inconsistent with general pieces of statutory interpretation, in my submission. That is in, section 5(3) is a statement of the law in New Zealand and, and is not subject to the change in the way my friend was suggesting it might be.

GLAZEBROOK J:
How do you define advocacy? Do you accept advocacy as political change?

MR GUNN:
I was listening to what my friend was saying in, in seeking to confine the impact of section 5(3) to essentially *Bowman* purposes, and it seems to me the authorities he was citing in support of that proposition were not as authoritative in support of it as, as he might have intended to suggest. It seems to me that advocacy goes wider than a simple advocacy for the change, for a change of the law and –

GLAZEBROOK J:
How much wider is what I am asking you.

MR GUNN:
Well the, the – it's –

GLAZEBROOK J:
I mean there is law in more generalist policies, I think.

MR GUNN:
Mmm. And to extent efforts to influence Government towards a particular policy it seems to me would fall within the advocacy line, and I think there is –

GLAZEBROOK J:

Well it is the – that would be the Justice Hammond, if you are changing the law or changing policy that is the same thing.

MR GUNN:

And –

GLAZEBROOK J:

Is that...

MR GUNN:

Yes.

GLAZEBROOK J:

Yes?

MR GUNN:

And, and also if you're seeking to maintain the law or maintain policy in a particular way as well.

ELIAS CJ:

And what about if you are trying to create a public climate in which there will build up sufficient political will to change?

MR GUNN:

Your Honour, on that I again was listening to the discussion you had with my friend about provision of statute, provision of statistics, for example, or information to select committees and, and the like and, and the way in which that might be regarded. It seems to me that there is a, an argument that in some circumstances what an organisation might be doing in those circumstances is providing an educative function which may be related to an educative purpose that it has. But in terms of seeking to produce a climate of opinion or, or to influence people towards a particular way, then – and particularly if that involves engagement with the political process – it seems to me that that does fall within the definition of advocacy on, on the case law that we've seen.

GLAZEBROOK J:

But you would accept, not, for instance, saying that the example given, children should go and check on their grandparents or people should make sure that they give money to these causes that are charitable? It is anything to do with the political system, both in terms of law and policy. Is that –

MR GUNN:

I, I think that's, in, in broad terms, the submission I'm making, your Honour. It's – there are – as I say, sometimes it is difficult to discern –

GLAZEBROOK J:

Yes, obviously.

MR GUNN:

– where education starts and polemics finish, but I think taking your Honours back again to the Charities Bill discussion and, and the genesis of section 5(3), that is, is my suggestion as to the parameters of the section.

The other, the other point I would make in this regard is that we are looking at a snapshot of the law as at 2005 as well in, in this respect, it seems to me. And so –

ELIAS CJ:

What does that mean?

MR GUNN:

Well, your Honour, my friend was talking about the ability of the law to, to change and, and it, that was, I think, particularly discussed in, in respect of public benefit, and it seems to me there, there is scope for the law to evolve in that respect. What was held to be in the public benefit in, at a particular point in time and a particular time and a particular place may evolve over time and, in my submission, I think my written submissions make this plain, there is still scope for that to happen. And, and if one is looking for an example of that one might look to the Court of Appeal on the approach it took towards peace and disarmament in this case, saying that we have now reached the position in New Zealand where the climate of opinion on nuclear weapons, weapons of mass destruction, is, is such that we can with a degree of confidence say that there is no longer a political, contentious aspect to those matters. We can therefore accept that they are charitable purposes.

So that, that still is open under the law as it stands. What I say though is –

GLAZEBROOK J:

Are you accepting that – I just still fell uncomfortable with this contentious aspect because it is obviously usually not contentious to say, "Let's keep the law as it is." I suppose it, well I suppose it can become contentious if you have got somebody on the other side saying the other thing. But is it really the contentious aspect to it or that it's become political? Because if you look at, say, the nuclear thing, if you say, well, it's not that it's not contentious, it's just that nobody's actually suggesting, perhaps apart from fringe groups, that you actually do want weapons of mass destruction. Is that more the aspect, that you don't have a political debate over it, or…

WILLIAM YOUNG J:

And it might be temporal, because you may want weapons of mass destruction if someone else has got weapons of mass destruction next door. I mean, it is, it can hardly be a forever proposition, I would have thought.

MR GUNN:

If I may address that point first, your Honour, I think that's exactly what some of the cases say in terms of *Southwood* and others, nobody can argue with peace, it's when you say, well, is it peace with honour, is it peace through strength, peace through disarmament, those are much more complex and potentially contentious issues. In terms of what your Honour I think referred to as "majoritarianism" and the concerns that were expressed about that, there has to be, and I think the, it goes beyond a simple popularity or a vote on these issues, it seems to me, there are other elements to it as well, and in the area of human rights one can point to the development of international convention, to the adoption of legislation, as well as what might be a public view on a particular issue as, or contributing to a situation where there is no longer an element of contentiousness to something that may have previously been contentious.

