"Parliament, We Don't Need No Stinking Parliament" – A Comment on *Sheldon Inwentash and Lynn Factor Charitable Foundation v The Queen*

SUNITA D. DOOBAY* AND DARCY L. MACPHERSON**

In an earlier case summary published elsewhere,[1] the authors explained the immediate concern of the Federal Court of Appeal in its decision in *Sheldon Inwentash and Lynn Factor Charitable Foundation v The Queen*.[2] In the case, the issue was whether a "public foundation" as defined by the *Income Tax Act*[3] should be allowed to have a single trustee. The Court, quite correctly in the view of the authors, concluded that it could not. Arguments as to why this is the correct interpretation are made in the earlier piece, and need not be repeated here.

However, there was a broader issue raised by the case that space constraints did not allow us to address in our earlier piece. One of the most interesting, and in the view of the authors, controversial, aspects of the judgment involves the decision of the Canada Revenue Agency to adopt as an "administrative policy" a measure which had been defeated in Parliament, and never adopted legislatively. This issue is raised by an observation in an *obiter dictum* made by Dawson JA in the following terms:

* TaxChambers LLP, Toronto

** Associate Professor, Faculty of Law, University of Manitoba

1 Sunita Doobay and Darcy L. MacPherson, "Can a Charitable Foundation With a Single Trustee Be Designated as a Public Foundation? – A Comment on *Sheldon Inwentash and Lynn Factor Charitable Foundation v The Queen*" (2012) 60(4) Can Tax J 917.

2 2012 FCA 136, 432 NR 338 [*Sheldon Inwentash*].

3 RSC 1985, c 1 (5th Supp) [the Act].

Bill C-33 "*Income Tax Amendments Act, 2006*" introduced legislative proposals to change the second requirement found in the definition of a public foundation. The proposed amended definition of "public foundation" (proposed definition) was:

> "public foundation", at a particular time, means a charitable foundation
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> (*a*) more than 50% of the directors, trustees, officers or like officials of which deal at arm's length with each other and with
>
> (i) each of the other directors, trustees, officers and like officials of the foundation,
> (ii) each person described by subparagraph (*b*)(i) or (ii), and
> (iii) each member of a group of persons (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 149(1)(*l*)) who do not deal with each other at arm's length, if the group would, if it were a person, be a person described by subparagraph (*b*)(i), and
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> (*b*) that is not, at the particular time, and would not at the particular time be, if the foundation were a corporation, controlled directly or indirectly in any manner whatever
>
> (i) by a person (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 49(1)(*l*)),
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> (A) who immediately after the particular time, has contributed to the foundation amounts that are, in total, greater than 50% of the capital of the foundation immediately after the particular time, and
> (B) who immediately after the person's last contribution at or before the particular time, had contributed to the foundation amounts that were, in total, greater than 50% of the capital of the foundation immediately after the making of that last contribution, or

> (ii) by a person, or by a group of persons that do not deal at arm's length with each other, if the person or any member of the group does not deal at arm's length with a person described in subparagraph (i).

> The proposed definition was not enacted. Notwithstanding, on July 11, 2007 the Canada Revenue Agency (CRA) issued a news release announcing that it was going to give effect to the proposed change to the definition of public foundation contained in Bill C-33 and administer charitable foundations on the basis of the proposed definition.
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> To date, the proposed definition has not been enacted, but the CRA continues to apply the control test set out in the proposed definition in its review of applications for registration and redesignation of charitable foundations.[4]

The current definition under the *Act* for what constitutes "control" of a charitable foundation is a "bright-line" test. This determination of "control" will affect the determination of whether or not the foundation is a "public" foundation. Back in 2006, the amendment had been proposed to add a more nuanced flavour to the definition of "control". The paragraphs drawn from the judgment of Dawson JA raise the question of whether a measure defeated in Parliament should be adopted administratively. To be fair to Dawson JA, she neatly sidesteps this issue. At paragraph 26 of her reasons, she writes:

> The parties [to the immediate dispute before the Court] agree that there is no material distinction between the arm's length requirement as set out in part (*a*)(i) of both the existing and proposed definition of "public foundation." I agree. It is therefore sufficient to confine my analysis to the current definition of "public foundation."

