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**MEASURING COMPARATIVE WORTHINESS:
STRIATION OF CHARITIES IN CANADA**

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“At this festive season of the year, Mr. Scrooge,” said the gentleman, taking up a pen, “it is more than usually desirable that we should make some slight provision for the Poor and Destitute, who suffer greatly at the present time. Many thousands are in want of common necessities; hundreds of thousands are in want of common comforts, sir. ... a few of us are endeavouring to raise a fund to buy the Poor some meat and drink and means of warmth. We choose this time, because it is a time, of all others, when Want is keenly felt, and Abundance rejoices. What shall I put you down for?”¹

Charles Dickens, *A Christmas Carol*

A. ARE ALL CHARITIES CREATED EQUAL?

The global financial crisis since 2007 is considered to be the worst since the Great Depression. It has led to the failure of numerous financial institutions and businesses, widespread unemployment, decline in consumption and investments, weakening of the world economy and collapse of the housing market. Governments, businesses and organizations have all implemented solutions to lessen the impact of the crisis.² In the midst of the economic downturn, relieving poverty has become more important than ever

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¹ Charles Dickens, *A Christmas Carol*, 1843 (online: <http://www.literature.org/authors/dickens-charles/christmas-carol/chapter-01.html>).

² “Reuters: Timeline of Crisis”, Reuters, accessed October 7, 2009. (online: <http://widerimage.reuters.com/timesofcrisis/>) . See also “Economic Crisis in a Globalized World,” PBS Wide Angel, November 21, 2008. (online: <http://www.pbs.org/wnet/wideangle/uncategorized/how-global-is-the-crisis/3543/#>).

before.³ Furthermore, in recent years, the government has become increasingly reliant on charities to help people in hardship, such as food banks, soup kitchens, temporary shelters, etc.⁴

In a survey conducted by Ipsos Reid on behalf of World Vision Canada in July and November 2008, a majority of Canadians surveyed planned to tighten their belts on gift shopping and entertainment in December 2008, but 82% indicated that they would give as much or more to charities as they had in the past, in part because they realized that the poor needed their help even more. They also indicated in the survey that “in this time of a global economic downturn, people in developing countries need even more of our help to keep the basic necessities of life.”⁵ The Alberta Council for Global Cooperation, in partnership with the Wild Rose Foundation and Angus Reid Strategies, conducted an Alberta-wide and a Canada-wide survey in March 2009 on the public perceptions of global poverty and the role that Albertans and Canadians play in addressing this issue. The survey results indicate that global poverty is a very pressing issue, and that 89% of Canadians believe that Canada should address global poverty, with 60% placing the importance of addressing local poverty as a first priority.⁶

In light of the importance of poverty relief during the current economic downturn, and the attitude of the public toward the need to relieve poverty as revealed by the surveys, this paper examines the questions of whether activities directed at relieving

³ Dennis Howlett, “Poverty issue even more important in times of economic crisis” *Make Poverty History Blog* October 10, 2008 (online: <http://www.makepovertyhistory.ca/en/blog/poverty-issue-even-more-important-times-economic-crisis>).

⁴ Christine Saulnier, “Poverty-reduction plan smart economics”, Canadian Centre for Policy Alternatives, November 25, 2008 (online: <http://www.policyalternatives.ca/editorials/2008/11/editorial2023/>).

⁵ “No humbug here: Economic slump won’t deter Canadians from donating” World Vision Canada, November 17, 2008, (online: <http://www.worldvision.ca/About-Us/Newsroom/press-releases/Pages/economic-slump-wont-deter-canadians-from-donating.aspx>).

⁶ See website for Alberta Council for Global Cooperation at http://acgc.ca/pages.php?section_name=projectdescript, http://acgc.ca/_docs/Fact%20Sheet%20-%20Poll%20Results.pdf and http://acgc.ca/pages.php?section_name=globalpoverty.

poverty or benefiting the poor should be treated as more worthy than other types of charitable activity; and whether all charities (such as hospitals, universities, museums, and operas, etc.) should be required to provide at least some of their services for the poor free of charge or at low cost. In other words, should there be an interest not only in *what* a charity spends on, but also about *whom* the charity spends on?

These questions must be reviewed in the context of the legal definition of charity expressed by the House of Lords in *Special Commissioners of Income Tax v. Pemsel*,⁷ which has been adopted by the courts in Canada. In this regard, the House of Lords set out four heads within which all charities must fall: namely relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community. As a result of the multiplicity of charitable purposes that may exist in the framework of *Pemsel*, one might ask whether some charities in Canada may be considered to be more worthy than others, and if so, how one might measure the comparative worthiness of such charities. While there has been considerable scholarly interest in the overall adequacy of the *Pemsel* classification in modern times, this paper reviews why there appears to be little interest or debate regarding whether certain types of charity may be more worthy than others.

In this regard, the *Pemsel* classification in Canadian law creates a *prima facie* equality between all purposes and related activities that are held to be charitable at law. However, despite this presumption of the equality of charities, the regulation and administration of charities in Canada under both federal and provincial legislation have, to a certain, extent created a striation of charities in a number of respects and thereby creating shades of virtue within the charitable sector in Canada. Government policy that shapes the regulation and administration of charities can therefore provide indicia of how Canadians tend to measure the comparative worthiness of their charities. To this end, this paper attempts to identify and explain some of the sources of striation.

⁷ [1891] A.C. 531 (H.L.) [*Pemsel*].

B. EQUALITY IN THE WORTHINESS OF CANADIAN CHARITIES: A CAUSE AGNOSTIC SYSTEM

It has been pointed out that the Canadian tax system regulating charities is “cause agnostic” because the Canadian *Income Tax Act*⁸ generally treats donations to “all causes within the charitable sector equally for tax purposes” so that a donation to a church in Flin Flon, Manitoba, receives the same tax treatment as a donation to a university in Montreal.⁹ This section of the paper reviews whether activities directed at relieving poverty or benefiting the poor should be treated as more worthy than other types of charitable activity in Canada.

1. The Pemsel Definition of Charity

In accordance with English common law, the legal concept of “charity” in Canada can be traced back to the enactment of the *Statute of Elizabeth* in 1601,¹⁰ which preamble listed numerous purposes that would assist in the statute’s objective of reforming the law of uses, being an early form of trusts. Although it has been suggested that “[t]he purpose of the preamble was to illustrate charitable purposes rather than to draw up an exhaustive definition of charity”,¹¹ the courts have traditionally used this extensive preamble to assist in defining “charity” and classifying what would be “charitable.”

The *Pemsel* decision is considered to be the leading case in establishing a legal definition of charity. Lord Pemsel, the plaintiff in this case, was a treasurer of the

⁸ R.S.C. 1985, c. 1 (5th Supp.).

⁹ Malcolm D. Burrows, “Charitable Tax Incentives in Canada: Overview and Opportunities for Expansion” *The Philanthropist* 22:1 (2009) 3 at 13.

¹⁰ (1601) 43 Eliz. 1 c. 4. Also known as the *Charitable Uses Act* or the *Statute of Uses*. The preamble of the *Statute of Elizabeth* lists the following purposes as being charitable: The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poorer maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

¹¹ Hubert Picarda, *Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) at 72.