ELIAS CJ:

But you might have a public benefit. But in the case of, say, nuclear disarmament, how does that translate into a charitable purpose, except by advocacy? I mean, one would not have thought that anyone can practice nuclear disarmament.

MR GUNN:

There are some practical disadvantages, your Honour, I'm sure, and I suppose my answer to that is that there may be an educational function, for example, that may be able to be performed.

ELIAS CJ:

But an educational function directed at what?

WILLIAM YOUNG J:

Just advocacy.

ELIAS CJ:

Just advocacy, isn't it?

WILLIAM YOUNG J:

There will not be, there are – it will not be an educational function like, there are two sides to this debate. It will be, I mean, there could not be that sort of educational function because they would not want to do that.

MR GUNN:

I –

WILLIAM YOUNG J:

It will be, we are educating you in the view that we hold.

ELIAS CJ:

And to what end, it's to create a climate in which political action is more or less likely.

MR GUNN:

Your Honour, I think that the – I got back to my *Southwood* example, the promotion of peace, and the –

ELIAS CJ:

Sorry, *Southwood…*

MR GUNN:

Southwood.

ELIAS CJ:
Which one is that?

MR GUNN:
And –

GLAZEBROOK J:
Well, see, I still, again still having the difficulty of the difference between purpose and means, in the sense that you might have an ultimate purpose of peace, but your means of achieving that may also be either secondary purposes, or in fact in some people's view, inconsistent with the promotion of peace.

MR GUNN:
Indeed.

WILLIAM YOUNG J:
Or it could be a composite purpose, peace by disarmament, or peace by strength.

GLAZEBROOK J:
Yes. Well, exactly, and then some people –

ELIAS CJ:
Peace by violence.

WILLIAM YOUNG J:
Yes.

GLAZEBROOK J:
– would say peace by strength is inconsistent with peace, other people would say, peace by disarmament is inconsistent with peace. And just because you add a "nuclear" to it or "weapons of mass destruction", I am not sure that, that changes matters. I mean, isn't it – I mean, I can understand a circumstance that says I, "I'm the Women's Refuge and I give refuge to women and ancillary to that, or possibly even more important than that, I advocate for the people to stop violence against women so that I don't have to provide refuge for women anymore."

MR GUNN:

Because that would be in support of your –

GLAZEBROOK J:

And that is in support of the primary –

MR GUNN:

– or –

GLAZEBROOK J:

– purpose part.

MR GUNN:

– it may even be regarded as part of the primary purpose.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Well, that is where, you see, I mean –

GLAZEBROOK J:

That's the difficulty, isn't it?

WILLIAM YOUNG J:

I mean, if you take the view that charities are about doing things, doing stuff that is good –

MR GUNN:

Doing good works.

WILLIAM YOUNG J:

– and then ancillary to that is, you know, the Women's Refuge example, I think most people would say that advocating for changes in laws or administrative procedures that limit violence towards women would be ancillary to the general purpose which is reflected in the substance of the work they do.

MR GUNN:

I accept that as a proposition, your Honour, and it seems to me that if you – but there are definitional issues, and again I'm not here to promote *Aid/Watch*, but you might be able to say, in the context of a particular charity, that there is more than one way of advancing that particular charity's charitable purpose, and one of those ways may be to provide food, money, another way may be to provide some education to people, another way might be to actually promote a particular course of action as the quickest way of getting to a charitable end. But, in essence, your Honours, the proposition from the Board is that there has to be a, a political prohibition is a prohibition only on ancillary activities and they are not prohibited across the board.

GLAZEBROOK J:

Do you, in terms of defining ancillary activities, do you have a sort of a percentage view of that or a view, or what would be your definition of "ancillary"?

MR GUNN:

The acknowledged difficulties that were mentioned this morning, I think his Honour Justice Arnold was talking about the difficulties of measuring both in a quantitative and in a qualitative sense and, in my submission, the history of this litigation in a way demonstrates that there are difficulties attached with trying to measure what is ancillary and what isn't. The authorities I have are mentioned at paragraph 65 of my submission, there's the *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 1065 (HC) case, which is a New Zealand High Court case, and that's one of the cases that's emerged at, first instance, considering and reviewing Charities Commission decisions, as they were, and at that paragraph 65 in my submissions Justice Simon France says, "There is little discussion on what is an ancillary activity," but in *Re Education New Zealand Trust* (2010) 24 NZTC 24, 354 (HC) Justice Dobson doubted that an activity that represented 30 per cent of the Trust's endeavour could be said to be ancillary, "I agree that 'ancillary' must have a quantitative component and do not consider that the applicants in the present case have demonstrated these activities are ancillary," and then he goes on to say, "Conceptually under the constitution the expenditure could be a hundred percent of the general funds; realistically that cannot amount to an ancillary purpose." So the suggestion in that case is that 30 per cent would be too much. There is, I think –

GLAZEBROOK J:

Thirty per cent of what? Expenditure, time…

MR GUNN:

Well, it's not even quite that clear and that –

GLAZEBROOK J:

No, no, well, that's why I was asking you really.