After reaching her conclusion with respect to the main ground of appeal, Dawson JA continues as follows:

> This conclusion makes it unnecessary to consider whether the appellant meets the second requirement of the proposed definition. I decline to consider this issue because the proposed definition may never come into force and the Minister did not rely on this ground when confirming the appellant's designation.[5]

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4 *Sheldon Inwentash, supra* note 2 at paras 8-10.

5 *Sheldon Inwentash, supra* note 2 at para 48.

In other words, Dawson JA specifically confines herself to commenting on any area where the CRA policy does not actually differ from the statutory language currently in place. Therefore, Dawson JA does not have to deal with the issue of the effect of the CRA policy. By the same reasoning, Dawson JA also avoids the second branch of the control test.

In the view of the authors, however, beyond the immediate dispute before the Court, this might not have been a blessing. The Court found as a fact that all financing for the foundation at issue came from a husband and wife (the two individuals after whom the foundation was named) and entities controlled by them.[6] To the authors, regardless of whether one adopts the bright-line test in the current section 149.1 of the Act,[7] or the broader definition provided in Bill C-33,[8] the result is the same. On the application of either test, it is clear to the authors that more than enough money was contributed to the Foundation by Inwentash, Factor, and related entities such that the Foundation would still likely not qualify for the designation of "public foundation" under the Act.[9]

In the view of the authors, the decision of the CRA to apply administratively the measure specifically not passed by Parliament is particularly worthy of comment. To be clear, however, we do not intend to make the argument that a more nuanced approach to control is not better than a more "bright-line" test. In fact, we agree that the more nuanced approach has merit. Rather, the question is more basic than this: If Parliament says no, can the administrative arm of the government (considered by most commentators to be part of the executive branch of government) come back and say yes? In the view of the authors, the answer to this most basic question is, and ought to be, in the negative.

The very fact that there will be confusion about which test to follow — the "bright line" test in the current version of the statute or the more nuanced version in the administrative "policy"— may deter charitable giving. After all, even in 1975, the capital of 15 large charities was over

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6 *Ibid* at para 4.

7 *Supra* note 3, s 149.1, *sv* "public foundation", subpara (a)(ii).

8 Bill C-33, *Income Tax Amendments Act, 2006*, 1st Sess, 39th Parl, 2006, s 149 [the Bill], amending s 149.1 of the Act, in particular, *sv* "public foundation", cl. (b)(i)(A).

9 *Supra* note 3.

$700,000,000.[10] For a more recent statistic, in 2010 the total assets of Canadian Private and Public Foundations are over $36 billion.[11] In other words, the charitable sector is huge. The current system of charitable foundations was originally developed to balance the fact that many sectors of importance require charitable giving in order to be viable[12] with the fact that some taxpayers were trying to exploit the tax system in a way that was abusive.[13] Because there is a balance involved, changing the system should be done with care. If there is significant uncertainty created as to the test for control, the willingness of Canadians to create and contribute to charitable foundations may be diminished. The very fact that the participants in the *Sheldon Inwentash* case were willing to argue all the way to the Court of Appeal shows that this can be an important factor to those who are contributing.[14]

Therefore, the issue of what constitutes "control" is an important one. This may explain why Parliament itself considered the issue of what the test ought to be. The measure did not proceed past first reading in the Senate. In the view of the authors, where the legislative branch has been presented with a legislative change, and expressly declines to continue with the change in the full legislative process, the administrative branch of government must respect this, and not use the measure that was not passed as the basis for an administrative policy.

Put another way, in the hierarchy of law-making, the Legislature remains supreme, subject only to constitutional considerations.[15] The

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10 More than 35 years ago, the federal government of the day itself acknowledged this in *Discussion Paper: The Tax Treatment of Charities* (Ottawa: Department of Finance, 1975) [Discussion Paper] at 5.

11 Philanthropic Foundations Canada, "Canadian Foundation Facts" (December 2011), online: Philanthropic Foundations Canada <http://pfc.ca/en/resources/canadian-foundation-facts/>.

12 Discussion Paper, *supra* note 10 at 5.

13 *Ibid* at 9.

14 As an aside, it is also worth noting that despite the size of charitable sector, the statutory and common law that directly addresses issues around the governance of charities is comparatively sparse. This may explain why a case as seemingly clear as *Sheldon Inwentash* did not arise until more than three decades after the current system of tax rules on the governance of charitable organizations was originally proposed.