Moravian Church who sued the Income Tax Commissioners on behalf of the church for having denied the church a property tax rebate that was normally given to charities. The main issue at trial was whether the Moravian Church, the stated purpose of which was to maintain, support and advance missionary establishments among heathen nations, could be considered a charitable trust.¹² At first instance, the court rejected Pemsel's application and found that the purposes of the Moravian Church were not charitable as they were not solely directed towards the relief of poverty. This decision was reversed on appeal, and was further appealed by the Tax Commissioners to the House of Lords. Lord Macnaghten, on behalf of the House of Lords, rejected the notion that relief of poverty is the only valid charitable object and acknowledged that advancement of religion can take various practical forms, including the zealous missionary work undertaken by the Moravians. The court set out the legal definition of charity in following passage from the judgement:

How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trust for other purposes beneficial to the community, not falling under any of the preceding heads.¹³

From a common law standpoint, the acceptance of *Pemsel* as a precedent in Canada established the legal definition for charity to be broader than any one particular type of charitable purpose, and in particular broader than simply the relief of poverty. Although there is some concern over the judicial interpretation of the fourth head of charity, being other purposes beneficial to the community, the fourth head theoretically provides a completely open-ended classification system for the inclusion of purposes that do not relate to poverty, education or religion. This common law definition is vital to the Canadian charitable sector because there is no statutory definition to explain the terms

¹² [*Pemsel*], as explained by Kathryn Bromley, "The Definition of Religion in Charity Law in the Age of Fundamental Human Rights", *Advancing The Faith In Modern Society* (Canadian Council of Christian Charities, 2000); also presented at the Canadian Bar Association – Continuing Legal Education Program, October 27, 2000.

¹³ *Ibid.* at 583 per Lord Macnaghten.

“charity” or “charitable” in the *Income Tax Act*, which is the primary regulatory mechanism for charities. Although the Canadian constitution¹⁴ establishes that charities are the jurisdiction of the provinces, the federal government exercises primary *de facto* jurisdiction because of its administration of the *Income Tax Act*.

As early as 1952, the Supreme Court of Canada effectively adopted the *Pemsel* definition in *Dames du Bon Pasteur v. R.*,¹⁵ in which the Court referred to Lord Macnaghten’s approach in defining charity as a legal term.¹⁶ The Court referenced the *Statute of Elizabeth* and, without citing *Pemsel*, outlined very similar four heads of charity:

A charity or charitable society is, I should say, one whose purposes are those described in the preamble to the statute 43 Eliz. c. 4 or purposes analogous to them. They can be classified generally, as *for the advancement of religion, for the relief of poverty, for the promotion of education, and for other purposes bearing a public interest...*¹⁷ [emphasis added]

In 1967, the *Pemsel* definition of charity was expressly adopted by the Supreme Court of Canada in *Towle Estate v. Minister of National Revenue*.¹⁸ After quoting Lord Macnaghten’s explanation of the four heads of charity, the Supreme Court of Canada explained that “[t]his definition has received general acceptance in this country.”¹⁹ This has been reaffirmed more recently in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*,²⁰ where the Supreme Court of Canada stated that “the starting point for the determination of whether a purpose is charitable has, for more

¹⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1984, App. II, No. 5.

¹⁵ [1952] 2 S.C.R. 76.

¹⁶ *Ibid.* at para. 13.

¹⁷ *Ibid.* at para. 26.

¹⁸ [1967] S.C.R. 133 at para. 5.

¹⁹ *Ibid.*

²⁰ [1999] 1 S.C.R. 10 [*Vancouver Society*].

than a century, been Lord Macnaghten's classification, set out in [*Pemsel*]... of the purposes of the common law had come to recognize as charitable."²¹

While there is no doubt that the *Pemsel* definition is firmly entrenched in the Canadian legal landscape, it has clearly been the subject of considerable scholarly scrutiny.²² Discussion generally gravitates towards whether the existing classification is adequate given the change and development in Canadian law and social values, and it is often advocated that Canada needs a broader or different method of classification to appropriately define charity in the modern Canadian context.²³ The Supreme Court of Canada recognized in *Vancouver Society* that the legal definition of charity was "an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts"²⁴ but clearly stating that the source of reform had to come from the legislature and not the judiciary:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. ...in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary

²¹ *Ibid.* at para. 144.

²² See, for example, Part II of Jim Phillips, Bruce Chapman & David Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2001). See also Ontario Law Reform Commission, *Report on the Law of Charities* (Queen's Printer for Ontario, 1989) ["OLRC"].

²³ See, for example, Deborah J. Lewis, "A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education" (2000), 25 *Queen's L.J.* 679. For a specific case study, see Kathryn Chan, "Charitable according to whom? The clash between Quebec's societal values and the law governing the registration of charities" (2008), 49 *C. de D.* 277. The author of the latter article examines the province of Quebec's longstanding commitment to three particular societal values: the advancement of the French language and Quebec culture, the encouragement of interculturalism, and the promotion of secularism, none of which are recognized as being charitable at common law.

²⁴ *Supra* note 20 at para. 149, quoting *Human Life International In Canada Inc. v. Minister of National Revenue*, [1998] 3 *F.C.* 202 at 214.

to keep the common law in step with the dynamic and evolving fabric of our society.²⁵

Similarly, in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*,²⁶, the Supreme Court of Canada upheld the Federal Court of Appeal's decision that the promotion of the sport of soccer is not charitable and therefore the appellant did not qualify for registration as a registered charity under the *Income Tax Act*. The Court confirmed the application of existing common law with respect to the determination of what is charitable in the context of sports organizations, and that the recognition of an organization, such as the appellant, would result in a significant change to the common law beyond the incremental changes mandated by the jurisprudence and would be best left to Parliament.²⁷

2. Charity or Philanthropy?

Despite the acceptance of the *Pemsel* definition of charity in Canada, the question remains whether activities directed at relieving poverty or benefiting the poor should be treated as more worthy than other types of charitable activity.

It has been noted that a divergence may exist between what is *legally* considered to be charity and what is *popularly* considered to be charity. In this regard, the popular conceptualization of charity tends to focus on assisting the poor and on relieving poverty.²⁸ As well, poverty-related issues are listed first in both the *Statute of Elizabeth* and in *Pemsel*, and as such one might suggest that this emphasizes the relative importance of assisting the poor.

²⁵ *Ibid.* at para. 150, quoting *R. v. Salituro*, [1991] 3 S.C.R. 654 at para. 39.

²⁶ 2007 SCC 42.

²⁷ Karen Cooper, "Supreme Court Of Canada Confirms the Common Law with respect to Charity and Sports Organizations," *Charity Law Bulletin* No. 126, October 17, 2007 (online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb126.pdf>). See also Adam Parachin, "Unravelling the Definition of Charity: fiscal objectives shouldn't govern the granting of charitable status", *Lawyers Weekly* (March 6, 2009). (online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=869>).

²⁸ Sheila Nemet-Brown and Don Bourgeois, *Halsbury's Laws of Canada*, 1st Ed (Markham: LexisNexis, 2008) at 194.