McGRATH J:

Endeavour, yes, endeavour.

MR GUNN:

Yes, but it could be expenditure, it could be time, it could be activities that are undertaken, and it's not something that is susceptible to a pagination test, if I can put it in that sense. His Honour Justice Heath at first instance in this case said that it's not just a question of sort of totting up how many pages on a website there are on this activity compared to how many there are on others, it must be qualitative as well as quantitative, and his Honour referred in that instance to the fact that Greenpeace had certain ethos, if you like, certain distinguishing characteristics, and he weighed those in the balance of deciding whether or not their political activities were truly ancillary. So I –

WILLIAM YOUNG J:

It may just be, it may be a proposition that's irreducible, you cannot go beyond is it ancillary or not, because any attempt to do is simply going to be more problematical than the simple test.

MR GUNN:

It is –

WILLIAM YOUNG J:

But that is the point at which a valuation is required.

ELIAS CJ:

Yes –

MR GUNN:

I think –

ELIAS CJ:

– it is application rather than a test that is…

GLAZEBROOK J:

Well unless “ancillary” means, “supportive of the charitable purposes in some way,” then you probably would not have, apart from it not being 100 per cent political, any restriction on it.

MR GUNN:

Yes, I add a further perhaps unhelpful element to the mix, I believe, from my reading of the Canadian case law, the Inland Revenue service in Canada takes a 10 per cent cut-off point as their guideline, if you like, as to when something stops becoming ancillary or the equivalent under the Canadian legislation. But again, that's subject to exactly the same sort of difficulty, setting it at a lower level doesn’t help you in determining whether it’s ancillary or not.

ELIAS CJ:

Well, ancillary both has to referable to the charitable purpose and not the dominant purpose.

MR GUNN:

That's, in my respectful submission, correct, your Honour, as, yes, Justice Simon France says, it can’t be a hundred per cent, because then the tail’s wagging the dog.

WILLIAM YOUNG J:

There is no dog.

GLAZEBROOK J:

Yes, a hundred percent there is no dog.

MR GUNN:

Well, that's – indeed, your Honour. In terms of the, I guess, the other means of measuring the activity though, your Honours, there is no obvious answer in the case law at least, but there is a, I guess, a statutory guideline as to that's what it’s supposed to be about, and it reflects again the genesis of this provision in the legislation. The Select Committee, the Minister, is saying, “You can be, you can

have political means to advance your objectives, but they just can't overwhelm your charitable purposes."

ELIAS CJ:

Where do you want to take us further, Mr Gunn, in terms of…

MR GUNN:

Your Honours, there was a question your Honours addressed to my friend at the very outset, which is whether this hearing is moot, and it seemed to me that I might usefully just –

ELIAS CJ:

Yes.

MR GUNN:

– touch on that briefly. In the first instance, it seemed to me that there was perhaps some – while the path the litigation has taken has perhaps been a little zig-zaggy in some respects, your Honours, there remains, in my submission, a purpose to this particular hearing, and one of those purposes, it seems to me, is to consider the points that the Court of Appeal was making about how you might assess the illegal activity, for example, that a charity might be engaged in or might not be engaged in, and that the, while the Board's position is that those comments from the Court of Appeal were consistent with the Act and were not exceptional in themselves, they did allow for quite a wide margin of appreciation, there are still, in this Court's purview, an ability to say whether those guidelines were appropriate, whether they, the Court of Appeal, got them right or not. And in that regard, your Honours, I say that that is one of the reasons why it is useful perhaps to have regard to the material in front of your Honours about Greenpeace and its activities. If your Honours are looking at what the Court of Appeal said I that respect, it seems to me it's useful to have at least some form of factual foundation to try and decide whether those guidelines are appropriate or not, and –

ELIAS CJ:

Appreciating that you are appearing ready to assist the Court, what is the outcome you say we should be coming to here? Because I am still feeling for that. Mr Salmon says that it is not – the answer he is looking from us is some sort of declaration that it is not prohibited for a charity to advocate beyond the ancillary, if it relates to a public

benefit, sort of paraphrasing there, so that the ancillary protection limitation is not necessary. What do you say we should be deciding?

MR GUNN:
I am essentially here in support of what the Court of Appeal said, your Honours.

ELIAS CJ:
Yes.

MR GUNN:
That the first of the propositions that the Court of Appeal was persuaded by is that the purposes that are primarily political cannot be charitable and that that is a proposition that should be sustained and that certainly, it's –

WILLIAM YOUNG J:
The advocacy is not a charitable purpose.