15 In some sense, the legislative branch of government is in charge of the constitutional considerations as well. After all, the repatriation of the Canadian Constitution in 1982 means that generally, the federal Parliament and seven of the ten provincial

administrative structure supports the day-to-day operation of the law. But it should not be contrary to the decisions made by Parliament itself. In this case, Parliament itself debated and voted down the exact measure that the CRA is now going to implement as an administrative policy. Delegated legislation (such as regulations) must be consistent with the statutory authority granting the power to make such delegated legislation.[16] In the view of the authors, the same holds true for administrative authority granted under a statute. An administrative agency should not be able to do more by calling something a "policy" than by using other forms of delegated authority (such as regulations made by either an administrative agency or the Governor-in-Council). Similarly, having rejected the same measure, Parliament should not be required to write a specific law to confirm that rejection in order to ensure that an administrative agency will not do 'an end-run' around the will of Parliament.

Many decisions can and should be made at the administrative level. To the extent that the matter is properly an administrative one, specific empowerment by the legislative branch should be unnecessary. Where the government places the same matter directly before the legislature, and the legislature has spoken on the issue, in the view of the authors, the matter is no longer administrative. The Legislature is the highest arbiter of public policy in Canadian democracy. Where it chooses to speak, the matter should be viewed as sufficiently important that the will of Parliament ought to be respected. The administrative structure should not go against the will of Parliament. In this sense, if Parliament takes on an issue, its voice on the issue is definitive, insofar as the legislative and executive branches of government are concerned. Both of these branches of government receive their powers from statutory enactments, and are thus subject to direct Parliamentary control. Much of the judicial branch of government, on the other hand, draws its authority not from an ordinary

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legislature representing more than 50 percent of the population can alter the constitutional framework, *The Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 s 38. It is also important to remember that insofar as the rights guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I [*Charter*] to the *Constitution Act 1982* are subject to legislative override by what is referred to as the 'notwithstanding' clause. See *Charter*, s 33.

16 See e.g. Denys C Holland & John P McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 181-182.

statute, but rather from the Constitution itself.[17] The authors leave aside the issue of whether a decision of Parliament not to pass a particular measure could fetter the common law.[18] This should arise very infrequently, given that statutes and the common law should generally be read as being consistent with one another, whenever reasonably possible.[19]

The problem with the approach taken by the CRA to the question of control with respect to charitable foundations is that it provides a government with two proverbial bites at the apple. If the government of the day wishes to hedge its bets as to the passage of a particular measure, it places the measure in legislative form, often as part of a larger bill amending a current statute. If the bill passes, of course, there is no further difficulty. The statute is amended by the amending bill, and the law is clear. If the amending bill is not proceeded with, or is defeated in Parliament, the government of the day simply holds the measure in abeyance, and then subsequently introduces the measure as an administrative "interpretation" of the unamended statute. In either event, the measure becomes *de facto* law. But, in the second alternative, the

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17 Notably, the provincial superior courts are created or continued by virtue of s 96 of *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. Other courts (including the provincial and territorial courts, the Federal Court and the Supreme Court of Canada) are created by statute, and are therefore limited by the terms of their enabling statute to the jurisdiction provided therein. Nonetheless, there can be no doubt that some courts have inherent jurisdiction, not under the direct control of the legislative branch.

18 The initial reaction of the authors is that it cannot. The common law by definition develops on an incremental basis. On this point, see the judgment of Iacobucci J, speaking for the Court in *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299, (1992) 97 DLR (4th) 261. Given the incremental nature of the change that is supposed to be occurring, a wholesale change to the common law to adopt a measure that was rejected by Parliament seems, to the authors at least, to be exceptionally unlikely.

Even if this difficulty were to be overcome, the common law tends to develop on a case- by-case basis. Legislation, on the other hand, tends to develop as a response to a larger policy problem or concern, to be applied in a multitude of circumstances. Therefore, in the view of the authors, it would be unusual for a rule of the common law to be framed in the form of a statutory framework, such as, for example, the *Income Tax Amendments Act, 2006*. In the end, though, this point would require its own detailed analysis in order to arrive at a final and defensible resolution. Therefore, this issue will have to wait for another day.