However, the existence of this dichotomy is not a novel issue in Canada, and is aptly encapsulated in an exchange of two articles published in 1989 and 1990. The issue of a “strict” definition of charity was raised in an article by James T. Bennett and Thomas J. DiLorenzo, suggesting that “charities” should be limited to poverty-relief charities:

Apart from the special economic advantages enjoyed by nonprofits, there is a bias toward nonprofit organizations in general, arising from their *pro bono publico* (for the good of the public) image. Although the halo of selfless charity surrounds nonprofit status, few private nonprofits are, in fact, “charitable” in the strict sense. Charities assist the poor, the handicapped, the unemployed, the hungry, the homeless, and the less fortunate in society, but only 10 per cent of private nonprofits do that. Many organizations with “charitable” tax status serve primarily the wealthy and middle classes, operate institutions such as Harvard University or the Music Center of Los Angeles County, or exist to promote public awareness of issues.²⁹

As a counterpoint to this article, a subsequent article by Mark Hughes responded to this “strict” definition of charity, indicating that charity means much more than simply giving alms to the poor:

[The authors of the first article have] enlisted an arbitrarily restrictive definition of charitable purpose which panders to their argument. In their vocabulary, “charity” is synonymous with giving alms to the poor. Charity, however, means much more than this. Some common synonyms are: benevolence, good will, kindness, and liberality. In any Bible concordance charity is always first listed as love. It has been described as “that disposition of heart which inclines men to think favourably towards their fellow men, and to do good”.

...

²⁹ James T. Bennett and Thomas J. DiLorenzo, “Commercial Nonprofit Enterprises in the United States: The Phenomenon of Unfair Competition” *The Philanthropist* 8:3 (1989), 51 at 52.

Moreover, the common law definition of charitable purpose has never been restricted to alms giving. Historically, the common law has defined purposes to be charitable if they somehow serve the “public benefit”.³⁰

This is echoed in a recent affirmation by Pope Benedict XVI that Christian charitable action “is not just philanthropic action” but goes beyond material aid. He added that charity involves “loving support offered to others” which is “translated into participation and sharing with the weakest and the marginalized.”³¹

These two contrasting perspectives were implicitly recognized by the Ontario Law Reform Commission, which conducted a thorough examination of the meaning and definition of charity in its 1996 *Report on the Law of Charities*.³² In doing so, the Commission explained that it had identified two distinct concepts of “charity” and “philanthropy” within the law of charities:

“Charity”, in its main connotation, signifies acts of kindness and consideration that demonstrate concern for the poor and needy; “philanthropy” signifies acts of generosity that demonstrate regard for the achievements of human kind in general. The first conception emphasizes feelings of empathy for people in emotional, economic, or physical distress; the latter is moved by respect for the higher endeavours of humanity, such as the sciences, philosophy, the arts, and sports. The abstraction uniting these two terms is that they are both concerned with (1) good (2) others. The structure and content of “charity” and “philanthropy” in these senses are, at this level of abstraction, the same. The differences lie at a deeper level: in the identification of the beneficiaries or the clientele of each (the disadvantaged versus the National Ballet, for example); in the types of human well-being pursued (economic and social capacity versus aesthetic and intellectual capacity, for example); and in the emotions

³⁰ Mark D. Hughes, “A Response to “Commercial Nonprofit Enterprises in the United States: The Phenomenon of Unfair Competition” and *Unfair Competition: The Profits of Nonprofit*” *The Philanthropist* 9:3 (1990), 43 at 47-48.

³¹ Pope: Charity is More than Philanthropy,” *Zenit*, April 3, 2009 (online: <http://www.zenit.org/article-25560?l=english>).

³² OLRC, *supra* note 22.

associated with each (concern for the poor versus respect for the achievements of science, for example).³³

...

Nonetheless, there are degrees of need and degrees of deprivation of the means to live a fulfilling life. “Charity” in the narrow sense identifies the most wanting end of the continuum, “philanthropy”, the least. The critical observation is that what seemed to be a difference in kind is now seen as only a difference in degree. Perhaps this explains the law’s wisdom in its more inclusive use of “charity”.³⁴

At the heart of these observations is recognition that there is a wide spectrum of pursuits that may be encompassed by the general concept of altruism. More importantly, the Commission places the concepts of charity and philanthropy along a continuum, which might be used to provide a theoretical framework for measuring the comparative worthiness of charities, depending on whether one believes charity is more important than philanthropy, or *vice versa*. However, the Commission expressed caution in using this distinction as the basis of a statutory definition of charity:

...there is a noticeable difference between two types of charitable activity: one designating acts motivated by a desire to help the poor; the other designating acts motivated by a desire to advance human achievement or quality of life. It may or may not be advisable, for reasons of social policy, for instance, to favour the former over the latter (with a larger tax subsidy or a less severe restriction on political activity, for example). The possibility of drawing a distinction suggests that doing so in a statute is at least feasible. The nature of the distinction, however, which we characterize more as a matter of degree than as a matter of kind ...³⁵.

The Commission’s statement therefore outlines the challenges in drawing a sharp legal division between the two forms of charitable activity, and the basis of the Commission’s report is that any legal definition should be broad enough to encompass

³³ *Ibid.* at c. 6-2(a).

³⁴ *Ibid.* at c. 6-2(b).

³⁵ *Ibid.* at c. 6-4(1).

both forms and that “charity” is used by the law to express both meanings.³⁶ However, the Commission also implies that other mechanisms, such as tax policy, could be used as a practical means to promote one more than the other.

While it may be constructive to understand the philosophical dichotomy within the definition of charity, as well as the movement in Canada to modernize the definition of charity, what remains indisputable in Canada is the present acceptance of *Pemsel* as a legal definition and method of classification, which remains the basis for the regulation and administration of charities. Rightly or wrongly, the adherence to the legal definition is such that the Federal Court of Appeal held in *Everywoman’s Health Centre Society (1988) v. Minister of National Revenue* that unfavourable public opinion and an absence of public policy are not sufficient reasons for denying a purpose from being charitable at law.³⁷

It is one thing to act in a way which offends public policy; it is a totally different thing to act in a way which is not reflected in any, adverse or favourable, public policy. An activity simply cannot be held to be contrary to public policy where, admittedly, no such policy exists. It would impose an unbearable burden on those who apply for charity registration to require that there be a clear public policy approving of their activities.

...

To define “charity” through public consensus would be a most imprudent thing to do. Charity and public opinion do not always go hand in hand; some forms of charity will often precede public opinion, while others will often offend it. Courts are not well equipped to assess public consensus, which is a fragile and volatile concept. The determination of the charitable character of an activity should not become a battle between pollsters. Courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.³⁸

³⁶ *Ibid.* at 6-2(a).

³⁷ [1992] 2 F.C. 52 [*Everywoman’s Health Centre*].

³⁸ *Ibid.* at paras. 15-16.

In other words, provided that a court decides that a purpose is charitable at law, there is no requirement or expectation that a charitable purpose must be supported by either official policy or public opinion.

Therefore, the popular conceptualization of charity focussing on assisting the poor and on relieving poverty³⁹ and the apparent importance of poverty issues during an economic downturn, should not form the basis for treating activities directed at relieving poverty or benefiting the poor as more worthy than other types of charitable activity. One is reminded of the judgment by the House of Lords in *Pemsel* that the fourth head of charity is “not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.”⁴⁰ This statement clearly negated the narrow view of the definition of charity expressed by the Crown’s counsel who argued in the case that “[c]harity implies the relief of poverty and that there must be in the mind of the donor an intention to relieve poverty.”⁴¹

3. Public Benefit and Charging Fees

Having concluded that activities directed at relieving poverty or benefiting the poor should not be treated as more worthy than other types of charitable activity, should all charities (such as hospitals, universities, museums, and operas, etc.) be required to provide at least some of their services for the poor free of charge or at low cost?