GLAZEBROOK J:
And that is advocacy in the sense that we have talked about, with some fuzziness around the edges.

MR GUNN:
Indeed, yes.

GLAZEBROOK J:
In that public campaign issue.

MR GUNN:
And I keep harping on about the parliamentary process here but in my view that is a very significant aspect of this whole case, in that Parliament has spoken on this occasion and bound to say that I found the intrinsic material somewhat more useful in this case than in many other cases where I have had a look at, in order to demonstrate what Parliament was really trying to achieve here. So it seems to me that, allied to that submission, there is a parliamentary intent here which I believe the board would seek to have maintained as well. And the rationale for the proposition, the prohibition on political purposes, is something that the Court of Appeal said it was not convinced it should be, that the rationale had been exploded. It looked at

Aid/Watch and was not convinced that *Bowman* should be overturned and that *Molloy* should be overturned. And part of that in my submission is obviously due to the statutory code but the Court of Appeal also, I think, notwithstanding the encouragement from my friend, had determined that there was still a valid reason to *Bowman* and concerned to maintain that prohibition and the case law that had culminated in that.

So those, in essence, I think, your Honour, are what the board are about. There is – the point that the board is here, not as a party but to assist and that is an aspect of it as well.

GLAZEBROOK J:
So the second part of that though would be purposes primarily political cannot be charitable but if they are ancillary however, that is defined and again it has to be relatively fuzzy at the edges, to a proper charitable purpose, then they are permitted under section 5(3). Is that –

MR GUNN:
Indeed your Honour and that is the – this is one of I think possibly two cases that have concerned the political prohibition aspect in New Zealand but there are – as my friend was referring to – numerous charities out there who are engaging with the political process on a daily/weekly/monthly basis and the concern would not be to stymie that, but to make sure that it is conducted within a proper charitable context. That to do good works in a charitable sense, is that important part of that, it is not just that you are doing something in the public benefit, it must go beyond that and must fit within a charitable constraint as well.

WILLIAM YOUNG J:
Is the other case, that involving the National Council of Women?

MR GUNN:
It is not any more, your Honour. I can say that the National Council of Women was an issue for the Charities Commission and my instructions I think are that the National Council of Women is currently registered with the board. The other case was Families First, I think. The other – and we have talked to your Honours about perhaps the difficulties that are associated with the ancillary definition and problems associated with that. There are problems on the other side of the ledger, if I may put

it in that way too, in terms of where does political stop and if you are to advance *Aid/Watch*, the extent to which that would enable political organisations or commercial organisations, to advance their propositions under a cloak of, I use the word cloak, perhaps it is too strong – but to advance their objectives using –

ELIAS CJ:
For a position of advantage.

MR GUNN:
Indeed, your Honour. And to obtain tax advantage from doing so. The other point that might be said about the tax advantage side of things, is addressing one of the questions about the Bill of Rights aspects of this that was raised this morning and it is the board's firm submission that there is no restriction of freedom of expression here in any sort of sense. There is a limitation on tax advantages but that equivalent jurisdictions, and by that I mean both America and Canada have held that those sorts of restrictions are not a breach of freedom of expression and the *Regan v Taxation With Representation of Washington* 461 US 540 (1983) case, which is in the Board's authorities and the – that's an American case obviously – the *Human Life International in Canada Inc* v *MNR* [1998] 3 FC 202 (FCA) case also in the board's authorities, establish I think those points.

ELIAS CJ:
Does the Canadian legislation have – does it make the charitable object the only one. Is that –

MR GUNN:
Your Honour, I have the definition of charitable organisation as I understand it. Under the Canadian legislation talks about the fact that if an organisation devotes part of its resources to political activities and those political activities are ancillary and incidental to its charitable activities, and – and this is a difference from the New Zealand situation, those political activities do not include direct or indirect support of or opposition to any political party or candidate for political office. Then the organisation shall be considered to be devoting that part of its resources to charitable activities. So there is –

GLAZEBROOK J:
And that is statutory?

MR GUNN:

That is statutory. And your Honour that was significantly in my submission referred to by the High Court of Australia in *Aid/Watch* as a point of distinction between the Australian situation and the Canadian situation. When I was looking through the transcript to Aid/Watch there was some discussion with their Honours about Commonwealth legislation and for some unaccountable reason, the New Zealand legislation did not seem to be featuring in that discussion but there was certainly reference to the Canadian legislation which found its way into the –

ELIAS CJ:

Well probably there is that decision of the Supreme Court of Canada which they dealt with isn't there?

MR GUNN:

Indeed, and, your Honour –

WILLIAM YOUNG J:

Which decision was that, Mr Gunn? I am just looking –

MR GUNN:

There was the – first of all there was *Aid/Watch* that made the initial point, your Honour, and then it was picked up by the Canadians later on.