19 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Toronto: LexisNexis Canada, 2008) at 482-483.

government of the day circumvents the need for Parliamentary approval at all. At the same time, if Parliament wishes to enforce its decision not to pass or proceed with the measure, Parliament would then have to pass the opposite measure, essentially being explicit that the measure is not the law. In the view of the authors, an explicit, positive disavowal of the measure is both unnecessary and unwise. It is unnecessary because the law is sufficiently adaptable to deal with this situation without an express disavowal. It is unwise, in the sense that it puts the executive branch of government into conflict with the legislative branch.

In the view of the authors, the legitimacy of a government relies at least in part on the fact that it can operate cohesively, within the constitutional structure as set out for the country.[20] Here, the government of the day decided that this was a matter for legislative attention. In the view of the authors, it remains such until the legislative branch itself says otherwise. There is no indication that Parliament empowered any other body to consider this issue. Therefore, it remains with Parliament. In the view of the authors, the policy of the CRA that implements the *Income Tax Amendments Act, 2006*[21] is on very shaky ground.

But, this leaves the question of whether there is any support for an approach similar to the one proposed here. In the view of the authors, such support exists. Ironically enough, it is found in the law applicable corporate by-laws, that is, corporate governance. Section 103 of the *Canada Business Corporations Act*[22] reads as follows:

> 103(1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.

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20 One can see an example of this in the related area of constitutional law. The related doctrines of both federal paramountcy and inter-jurisdictional immunity are designed to resolve issues of operational conflict between levels of government. On this point see the decision of Binnie and LeBel JJ, speaking for the majority of the Supreme Court of Canada in ***Canadian Western Bank v Alberta***, 2007 SCC 22 at para 4, [2007] 2 SCR 3. These doctrines resolve disputes between levels of government (that is, federal and provincial). The issue here is between different branches of the same level of government (that is, within the same jurisdiction). In the view of the authors, the latter (that is, the need for cohesiveness between branches) should be as important (and perhaps even more so) than the former.

21 *Supra* note 3.

22 RSC 1985, c C-44 [*CBCA*].

(2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.

(3) A by-law, or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.

(4) If a by-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

(5) A shareholder entitled to vote at an annual meeting of shareholders may, in accordance with section 137,[23] make a proposal to make, amend or repeal a by-law.

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[23] Generally, shareholders as such have very limited power to affect the operations of the corporation. On this point, see, for example, J. Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships and Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 254 [VanDuzer]. The main control mechanism exercised by shareholders is the right to elect the directors of the corporation. See VanDuzer at 254, and 258. Once the directors are elected, however, the shareholders, absent a unanimous shareholder agreement (as defined by the *CBCA*, s 146), do not possess the ability to instruct the directors as to what decisions need to be made. See *CBCA*, *ibid* s 102(1), and *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*, [1906] 2 Ch. 34 (CA). The case did not arise under the *CBCA*, or any statute modelled on its provisions. These statutes are known to have as their basis a statutory division of powers between the shareholders, directors and officers of the corporation. See VanDuzer at 94. In fact, the *Automatic Self-Cleansing Filter Syndicate Co Ltd* case arose in England, which uses a "contractrarian" model of incorporation. This means that the incorporating document is presumed to be a contract between the shareholders of the corporation. See VanDuzer at 93. However, as a matter of practice, the division of powers contractually agreed upon is often very close to (if not identical to) that prescribed by the statute in a statutory division of powers jurisdiction. Therefore, even though the *Automatic Self-Cleansing Filter Syndicate Co Ltd* case arose in a different jurisdiction, it still represents the law in Canada. See VanDuzer at 255.

Under the *CBCA*, the shareholders do have the right to remove directors. See *CBCA*, *ibid* s 109. The shareholders even have the right to requisition a meeting for this purpose. See *CBCA*, *ibid*, s 143. Generally, absent some very good reason, the directors cannot interfere with the meeting so requisitioned. On this point, see *Oppenheimer v United Grain Growers*, (1997) 120 Man R (2d) 281 at para 22, [1997] MJ 510 (Man QB), Steel J (as she then was).