To be charitable at common law, an organization must not only engage in activities that are intended to achieve its charitable purpose, but such activities must also result in a benefit to the public, or a sufficient section of it. This is commonly referred to as the requirement for public benefit, and is a discrete concept applicable to charitable

³⁹ *Supra* note 28 at 194.

⁴⁰ *Pemsel*, *supra* note 7 at 583 per Lord Macnaghten.

⁴¹ *Ibid.* at FN 4 per Sir E. Clarke S.G. and Dicey Q.C.

purposes in general, not to be confused with the fourth head of charity, being “other purposes beneficial to the community.”

First, the fourth head of charities focuses on *what* would be provided by a charity and can usually only be determined by finding an analogy to other accepted charitable purposes; while the broader public benefit test centers on *who* would benefit from the charity. Second, all charities must meet the public benefit test by being established for the benefit of the public or a sufficient segment of the public.⁴² This consists of two parts, namely, a tangible benefit must be conferred, directly or indirectly, and the benefit must have a public character.

The origin of the public benefit requirement in Canada is clearly found in *Towle Estate*, where the Supreme Court of Canada not only expressly adopted the *Pemsel* definition, but additionally, stated that those purposes were “subject to the consideration that in order to qualify as ‘charitable’ the purposes must... be ‘[f]or the benefit of the community or of an appreciably important class of the community’.”⁴³ The separate requirement of public benefit was clearly explained in *Vancouver Society*:

The difference between the [*Pemsel*] classification and this additional notion of being “for the benefit of the community” is perhaps best understood in the following terms. The requirement of being “for the benefit of the community” is a necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable. However, even if it is present the court must still ask whether the purpose in question has... the “generic character” of charity. This character is discerned by perceiving an analogy with those purposes already found to be charitable at common law, and which are classified for convenience in [*Pemsel*]. The difference is also often one of focus: *the four heads of charity concern what is being provided while the “for the benefit of the community” requirement more often centers on who is the recipient.*⁴⁴ [emphasis added]

⁴² *McGovern v. A.G.*, [1981] 3 All E.R. 493.

⁴³ *Supra* note 18 at para. 5.

⁴⁴ *Supra* note 20 at para. 148.

Canada Revenue Agency (“CRA”), in applying the public benefit requirement, has enunciated a number of principles.⁴⁵ For the purposes of discussing equality and comparative worthiness in the charitable sector, there are two particularly relevant principles – the organization cannot restrict delivery of the benefits to a certain group or class of persons without adequate justification; and the organization cannot charge fees for its services where the effect of the charge would be to unduly exclude members of the public.⁴⁶

Therefore, instead of focusing on providing preferential treatment to charities that relieve poverty, there is a general requirement on all charities to confer a tangible benefit, directly or indirectly, to a significant segment of the public. In the delivery of charitable programs that meet the public benefit test, charities are permitted to charge reasonable fees. It is expressly acknowledged by CRA that many charities do charge fees, such as museums, arts organizations, and some religious institutions, and that the charging of fees does not inherently mean that the public benefit requirement is not satisfied.⁴⁷ Instead, CRA outlines a number of criteria that should be taken into account when assessing whether the fees are incompatible with the public benefit requirement:

- Charges should be reasonable in the circumstances and should typically aim at cost recovery.
- Exceptionally, charges may, if appropriate to the overall purposes of the charity, be set at a rate that generates a surplus to help fund the organization's charitable programs and activities for the benefit of the public.
- Any charge should not be set at a level that deters or excludes a substantial proportion of those served by the charity.

⁴⁵ Canada Revenue Agency, “Guidelines for Registering a Charity: Meeting the Public Benefit Test” CPS-024, March 10, 2006 (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-024-eng.html>).

⁴⁶ *Ibid.* at s. 2.0.

⁴⁷ *Ibid.* at s. 3.2.5.

- The service provided should not in practice cater only to those who are financially well-off — it should be open to all potential beneficiaries.
- It should be clear that there is a sufficient general benefit to the community, directly or indirectly, from the existence of the service.⁴⁸

The issue of fees is also discussed in CRA’s policy regarding charities and their operation of businesses, which are generally not considered to be charitable programs.⁴⁹ The policy provides some additional indicia of what would constitute acceptable fees in the context of a charity’s programs as follows:

- The program does not offer services comparable to those otherwise available in the marketplace.
- The fees are set according to a charitable objective as opposed to a market objective. For example, they are designed to relieve poverty by being set in accordance with the users’ means, or to promote broad public participation in an educational program, such as waiving admission charges to an art exhibit.⁵⁰

In light of these various considerations, it is not exactly clear how much flexibility exists in assessing the acceptability of fees. For example, how should the level of exclusion be measured (e.g. by average household income)? If a charity sets the level of its fees only on a cost-recovery basis, but this amount is still clearly beyond the means of many potential beneficiaries, would it be required that the fees be reduced to being below the cost-recovery level? In those circumstances, would the charity be required to subsidize those fees with its own financial resources?

Canadian judicial consideration of the issue of fees has been scarce, but it may still provide some measure of clarification. The subject of a charity charging fees was addressed in *Everywoman’s Health Centre*, where the Federal Court of Appeal stated

⁴⁸ *Ibid.*

⁴⁹ Canada Revenue Agency, “What is a Related Business?”(online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-019-eng.html>.)

⁵⁰ *Ibid.*

clearly that “[i]t is beyond question that private, fee-charging hospitals prima facie qualify as charities at common law on the basis that “the provision of medical care for the sick” is accepted as conferring a public benefit.”⁵¹ The Court proceeded to quote the decision *In re Resch's Will Trusts*:⁵²

Their Lordships turn to the second objection. This, in substance, is that the private hospital is not carried on for purposes “beneficial to the community” because it provides only for persons of means who are capable of paying the substantial fees required as a condition of admission.

In dealing with this objection, it is necessary first to dispose of a misapprehension. It is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick. Whether one regards the charitable character of trusts for the relief of the sick as flowing from the word “impotent” (“aged, impotent and poor people”) in the preamble to 43 Eliz. c. 4 or more broadly as derived from the conception of benefit to the community, *there is no warrant for adding to the condition of sickness that of poverty.*

...

To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expensive, without any profit motive, might well be charitable on the other hand to limit admission to a nursing home to the rich would not be so.

...

The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions. ⁵³ [emphasis added]

As such, the decision in *Everywoman's Health Centre* not only provides guidance with respect to the legal definition of charity and the public benefit requirement, but the

⁵¹ *Supra* note 37 at para. 11.

⁵² [1969] 1 A.C. 514 (P.C.).

⁵³ *Supra* note 37 at para. 11.

reference to *In re Resch's Will Trusts* arguably supports the proposition that an expensive fee, which excludes the poor, is still acceptable as long as it is meant for cost-recovery and not for profit. While the aforementioned CRA policies do indicate that cost-recovery is one indicator of an acceptable fee structure, the policies do not make any reference to this portion of the Federal Court of Appeal's judgment.⁵⁴ It should be noted, however, that the issue of charging fees does not actually appear to be a disputed matter in *Everywoman's Health Centre*, and therefore the discussion regarding fees is best categorized as *obiter dicta*.