ELIAS CJ:

Is that – I have been looking at *Vancouver Society of Immigrant & Visible Minority Women v MNR* [1999] 1 SCR 10.

MR GUNN:

I am sorry, your Honours, I can find that reference for you. It's the Canadian Federal Court of Appeals and it's –

ELIAS CJ:

Oh yes.

MR GUNN:

And it's *News To You Canada v MNR* [2011] FCA 192, (2011) 336 DLR (4th) 355. It's referred to your Honours at paragraph 60 of my written – 60 of my written submissions.

WILLIAM YOUNG J:

Thank you.

MR GUNN:

And what the Canadian Federal Court said there was the High Court of Australia recognised the law in Australia was substantially different from that of Canada because of the expressed limits that had been set out in the Canadian legislation regarding the conduct of political activities by a charity. And the, so you have a symmetry, if you like, there from both the Australian and the Canadian point of view.

ELIAS CJ:

The *News to You* case is interesting because it could arguably have been packaged as educational but the provision of news and current events in this way was not charitable.

MR GUNN:

And that, your Honour, I think is, offers an interesting perspective on the submissions made by the Board. There's traditionally, if you're advancing an educational charitable head, then the Courts have said you need to provide a balance, it needs to be a proper educational programme.

ELIAS CJ:

It's not advocacy.

MR GUNN:

It can't be polemical and you can't just reinforce one side of a debate all the time. Now, you might, on a pure public benefit analysis, be able to say, well, advancing one side of a debate can be in the public benefit because that stimulates debate, generates other debate in response and all the rest of it, but the distinction, it seems to me, between that, which may be in the public benefit, and education with a charitable purpose is that there is, the latter fits within a charitable head, whereas the first doesn't.

ELIAS CJ:

Do you expect to be much longer?

MR GUNN:

I don't –

ELIAS CJ:

That is all right, we're going to take the adjournment now and resume and you can tell us then whether you need more time.

MR GUNN:

Thank you.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.15 PM

MR GUNN:

Your Honour, just before the break I think we were addressing the question of, the point about whether advocacy in itself might be charitable and I fear that I was perhaps not as clear in my response to your Honours on that as I might have been. The point from the Board's perspective is that in New Zealand advocacy in support of a charitable purpose is acceptable, provided it's ancillary to a charitable purpose and I seek to expand upon that by saying that ancillary carries with it the concept that it has to attach to something, and that something is to a charitable purpose. So in essence then, the answer to the question is that advocacy cannot, in itself, be charitable in New Zealand at least. And my friend, I think, struggled to provide authorities contrary to that proposition.

It goes back in my submission, your Honours, to a point that your Honour the Chief Justice was making at the very beginning of today's argument about what represents the core of charity and if one looks at some of the historical material about the Statute of Elizabeth for example, there is attached to that piece of legislation the idea that the Parliament of that day was talking about an assumption of responsibility for things that would otherwise fall to the public purse to pay for and it flows, I think, from that concept that advocacy in itself is not one of those things.

So the essential point, I think, on this from the Board is that when you are considering the position of advocacy, you have to not only be able to demonstrate a public benefit but also to be able to demonstrate that you're within the spirit and intendment of the Statute of Elizabeth and we've talked about various formulations of that, the doing of good works being one of them, that mere public benefit is not enough, assuming of course that you can demonstrate public benefit. And I have, your Honours, been labouring perhaps the statutory point but that is the touchstone, as I said at the outset, of the Board's position on this case.

There was one other aspect of the statutory history that I thought might be briefly worth adverting to, and that's to be found in the case on appeal in the Court of Appeal decision, which is at tab 4, volume A of the case on appeal. I hesitate to say that it's the orange volume, your Honours, because it may not be. But at paragraph 42, page 24 the Court of Appeal was considering the section 5(3), section 5 definition and noted that Parliament had adopted at 42 the well-established fourfold classification of charitable purpose, and that's something that we've talked about at length.

But going on, the Court of Appeal notes that in doing so, "Parliament have rejected the recommendation of the working party that a new definition be adopted, which would have recognised as legitimate charitable purposes a number of new purposes –

ELIAS CJ:
So what paragraph are you at?

MR GUNN:
That's still at 42, your Honour, page 24, but turning over the page to 25, and that's at volume A of the case on appeal. In doing so, Parliament rejected the recommendation of the working party that a new definition be adopted which would have recognised as legitimate charitable purposes a number of new purposes, including, "The advancement of the natural environment," and, "The promotion and protection of civil and human rights." So, again –

ELIAS CJ:
We do not have that, presumably?

MR GUNN:

Not in front of – no, your Honour, no.

ELIAS CJ:

No, that is all right.

GLAZEBROOK J:

You're not suggesting they wouldn't be charitable but they would just have to, in their manifestation, come within the existing definition?

MR GUNN:

Yes, that's exactly my submission, your Honour, there was a rejection of that as a codification. In order to come within it you would have to fall within public benefit and the spirit and intendment, is my submission.