Several points come out of this. First, the section provides a series of default rules, which may be changed in the constating documents[24] of the corporation. Second, there are, of necessity, two groups involved in the making of by-laws, that is, the directors and the shareholders. Third, where one group (the directors) acts, while waiting for the other group (the shareholder) to act, the measure is effective. Fourth, if the other group (the shareholders) wishes for the measure to remain effective, the next time that the group meets on an annual basis, they must confirm the by-law. Fifth, only one group has the final say, that is, the shareholders. Sixth, if the final say is in the negative, the other group (the directors) cannot re-adopt the same measure that has been disapproved, and have it be effective, without specific approval by the shareholders. One can see parallels to the division between the administrative and legislative branch of government.[25] If one group (the legislative branch) says no, the other group cannot affect change without its consent.

Section 137 deals with shareholder proposals. A shareholder proposal is a shareholder participation mechanism. On this point, see *Verdun v Toronto-Dominion Bank*, [1996] 3 SCR 550, 139 DLR (4th) 415, Iacobucci J, for the Court. Essentially, this allows the shareholders to make a non-binding recommendation to the board of directors as to how to proceed on an issue. For example, a proposal may indicate the desire of the shareholders to implement certain standards with respect to corporate governance issues. For an example of one such proposal, see *Michaud v National Bank of Canada*, [1997] RJQ 547 (SC), Rayle J. While the proposal cannot bind the board of directors to implement it, nor does it bind the corporation itself, the fact that shareholders may remove directors provides a reasonable incentive for the board to not dismiss a proposal passed by a majority of shareholder votes out of hand, out of fear of being dismissed as directors.

However, the point being made here is not restricted to proposals. Therefore, the rule which specifically deals with the ability of shareholders to suggest the creation, alteration or repeal of a by-law is not particularly relevant here.

24 The "constating documents" of a corporation include its articles of incorporation, by-laws, and any unanimous shareholder agreement, but not other *Duha Printers (Western) Ltd v Canada*, [1998] 1 SCR 795, 159 DLR (4th) 457, Iacobucci J for the Court.

25 It must be acknowledged that the analogy is not a perfect one. In the case of by-laws, it is clear that the formulation of the by-law rests solely with the directors. For example, in *Kelly v Electrical Construction Co* (1907), 16 OLR 232 (HCJ) at 238, (available on WL Can) Chief Justice Mulock of the Exchequer Division determined that the shareholders do not have the right to confirm by-laws that were not passed by the directors. Put another way, in general, under the *CBCA*, a shareholder cannot initiate the process of creating, amending or repealing a by-law. Rather, this process must first pass the directors of the corporation, and then be confirmed by the shareholders.

Therefore, having dealt with the specific issue that was raised, but avoided, in *Sheldon Inwentash*,[26] can we extrapolate a more general principle? In the view of the authors, we can. When formulating policy, where

(i) the matter *could* be dealt with administratively, according to the powers granted to an administrative agency by the legislative branch of government, and
(ii) the matter is considered and dealt with administratively, then
(iii) until the measure is successfully challenged on administrative law grounds, the administrative measure should be presumed to be valid.

However, if the policy decision is first made at the legislative level (whether Parliament or the provincial legislature), the result, positive or otherwise, is definitive. No second-order body (that is, a body that is subject to the direct control of the legislature) may adopt the identical measure that the legislative body has rejected. This approach is also consistent with the basic principle that in construing legislative enactments, the intention of the legislative body as expressed through the wording of the enactment is the primary determinant of meaning.[27] Presumptions (particularly rebuttable presumptions) are used in many statutory construction exercises.[28] The authors would suggest that this would be an appropriate place for two presumptions as follows: "Where a

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Even s 103(5) does not alter this reality. Even though *Kelly v Electrical Construction Co* arose under a different model of incorporating statute (in this case, a letters patent system, requiring, among other things, specific government approval for the creation of the corporation, which is not required in a jurisdiction employing a statutory division of powers) than the CBCA, this nonetheless represents the law in Canada. See VanDuzer, *supra* note 23 at 255.

As mentioned, *supra* note 23, a shareholder proposal, even if passed by the majority of the shareholders of the corporation, binds neither the directors to carry it into effect, nor the corporation itself. Therefore, the directors must act first, and the shareholder must act second. As explained in more detail elsewhere in this paper, the hierarchy is not so rigid in the legislative process. Either the administrative arm or the legislative arm of government may act. But, the administrative arm may never contradict the legislative arm.

[26] *Supra* note 2.

[27] Sullivan, *supra* note 19 at 1, and 116-121.