4. Disbursement Quota Requirement

In addition to requiring that fees charged be reasonable, Canadian charities are also required to spend a certain portion of their receipted income and investment assets on charitable programs. This is achieved by requiring all charities to meet a "disbursement quota." The requirement on charities to disburse a portion of their income and assets was first imposed in the mid-1970s. The disbursement quota is an annual spending requirement for all registered charities, mandating a charity to spend a minimum amount each year on either its own charitable programs or in gifts to qualified

⁵⁴ See footnote 7 of Canada Revenue Agency's policy on related business, *supra* note 49, which cites the *Everywoman's Health Centre* decision, but only the following quote: "The Society is to be carried on an exclusively charitable basis with no intention to make a profit. ... Any surplus or charitable donations are to be used to reduce charges to patients." This statement does not actually describe a requirement imposed on the Society, but is merely a description of the Society's own intention to use surplus and donations to reduce charges. As such, this quote is only used to support the proposition that fees are not necessarily incompatible with charitable purpose or public benefit.

donees, such as other registered charities.⁵⁵ As explained by CRA, the purpose of the disbursement quota is “to ensure that most of a charity's funds are used to further its charitable purposes and activities; to discourage charities from accumulating excessive funds; and to keep other expenses at a reasonable level.”⁵⁶

In very general terms, all registered charities are required to annually disburse 80% of all receipted gifts received from the public and gifts received from other registered charities.⁵⁷ This percentage level is based on the amount of gifts that the charity received in the immediately preceding year. Moreover, all charities are required to annually disburse 3.5% of the average value of their investment assets (i.e. assets not used directly in charitable activities or administration) that is over \$25,000.⁵⁸ The disbursement quota requirements for all registered charities are the same, save and except that private foundations (but not charitable organizations or public foundations) are required to disburse 100% (rather than 80%) of all amounts received from other registered charities in the immediately preceding taxation year.⁵⁹

⁵⁵ Subsection 149.1(1) of the *Income Tax Act* provides that qualified donees are organizations that can issue official donation receipts for gifts that individuals and corporations make to them under paragraphs 110.1(1)(a) and (b) and 118.1(1). They consist of registered charities, registered Canadian amateur athletic associations, certain low-cost housing corporations for the aged, municipalities, provincial and federal governments, the United Nations and its agencies, prescribed universities outside Canada, charities outside Canada to which the federal government has made a gift in the past year, and registered national arts service organizations. In February 2004, it was proposed to amend sections 110.1 and 118.1 of the *Income Tax Act* by including municipal or public bodies performing a function of government in Canada. This proposed amendment has been brought forth and was previously included in Bill C-33 in November 2006, which died on the Order Paper since the federal Parliament was prorogued on September 14, 2007. The proposed amendment was again re-introduced in Bill C-10 on October 29, 2007. Bill C-10 again died following the dissolution of the federal Parliament on September 7, 2008.

⁵⁶ Canada Revenue Agency, “What is the disbursement quota?”, (online: <http://www.cra-arc.gc.ca/tx/chrts/prtng/spndng/whts-eng.html>.)

⁵⁷ For specific commentary on how the disbursement quotas are calculated, see Maria Elena Hoffstein & Theresa L.M. Man, “New Disbursement Quota Rules Under Bill C-33” *The Philanthropist* 20:4 (2007) at 294.

⁵⁸ For an explanation on the calculation of the 3.5% disbursement quota, see also Theresa L.M. Man, “Calculation of 3.5% Disbursement Quota for All Registered Charities” *Charity Law Bulletin* No. 150, December 18, 2008 (online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb150.pdf>.)

⁵⁹ See paragraph (a) of variable “B” in the definition of “disbursement quota” in subsection 149.1(1) of the *Income Tax Act*,

As a result of amendments to the disbursement quota rules since the mid-1970s when it was first introduced, the complexity and various problems associated with these rules have led to an initiative in the charitable sector to seek reform of these rules, including removing the 80% disbursement quota and simplifying the 3.5% disbursement quota, or a complete revamp of the rules.⁶⁰

5. Summary

Canada's firm adherence to the existing legal definition of charity, as framed by *Pemsel* and the *Statute of Elizabeth*, remains the foundation for the presumption that all charities are equally worthy before the law. The fact that the highest court in this country has deferred to Parliament for any redefinition of the common law meaning of charity is a clear indicator that any major changes in the law must come from statutory reform. If such reform should happen, it is unclear what course it would take, but as discussed in this part of the paper, a major concern with the current *Pemsel* definition is its adequacy in classifying and recognizing new charitable purposes in modern Canadian society. In other words, while there is interest in broadening the definition, there does not appear to be any interest in redefining charity to reflect a form of hierarchy of worthiness or virtue.

The current Canadian tax regime retains a broad legal definition of charity that generally encompasses all purposes that are beneficial to the community, and as such there is no apparent interest in delineating, as a general matter of law, the concepts of "charity" and "philanthropy" that were used by the Ontario Law Reform Commission. However, as mentioned above, the Commission also indicated that this kind of delineation could be achieved through both statutory redefinition and policy. In this regard, what is far less clear is whether particular aspects of Canadian tax policy and regulation have, either intentionally or unintentionally, striated the charitable sector to

⁶⁰ See Canadian Bar Association, Charities and Not-For-Profit Law Section, "Concept Paper on Reform of the Disbursement Quota Regime: Submission to Finance Canada and Canada Revenue Agency" July 20, 2009 (online: http://www.cba.org/CBA/submissions/2009eng/09_40.aspx).

the extent that one may be able to identify some indicia for measuring the comparative worthiness of Canadian charities. This issue is addressed in the next section of this paper.

C. SPECIFIC GOVERNMENTAL TREATMENT OF CHARITIES: CREATING SHADES OF VIRTUE

Despite the equality in the worthiness of Canadian charities, the administration of charities in Canada under both federal and provincial legislation has invariably accorded certain types of charities with preferential treatment under different circumstances. The purpose of this section of the paper is to identify particular ways in which the Canadian government's regulation of charities has striated or created shades of virtue within the charitable sector in Canada. In turn, this may provide some indicators for measuring the comparative worthiness of Canadian charities. The analysis that follows focuses primarily on regulation by the federal government, due to its responsibility for administering the *Income Tax Act*. However, reference will also be made to provincial examples in Ontario, which will provide an illustration of the effect of provincial regulation on the charitable sector.

1. Federal Income Tax Legislation

Under certain limited circumstances, some charities are given some preferential treatment under the *Income Tax Act* or CRA policies. Some of the preferential treatment is cause-related, such as religious charities, charities that support disaster relief and other temporary causes, environmental protection/conservation charities, cultural charities, universities, and charities that support causes with limited appeal. Small charities and charities with a high level of volunteer involvement are also sometimes accorded with preferential treatment when CRA administers certain polices. On the other hand, private foundations are required to comply with more stringent requirements than other charities. The following is an overview of how these types of charities are treated differently from other charities.

a) Religious charities

i) Annual filing requirements

As a general rule, all registered charities are required to file an annual Registered Charity Information Return (Form T3010) with CRA.⁶¹ The T3010 allows CRA to collect a variety of information about a charity, including financial information, and a portion of the T3010 is made available to the public. However, CRA exempts certain religious charities from being required to file the publicly accessible portions of the T3010.⁶² In order to be eligible for this exemption, the charities must be:

- a. religious charities or charities associated to a religious charity pursuant to subsection 149.1(7) of the Income Tax Act during the applicable fiscal period,
- b. that were in existence on December 31, 1977,
- c. that have not received a gift at any time since December 31, 1977, for which they have issued an official donation receipt, and
- d. that have not, directly or indirectly, received a gift from another registered charity, associated or not, that has issued official donation receipts since December 31, 1977.⁶³

The exemption was originally granted in the 1970s and continues to apply to a charity that has been created since that time from the amalgamation of exempted charities. This exemption is primarily intended to grandfather Catholic religious

⁶¹ For details about what information is required by the T3010, see Canada Revenue Agency, “Annual information return (T3010)”, (online: <http://www.cra-arc.gc.ca/tx/chrts/prtnng/rtrn/menu-eng.html>.)