GLAZEBROOK J:

And those two probably likely would, depending upon how they were being manifested in terms of what they – if you were planting trees, for instance, it probably would –

MR GUNN:

Yes –

GLAZEBROOK J:

– at the very least.

MR GUNN:

And if I may segue off into a point that I was looking to make a little later, which is directly related to that. It seems to me that discussion in the abstract of what a entity might be doing or might not be doing, we've heard a lot of discussion, for example, this morning about Amnesty and how that might be regarded. It seems to me that that's a particularly fraught path for this Court to embark upon with the absence of background evidence, the suggestion that the law has changed, that Amnesty is now a registered charity, for example, only goes so far. Until one actually knows what the charitable purposes are and the activities in New Zealand of the charity, one can only draw very limited conclusions as to the mere fact of registration. And I make that point more generally in terms of the law change that I understand my friend to be

advocating here for today, that there needs to be a proper foundation for such a law change and, as I've commented in the written submissions, I don't agree that such a foundation's been laid. Quite a –

McGRATH J:

Mr Gunn, is your point here, from paragraph 42, the *Greenpeace* case, is all you are saying is that there was a working party report which recommended some further specific provisions and they were not carried through into the legislation? There is no discussion of that or anything we need go and look at?

MR GUNN:

No, that's –

McGRATH J:

You are just picking it up from a matter of record that the Court of Appeal said?

MR GUNN:

Indeed, your Honour, yes. The next point that I thought would be useful just to touch on, if I may, your Honours, is the wider question that was raised at, a point earlier today, about whether in fact Greenpeace's objects were charitable or not, and your Honour the Chief Justice raised that question in terms of some of the wording which refers to promotion and the like. If I can take your Honours, again to the Court of Appeal decision and paragraph 8 of that decision, at page 14 of the case on appeal, volume A, the Court of Appeal noted at paragraph 8 that there was no dispute that, apart from the issues raised in connection with objects 2.2 and 2.7, all the rest of Greenpeace's objects met the definition of "charitable purpose under the Act". Now whether that's legally correct or not is something that this Court may wish to consider, and within the confines obviously of the question that was agreed to be before the Court, but –

ELIAS CJ:

Well I think what we would probably do is indicate that it was not suggested and we do not express any view on it. No one is inviting us to look at this, but for my own part, I would be uncomfortable about being co-opted into a determination that they are charitable.

MR GUNN:

And if I understand that point, your Honour, my purpose in drawing attention to paragraph 8 is simply to suggest that the Board, and previously the Commission, had not raised the concerns in question. They had in fact accepted that those other parts of the objects were charitable in terms of the Act and I'm not here today to take any different stance on that. As I say, the scope of the questions before the Court also is –

ELIAS CJ:

Does that mean, though, that the Board or Commissioner before it accepted that promotion of public interests is charitable more generally? Are there other examples?

MR GUNN:

If I may –

ELIAS CJ:

Because it might actually bear on the submission you make that it is only if ancillary to other charitable purposes, so that would be charitable.

GLAZEBROOK J:

Well that might just depend upon what, that I think the Board has a relatively narrow definition of advocacy, which is broader than the definition that was placed upon it by Mr Salmon, but...

MR GUNN:

Your Honour, you can hear obviously from my friend on those issues in reply but the essence of what the Commission decided at the outset, and if I can draw your Honours' attention in this regard to the case on appeal volume B, and at page 153, and this is the registration team's analysis but it does form part of the registration decision. At page 153 at paragraph 32, "The registration team considers that promoting the protection and preservation of nature and the environment," et cetera, is charitable, and I'm summarising, "Is charitable under the fourth head 'any other matter beneficial to the community' as it relates to the protection of the environment." And then at 2.3, 2.4 and 2.5, the registration team considered they were charitable under the advancement of education –

ELIAS CJ:

Sorry, I lost the reference to that, what volume?

MR GUNN:

My apologies, your Honour, it's the case on appeal, volume B and at page 153.

ELIAS CJ:

Yes, thank you.

MR GUNN:

And I'd taken your Honours I think to 2.2 being charitable as relating to the protection of the environment and then 2.3, 2.4 and 2.5 being considered to be charitable under the advancement of education, 2.1 they said was aspirational and clause 2.6 was ancillary, that was the Stichting reference that I think your Honour referred to earlier.

So I don't seek to make any more of that other than to say that is the basis on which the Commission, as it was, made those decisions.

GLAZEBROOK J:

What possibly is the issue, is that the 2.7 is the political side of it and the rest of them were seen as not being political because they were not related to the 2.7 in that very narrow sense.

MR GUNN:

That's right.

GLAZEBROOK J:

So it was probably assumed that 2.2 did not include the type of promotion that was dealt with in 2.7 which is, and if it did, then it would have to pass the ancillary test.