[28] *Ibid* at 476.

particular measure has been placed before a legislature and subsequently not passed:

> (i) it is presumed that the legislative body has reserved the issue to itself for discussion as a policy matter; and
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> (ii) no general power (to make regulations, policy, or otherwise) of any administrative or other regulatory body under the control of the legislature at issue is intended to be given the power to implement the measure specifically not passed"

The presumptions are separate, and in our view, with good reason. The first presumption deals with the level of government at which the broad policy issue should be considered. It does not deal with the exact wording of the particular measure not passed. It is instead a warning to lower bodies to ask the following question: "Does the measure at issue show that the legislative body intends to resolve policy concerns around the issue at the legislative level?" If the answer to this question is in the affirmative,[29] then the court engaged in construing the grant of authority to the administrative or regulatory body should construe that authority in such a way that the administrative or regulatory body will not impinge on the legislative body's discussion.

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[29] There are circumstances where the rejection of the bill in which a measure is embodied may not lead the court to the conclusion that Parliament meant to disavow the measure. One example that springs to mind is where the bill in which a measure is embodied is a large omnibus bill, covering many topics (one or more of which is highly contentious), and the measure is a relatively uncontroversial or technical one that all sides to the dispute agree would have been passed, but for its inclusion within the particular bill.

However, on the other hand, in recent years much has been of the increasing propensity of many governments (of different political stripes) to use very large omnibus legislation to pass widely variant policy measures. There would certainly be a portion of the population that would argue this practice to be less democratic than the use of smaller bills, on more confined subjects. This option would allow more certainty as to the intention of a legislative body in its rejection of the bill. Put another way, when the government of the day decides to amend large and disparate areas of law in a single enactment, it runs the risk of the presumptions offered here might apply. As a result, these presumptions encourage government to place controversial pieces of legislation in their own stand-alone bills. This way, if the bill is voted down, it would be clearer what the legislative body is rejecting. This in and of itself will provide more guidance to the courts when engaged in statutory construction exercises. If only for this reason, the authors argue that the presumptions offered here have significant merit.

The second presumption deals more specifically with the measure not passed by the legislative body. Legislative supremacy says that the legislature has made a decision. Whether that decision is expressed in statutory language that is adopted by the legislature, or alternatively, the legislature specifically refuses the opportunity to adopt the opposite statutory language, the result for the administrative arm of government is the same. While the form of the expression is always relevant, surely, it is still the substance of the decision of the legislature that matters more. In the view of the authors, the presumptions offered here are the full siblings of the presumption that a different pattern of expression implies a different interpretation.[30] In other words, the measure rejected by the legislative body will certainly be expressed differently than the current law. Otherwise, an amendment of the Act would, by definition, be unnecessary. Therefore, since the two (the current, unamended statute, on the one hand, and the administrative policy adopting the rejected measure) are in different words, they must be interpreted to mean different things. Therefore, the administrative body is not simply "clarifying" the statute; it is altering it. Clearly, the statute governs over the lower-level policy, and the administrative should be under an obligation to remove the policy, as it creates uncertainty in the law. If the administrative body refuses to do so, the Court has the tools to construe the Act to provide clarity, and thus, certainty to those who seek to use the Act to achieve the desired results of charitable giving.

Of course, this still leaves open the possibility that the legislative body will choose to later adopt the measure that it previously rejected. An administrative body is bound by the previous decisions of its legislative overseer. But, generally, future legislators are not bound to leave the decisions of its predecessors untouched. Parliamentary supremacy remains. If Parliament believes in the more nuanced approach to "control" for charitable foundations, it still has the power to change the statutory language to implement this approach. But it must act to do so, rather than trying to do through the proverbial back door that which cannot be done through the front door.

In the end, therefore, the authors believe that where a policy measure is placed before, and specifically not passed at, the legislative level of government, administrative "policy" should not be effective to implement

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30 Sullivan, *supra* note 19 at 216 - 218.

the same measure. Whether one deals with this issue through presumptions of statutory construction, or otherwise, the *Sheldon Inwentash* case raises an issue that should be dealt with by the courts to ensure that administrative "policy" is never used to displace the decision of a legislative body, even when that decision is expressed through the rejection of a measure by the legislature. The authors believe that the law can resolve this issue through current jurisprudence, and using techniques very similar to those already recognized in the rules of statutory construction.