⁶² Canada Revenue Agency, “Religious charities - Exemption from filling portions of the *Registered Charity Information Return*”, (online: <http://www.cra-arc.gc.ca/tx/chrts/ply/cpc/cpc-016-eng.html>.)

⁶³ *Ibid.*

communities and orders that were not, and continue not to be, dependent on gifts from the public or other charities for their operation.

ii) Political and advocacy activities

The *Income Tax Act* establishes a clear framework for registered charities and “political activities.” In effect, it only permits a registered charity to engage in political activities if it “devotes substantially all of its resources to charitable purposes” and (a) it devotes part of its resources to political activities; (b) those political activities are ancillary and incidental to its charitable purposes; and (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.⁶⁴ The term “political activities” is not defined in the *Income Tax Act* itself and consequently, these provisions have required much interpretation by courts and administrators. According to CRA’s policy on political activities, “an organization established for a political purpose cannot be a charity. The courts have determined political purposes to be those that seek to: further the interests of a particular political party; or support a political party or candidate for public office; or retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.”⁶⁵

It should be noted that the rules on political activities, while equally applicable to all registered charities, do not impinge on a religious charity’s general ability to advocate under the rubric of the advancement of religion. This is largely due to the fact that the advancement of a religion, by its very nature, typically involves proselytizing or the propagation of beliefs, and may encompass a wide range of activities that relate to the

⁶⁴ Subsections 149.1(6.1) and (6.2) of the *Income Tax Act*.

⁶⁵ Canada Revenue Agency, “Political Activities”, (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>), at s. 4.

religion. As such, religious charities are inherently afforded more flexibility when they engage in advocacy.⁶⁶

Courts in most common law jurisdictions have affirmed that advancement of religion, at its core, involves the promotion, dissemination and propagation of one's religious beliefs to others, and "freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship."⁶⁷ In the Australian case of *Church of the New Faith v. Commissioner of Pay-Roll Tax*, the court acknowledged that a central element of religion is the acceptance and promotion of moral standards of conduct which give effect to a belief.⁶⁸ This principle was perhaps best expressed in the *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council* decision, where it was stated that "[t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary."⁶⁹

Canadian courts have also affirmed that religion involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship. In *Walter v. A.G. Alberta*, the Supreme Court of Canada wrote that, "[r]eligion, as the subject matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion

⁶⁶ For an overview on this issue, see Terrance S. Carter, "Advancing Religion as a Head of Charity: What Are The Boundaries?" October 2006 (online: http://www.carters.ca/pub/article/church/2006/advrel_octo6.pdf).

⁶⁷ *Walter v. A.G. Alta.*, [1969] S.C.R. 383, [1969] 66 W.W.R. 513 at 521.

⁶⁸ *Church of the New Faith v. Commissioner of Pay-Roll Tax*, 83 A.T.C. 4, at 652.

⁶⁹ *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council*, [1957] 1 W.L.R. 1080 at 1090; 3 All E.R. 281 (Q.B.D.) at 285. Affirmed in *Russel Estate (Re)*, [1977] 6 W.W.R. 273, 1 E.T.R. 285.

involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship.”⁷⁰

Furthermore, courts have acknowledged that advancement of religion extends beyond worship and includes related activities, such as addressing social, moral and ethical issues. In relation to this inclusive approach, the Ontario Law Reform Commission remarked that, “[t]he domain of religious activity is essentially, but by no means exclusively spiritual, and that there is a necessity for an established doctrine and an element of doctrinal propagation, both within and sometimes outside the membership.”⁷¹ In *Re Scowcroft*, the court affirmed the principle that despite that the nature of a particular activity may in and of itself not appear to be charitable, it may still be held to be charitable where it is done for the larger purpose of advancing religion.⁷²

In his text on the law of charities, Hubert Picarda also indicates that where an activity of a charity is incidental to its main charitable purpose, it is an acceptable activity even though it is not in and of itself charitable at law.⁷³ Picarda cites the cases of *IRC v. Temperance Council*,⁷⁴ and *National Anti-Vivisection Society v. Inland Revenue Commissioners*,⁷⁵ wherein the courts found the promotion of legislation was ancillary to the attainment of the fundamental object of the charity, which was the advancement of religion, and held that the promotion of such legislation is merely a means to an end and would not negatively impact the charitable nature of the organization. In *Ontario (Public Trustee) v. Toronto Humane Society*, the Ontario High Court of Justice stated that a charity is permitted to engage in political activities as long as these activities are ancillary

⁷⁰ *Walterm. A.G. Alta.*, [1969] 66 W.W.R. 513 at 521.

⁷¹ OLRC, *supra* note 22, c. 8-3(b).

⁷² *Re Scowcroft*, [1898] 2 Ch. 638. In *Re Scowcroft*, the court accepted that a gift of a reading room “to be maintained for the furtherance of Conservative principles and religious and mental improvement” was made for the purposes of advancing religion, and was therefore charitable. In *Re Hood*, [1931] 1 Ch. 240, the court determined a gift that was made to spread Christianity by encouraging others to take active steps to stop drinking alcohol was a charitable gift, since it was made for the purpose of advancing religion.

⁷³ Picarda, *supra* note 11 at 230.

⁷⁴ (1926), 10 T.C. 748.

⁷⁵ [1947] 2 All E.R. 217 at 220 (H.L.).

and incidental to its charitable purposes. Since the political activities in question in that case were incidental and ancillary to the educational purpose and not ends in themselves, the court held that they did not disqualify the Society from being a charity.⁷⁶

In summary, the courts have recognized that advancing religion can encompass activities that are not in and of themselves overtly spiritual in nature, but which nevertheless maintain the crucial element of being based within, and serving to promote, a recognized religious doctrine. It is within this context that a religious organization whose work places an emphasis upon a practical application of religious principles should be able to be recognized as charitable under the head of advancement of religion. In this regard, Chief Justice Gleeson of the Australian court correctly points out that “[p]eople sometimes react with surprise and even indignation when church leaders make a public affirmation of religious doctrine. But what is to be expected of church leaders if they do not, from time to time, do that? Have people really considered what the social consequences would be if the great religions abandoned their teaching role?”⁷⁷

In this regard, CRA has been working on a new guidance on advancement of religion as a charitable purpose. In a presentation by the former Director General of the Charities Directorate of CRA, Mr. Terry de March, at the Modernising Charity Law Conference of the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology in April 2009, a draft of the CRA guidance was released. The ability of religious charities to engage in some political activities that are related to advancing the faith is clarified in the draft guidance as follows:

Organizations formed to support a political party or for the purpose of changing or opposing a change to the law or government policy in Canada or elsewhere cannot be registered as a charity. For example, if an entity is created with the main purpose of opposing or supporting a change in the law on a particular topic, that organization would not be charitable as advancing religion. That would be so even though their

⁷⁶ (1987), 60 O.R. (2d) 236.