MR GUNN:

Yes, and the other problem about 2.2 as it then was, was –

GLAZEBROOK J:

Was the disarmament issue, yes.

MR GUNN:

Yes, exactly, yes. So I conclude my remarks on that point by saying that the Board has accepted that that's the position on the objects and doesn't seek to argue differently today, your Honour.

On the question of illegality, my written submissions are before the Court and I anticipate that I don't need to provide your Honours with anything more on the illegality question, unless your Honours had some question of me on that?

The final point then, your Honour, from the Board's perspective, is simply a summary of section 5(3) and whether or not it is an appropriate test. The first point is that it's a statutory test, and those are the submissions that the Court already has from on that point, that is the law of New Zealand, is my submission. My subsidiary points though, is that that section does not restrict freedom of expression, as I've said earlier, it simply limits tax advantages in the way that I have referred to in the submissions. Ancillary political purposes are allowed, and so charities up and down this country can go to select committee, talk to their local councils, do all those things, provided they are ancillary, and in support of their charitable purposes. And the other point is that organisations can structure themselves in such a way as to minimise the effect. There's a rather unpleasant, the "bifurcation" word I think is used in some of the litigation that there has been, but in this case, of course, Greenpeace has the Greenpeace Educational Trust, so it's possible for a trust or a entity to organise itself in such a way as to separate its charitable activities from its non-charitable activities. And the final point is that there is still scope for Courts to assess public benefit, and the law of charity on that certainly is not static, although it has to be consistent with and constrained by the provisions of the Charities Act as the Court of Appeal said.

Unless your Honours have any questions for me, those are my submissions.

ELIAS CJ:

Thank you, Mr Gunn. Yes, Mr Salmon.

MR SALMON:

Four brief points, and they are brief.

One is, just to come back on the point that my learned friend's just discussed with you as to whether you're being invited to look into any of those issues, and I agree with the Chief Justice's comments that that's probably going further than we need to. Can I note in that context, regards your Honour's identification of the word "promotion", the Charities Commission looks at quite a lot of material that none of us have taken you through when looking at this, and when it goes back it will again. That gives some shape to how those provisions are interpreted, and in that context I think the answer to Justice Glazebrook's question is, yes, they are being read by the Commission, and I think rightly, as meaning that to the extent there's any questionable advocacy, questionable on my friend's case, it comes in under 2.7 rather than under the word "promotion", So it's just to clarify that. But it's not anywhere this Court needs to go, and neither of us are asking you to, but it is an area where there's quite a lot more facts that the Commission would look at. And in a similar way, the Court of Appeal's treatment of the nuclear disarmament issue, which was half a day's good debate on similar issues that were raised very briefly today, is a matter that actually involved a fair bit of evidence about what the domestic and international treaty position is and the nuanced nature of Greenpeace's position, such that the Court of Appeal accepted it wasn't controversial. So that's the first point, agreed we don't need to go there.

The second one is just to come back on a point I didn't answer very well from Justice Glazebrook regarding the moral majority and the risks of tyranny by majority. I won't burden you with it, but I read in the *Picarda* excerpt in my casebook a specific and very pithy summary of why that concern can be put to one side. There's good and well-established law that says that majority opinions are to be ignored in the Courts. Assessment of public benefit, and if your Honour wished to look at that, that's at tab 21 of my casebook in the *Picarda* text on, paginated page 257.

GLAZEBROOK J:
I quite understand that, it's just that it seems when you start to then talk about contentiousness, that in fact that strays into what is not supposed to be there. Maybe the way to put it is that it is just not something that the courts can assess so it is not, it is not a matter of whether there is or there is not. It is a matter of it just not being justiciable at that stage.

MR SALMON:

Yes, that it has been appropriate for the court to posit an opinion perhaps and I understand your Honour's point that one starts blurring the boundaries if one talks in terms of controversiality which is why I have endeavoured to keep coming back to controversial in that very specific sense of something for the House, so to speak.

ELIAS CJ:

What is the reference?

MR SALMON:

It's the *Picarda* text at tab 21 and the page is page 15 of that article, under the heading, "Irrelevance of Public Opinion". And just noting that often what is charitable will, this is in a quote from, *Everywoman's Health Centre Society (1988) v MNR* [1992] 2 FC 52. part way down that page.

GLAZEBROOK J:

Oh sorry, I need to grab that reference again.

MR SALMON:

Tab 21, of my casebook, *The Law and Practices Relating to Charities*, edited by Hubert Picarda and page 15 of that text with the paginations 257. Some forms of charity will always precede public opinion while others will often offend it, etc. etc. We ignore the talkback radio of the day. So that was the second point. The third is to react I suppose to the difficulty identified in the exchange with my learned friend about what percentage of activity would make something more than ancillary and just to make this submission in reply. The difficulty of articulating what ancillary means, in a sense gives the answer to whether this was intended to codify something or really just to do what the section actually says in 5(3) which is to avoid doubt and it begins with the words, "To avoid doubt." And we both know that the select committee report saying it is there to give some reassurance to people. In my submission, to say to avoid doubt and then use the word ancillary without attempting to give such things as percentages, confirms that this section was always just to alleviate the concern.