⁷⁷ Anthony Murray Gleeson, “The Relevance of Religion” (2001) 75 A.L.J. 93 at 95.

position on the issue were based on religious doctrine or belief. On the other hand, if a more broadly based religious organization with a wider range activities that advance religion occasionally opposes or supports a change in the law related to their religious beliefs this would be permissible within the allowable limits for political activity as distinct from an unacceptable political purpose.⁷⁸

Nevertheless, religious charities in Canada would need to be aware of CRA's position on political activities. There is a danger that religious organizations engaged in activities other than religious worship and teaching doctrine, particularly if they involve political activities, may become more vulnerable to having their charitable status revoked or be denied charitable status in the first instance, on the basis that they engage in too much overt political activity or if their activities are seen by CRA as being discriminatory in some way. As one commentator suggested:

If anything, the best way to deal with the problem is to ensure that any organization that alleges to be religious should have a primary purpose and thrust that are indeed religious; that any political pronouncements a religious charity makes are incidental, and that they are clearly tied to religious observance. Otherwise it would seem difficult to defend actions on the basis of advancement of religion.⁷⁹

b) Charities that support disaster relief and other temporary causes

CRA has established a general procedure that permits preferential treatment of charities that provide disaster relief. CRA recognizes that following a disaster, organizations may wish to apply to become registered charities for the purpose of providing disaster relief. In urgent circumstances, CRA “will expedite consideration of these applications.”⁸⁰ CRA has also demonstrated in the past that it may amend certain

⁷⁸ Terry de March, “CRA Guidelines on Advancement of Religion as a Charitable Purpose”, a PowerPoint presentation to the Modernising Charity Law Conference of the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology in April 16 to 18, 2009 (online: <https://wiki.qut.edu.au/display/CPNS/DAY+2+-+MCL+Conference+Papers>).

⁷⁹ Carl Juneau, *Defining Charitable Limits: Advocacy, Education and Political Activities* (Law Society of Upper Canada – Department of Continuing Legal Education, 1998).

⁸⁰ Canada Revenue Agency, “Disaster relief”, (online: <http://www.cra-arc.gc.ca/tx/chrts/pplyng/rlf-eng.html>).

administrative rules in order to facilitate the furtherance of temporary causes. For example, in order to assist charities that were addressing the tsunami in Southeast Asia, CRA extended the donation deadline in 2005 (from December 31, 2004 to January 11, 2005) specifically for donations to those charities.⁸¹

c) Environmental protection/conservation and cultural charities

Under the *Income Tax Act*, ecological gifts and gifts of cultural property are clearly afforded more generous donation treatment incentives than other types of donations. Since these special gifts are assets of national importance, only certain types of charities are capable of protecting them and therefore the favourable incentive is only available where these types of gifts are donated to specific types of environmental protection/conservation charities and cultural charities.

With the objective of protecting Canada's environmental heritage and biodiversity, the Canadian government established an "ecological gifts program" by providing capital gains tax incentives for donations of ecological gifts.⁸² Generally defined, an ecological gift is a donation of land or a partial interest in land, such as a conservation easement, covenant, or servitude, which is officially recognized as furthering the objective of protecting Canada's environmental heritage and biodiversity. The Minister of the Environment must certify the land as ecologically sensitive, approve the recipient to receive the gift, and certify the fair market value of the donation.⁸³ The recipient of the ecological gift must be an eligible recipient, such as a Canadian territorial, provincial or federal department or agency; municipality; or a registered charity which has the main purpose of environmental protection and conservation. An eligible registered charity

⁸¹ See Canada Revenue Agency's webpage at http://www.cra-arc.gc.ca/tx/chrts/tsnm_fq-eng.html.

⁸² Paragraph 38(a.2) of the *Income Tax Act*.

⁸³ Environment Canada, *The Ecological Gifts Program* (Gatineau: Environment Canada, 2007), (online: http://www.cws-scf.ec.gc.ca/egp-pde/E6E3313F-59A4-43A9-9D84-7F5A1EBCA58F/bro_e.pdf).

must be expressly approved by the Minister of the Environment, and in this regard, there are currently over 190 eligible registered charities in Canada.⁸⁴

A cultural gift is a gift of property that is officially recognized as being “of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value to the study of the arts of sciences” or of “such a degree of national importance that its loss would significantly diminish the national heritage.”⁸⁵ The procedure for making a gift of cultural property involves three regulatory mechanisms that are generally the same as those applicable to ecological gifts. In this regard, the Canadian Cultural Property Export Review Board will ensure that the property meets certain criteria, has an appropriate fair market value, and is being donated to an approved recipient. The recipient of the gift of cultural property must be a designated “institution or public authority”,⁸⁶ which typically include museums and art galleries across Canada. Procedurally, a donor or vendor of cultural property must first reach a tentative agreement concerning the donation or sale with an institution or public authority designated by the Minister of Canadian Heritage, and the designated institutions or public authorities would typically make applications for certification to the Canadian Cultural Property Export Review Board on behalf of donors or vendors.⁸⁷

The favouring of ecological gifts and gifts of cultural property is achieved in two specific ways. First, donors can generally only claim a tax credit on (or deduct) up to 75% of their annual net income.⁸⁸ However, the 75% ceiling that is generally applicable to

⁸⁴ Environment Canada, “The Ecological Gifts Program – Who can receive an ecogift?”, (online: <http://www.cws-scf.ec.gc.ca/egp-pde/default.asp?lang=En&n=9D3A4276-1>).

⁸⁵ *Cultural Property Export and Import Act*, R.S.C. 1985, c. C-51, ss. 29(3)(b) and (c).

⁸⁶ Paragraph 39(1)(a)(i.1) of the *Income Tax Act*.

⁸⁷ Department of Canadian Heritage, *Cultural Property Export and Import Act: Annual Report, 2006-2007* (Gatineau: Canadian Heritage, 2008) at 5.

⁸⁸ Subsection 110.1(1) and the definition of “total gifts” in subsection 118.1(1) of the *Income Tax Act*.

charitable donations is increased to 100% for donations of ecological gifts and gifts of cultural property.⁸⁹

The second method of favouring these gifts is through exemptions from capital gains tax.⁹⁰ For the purpose of explaining this point, it is worth providing an overview of the administration of capital gains tax in Canada. Technically, a separate mechanism of a “capital gains tax” does not exist in Canada, since the taxation of capital gains is achieved indirectly through the inclusion of a portion of the capital gain in the taxpayer’s income, which is taxed at the applicable marginal income tax rate for the individual.⁹¹ This is generally referred to as the “capital gains inclusion rate”, which is currently 50% of the amount of the capital gain.

“Capital property” is broadly defined under the *Income Tax Act* as any property that is depreciable or will give rise to a capital gain or loss when disposed of.⁹² In general, capital gains that are accrued but not realized will not be taxed until the property is sold. However, there are exceptions to this rule because of the imposition of certain deemed dispositions under the *Income Tax Act*, which are specific events where the taxpayer is deemed to have disposed of the property.⁹³ One of those events under the *Income Tax Act* includes gifts of capital property, which are deemed to have been disposed of at the fair market value at the time the gift is made.⁹⁴ As a result, any accrued gains on such gifts are

⁸⁹ *Ibid.*

⁹⁰ For an overview, see Terrance S. Carter, “An Overview of Capital Gains Tax Exemptions as a Philanthropic Incentive in Canada” (Presented to the Australian Centre for Philanthropy and Nonprofit Studies - Modernising Charity Law Conference, Queensland University of Technology, April 2009). (online: <http://www.carters.ca/pub/article/charity/2009/tSCO418b.pdf>).