ELIAS CJ:

Well it may be because it is so obvious, but it is to avoid the doubts that have been expressed but that isn't to say that it isn't an attempt to identify what the law is.

MR SALMON:

Yes, yes. But it may not be one that is attempting to change what the common law is which is where I was heading on this.

ELIAS CJ:

Right.

MR SALMON:

Justice Young said, "We may not be able to drill down deeper or be more fine grained about what ancillary means than the word itself." I think I heard him say that or someone said that. And I agree with that, there isn't a percentage that really makes sense; there is no particular number of man hours. The common law works reasonably well on that and probably will have to continue to do so in this section. I can't think of any substantive change to the law or qualification that would normally begin with the words, "To avoid doubt." Can be seen for what it was, in the select committee report which is comforting people that the ancillary test is not being legislated away implicitly by the rest of the Act. So to put it another way, the framers of this Act didn't even think they needed subsection 3, they are just avoiding doubt. And that leads me to my final point which is, if they have opted and I think this is the hardest point for my friend. If they have opted to somehow codify or lock in an advocacy prohibition, then they must have done it against an accepted meaning at the time and it must be respectfully, relatively narrow. My friend said I had struggled to point out an authority –

ELIAS CJ:

Sorry, the avoidance of doubt is related to the ancillary purpose.

MR SALMON:

Yes.

ELIAS CJ:

The example that is given is not expressed for the avoidance of doubt. It indicates some legislative assessment that advocacy is not, in itself, charitable.

MR SALMON:

Or wasn't at the time the Act was passed.

ELIAS CJ:

Yes, well I understand your point that it can't be ambulatory although I have some difficulty with that because it is a statute after all.

MR SALMON:

Well I think that is the biggest issue of the day with respect, so I will respond to you, talk to you on that if I may.

ELIAS CJ:

Yes.

MR SALMON:

The first point is, the primary purpose of the section must be the ancillary clarification to avoid doubt, that is the part that is not in brackets and it is the main thrust of the cause and that wording in the select committee report confirms that. So that is the primary purpose of the cause. If the words in brackets, for example, advocacy, were intended to codify advocacy, it is the worst codification one could imagine. Firstly and buried in brackets, in a bracketed example given, were others, if this is only one of a category. Also being codified and frozen forever because one would expect on an *ejusdem generis* basis perhaps there's more. Is that really how the legislature would do it? So, unlikely. If that's a Trojan horse for freezing whatever the law on advocacy was, it's a pretty hard one to pick up and also is in an Act where the other things that were being addressed were done in some detail, whether it's the observation and enforcement of mismanagement or, indeed, ancillary which was actually given something of a definition, because there is a definition section in this Act. But they didn't define advocacy. And respectfully I think that is a pointer that it wasn't intended to be a codification.

However, I accept that I need to confront, and this is my final point, the question, well, if it was codifying it, what was it, and my friend said I struggled to point to an authority on any particular way one way or the other. I don't accept that, and I think this is the hardest point for my friend. If this is a codification, and I do submit it's a clumsy one, then it's got to really have been adopting what was the New Zealand legal position on what was prohibited at the time, because one thing that is clear is this wasn't seeking to prohibit something new. That would've needed a definition. It was prohibiting something that was already not okay. And I think that much is clear at least. It's giving an example of something that was known.

And that's where I would come back and finish up on *Molloy* and *Collier.* Neither of those two cases go anywhere near as far as my friend does in answer to the questions, what sort of advocacy or political engagement would he say is prohibited? Neither of them did. Both of those New Zealand cases only go the distance that I've attempted to show the original *Bowman* prohibition went.

So if this is codifying something, all it's doing is codifying that narrow political advocacy in the contentious sense, however we might describe it in the pure narrow *Bowman* sense, and that is the only part it codified. And my friend can't have it both ways. If it's codifying, with respect, that is as far as it can possibly go and anything more than that is making law and is a change. So respectfully, there's nothing, my friend said I'm here asking you to change the law. Actually, the starting point is, even if this is codified, it's codifying the law as it was and this Court is not being asked to do anything more than the Court of Appeal already did in *Molloy*, which is to say the narrow *Bowman* rule applies.

Does that submission make sense, or have I put that too quickly?

ELIAS CJ:
No, I understand the submission, yes.

MR SALMON:
And those are all the points I have in reply, unless you have any questions?

ELIAS CJ:
Thank you very much. Thank you all counsel for your submissions in this matter, they've been very helpful and we will take time to consider our decision.

COURT ADJOURNS: 2.42 PM