⁹¹ The marginal tax rate is calculated by combining the relevant federal and provincial tax rates, as both levels of government levy income taxes in Canada. For example, depending on the level of income, a resident of the Province of Ontario might pay combined taxes ranging from 21.05% to 46.41% plus provincial surtaxes. For a summary of all current federal and provincial marginal tax rates, see Canada Revenue Agency, “What are the income tax rates in Canada for 2009?”, (online: <http://www.cra-arc.gc.ca/tx/ndvdl/fq/txrts-eng.html>).

⁹² Section 54 of the *Income Tax Act*.

⁹³ David M. Sherman, *Basic Tax and GST Guide for Lawyers* (Toronto: Thomson Carswell, 2007) at 215.

⁹⁴ Paragraph 69(1)(b) of the *Income Tax Act*.

triggered for income tax purposes and must be reported.⁹⁵ With regard to the calculation of the amount of the tax credit or deduction that is available for a gift of capital property, particular rules are applicable.⁹⁶

A capital gains exemption strategy was first introduced by the Canadian government in 2000. In February 2000, the general inclusion rate for capital gains was reduced to $\frac{2}{3}$, with a corresponding reduction to $\frac{1}{3}$ for donations of ecological gifts.⁹⁷ In October 2000, the inclusion rate was further reduced to the current rate of $\frac{1}{2}$, with a corresponding reduction to $\frac{1}{4}$ for donations of ecological gifts.⁹⁸ The capital gains tax on gifts of ecological property was eliminated altogether in the 2006 federal budget.⁹⁹ The government anticipated that the tax incentive would cost \$5 million per year in the two years after the 2006 budget.¹⁰⁰ In terms of measuring the impact of the tax incentives, there is some indication that donations of ecological property increased after the introduction of the tax exemption in 2000. According to a 2003 government report, the number of ecological gifts increased from 34 gifts pre-2000, up to 52 gifts following

⁹⁵ David M. Sherman, *supra* note 93 at 225.

⁹⁶ Specifically, subsections 110.1(3) and 118.1(6) of the *Income Tax Act* provide for the general rule that when a charitable gift of capital property is made, of which the fair market value is higher than the adjusted cost base, the donor is permitted to elect any value between the fair market value and the adjusted cost base as the applicable proceeds of the disposition. The adjusted cost base is normally the cost of the property. Special rules, such as government assistance for the purchase of property, can adjust the cost up or down. See David M. Sherman, *supra* note 93 at 216. For the purposes of calculating tax credits and deductions for charitable donations, the fair market value of the property is deemed to be the amount elected by the donor.

⁹⁷ Department of Finance Canada, *The Budget Plan 2000: Better Finances, Better Lives* (Ottawa: Department of Finance Canada, 2000). (online: http://www.fin.gc.ca/budget00/features/bud_brief_-eng.asp).

⁹⁸ Department of Finance Canada, *Economic Statement and Budget Update* (Ottawa: Department of Finance Canada, 2000). (online: <http://www.fin.gc.ca/toc/2000/ecoo-eng.asp>)

⁹⁹ Department of Finance Canada, *The Budget Plan 2006: Focusing on Priorities* (Ottawa, Department of Finance Canada, 2006). (online: <http://www.fin.gc.ca/budget06/pdf/bp2006e.pdf>).

¹⁰⁰ *Ibid.* at 202.

2000.¹⁰¹ By March 2008, a total of 652 ecological gifts valued at over \$379 million had been made in Canada.¹⁰²

The capital gains tax exemption for donations of cultural property was first introduced in 1977.¹⁰³ The *Income Tax Act* was amended at that time to create the capital gains tax exemption by excluding the donation of cultural property altogether from the meaning of “a taxpayer’s capital gain for a taxation year from the disposition of any property.”¹⁰⁴ Generally, this incentive functions in a similar way to that of donations of ecological gifts, as described above. With respect to the effects of this capital gains tax exemption, there does not appear to be any relevant statistical data during the period in which the exemption was introduced from which conclusions can be drawn. Statistics from the period of 1992 to 2004 indicate that the number of annual applications to the Board for determination or redetermination ranged from 926 to 1,489, but revealed no identifiable trends.¹⁰⁵

d) Universities

There are special rules that would allow universities to receive tax-deductible donations from more sources than other types of charities.¹⁰⁶ These rules clearly indicate that additional support is provided to donors and recipient universities with a substantial connection to Canada. Combined with the government’s intention to use donations of

¹⁰¹ Environment Canada, *The Ecological Gifts Program: Progress Report, 1995-2003* (Gatineau: Environment Canada, 2003), (online: <http://www.cws-scf.ec.gc.ca/egp-pde/default.asp?lang=en&n=B22715BF>).

¹⁰² Karen J. Cooper, “Gifts of Environmentally Sensitive Land: What You Need to Know and How to Use Them” paper presented to the CBA/OBA 2008 National Charity Law Symposium: New Thoughts On Gifting, Toronto, May 7, 2008 at 1.

¹⁰³ S.C. 1974-75-76, c. 50, s. 48.

¹⁰⁴ Paragraph 39(1)(a)(i.1) of the *Income Tax Act*.

¹⁰⁵ Department of Canadian Heritage, *Cultural Property Export and Import Act: Cumulative Report 1992-1993 to 2003-2004* (Gatineau: Canadian Heritage, 2005) at 30.

¹⁰⁶ For an overview of these issues, see Theresa L.M. Man, “Cross Border Issues Under The Canada-U.S. Treaty: U.S. Charities Operating In Canada”, December 17, 2007 (online: http://www.carters.ca/pub/article/charity/2007/tlm_crossborder.pdf).

publicly traded securities to assist educational institutions, these rules may suggest that universities are considered to be more worthy of additional assistance.

Firstly, pursuant to Article XXI(6) of the *Canada-United States Income Tax Convention* (1980),¹⁰⁷ a Canadian donor who has made a donation to a U.S. charity may claim a charitable credit (in the case of an individual taxpayer) or deduction (in the case of a corporation) for the donation made to the extent of the donor's U.S.-source income.¹⁰⁸ However, the claim will not be restricted to the donor's U.S.-source income if the recipient U.S. charity is a U.S. college or university at which the donor, or a member of the donor's family, is or was enrolled.¹⁰⁹ Paragraph 2 of a letter between the U.S. and Canada dated September 26, 1980¹¹⁰ clarified that the term "family" means an individual's "brothers and sisters (whether by whole or half-blood, or by adoption), spouse, ancestors,

¹⁰⁷ Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital Signed on September 26, 1980, as Amended by the Protocols Signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997 and September 21, 2007. Enacted in Canada by S.C. 1984, c. 20; 1995 Protocol enacted in Canada by S.C. 1995, c. 34, Royal Assent November 8, 1995; 1997 Protocol enacted in Canada by S.C. 1997, c. 38, Royal Assent December 10, 1997; 2007 Protocol enacted in Canada by S.C. 2007, c. 32, Royal Assent December 14, 2007.

¹⁰⁸ Article XXI(6) of the Treaty, provides as follows:

6. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization that is a resident of the United States, that is generally exempt from United States tax and that could qualify in Canada as a registered charity if it were a resident of Canada and created or established in Canada, shall be treated as gifts to a registered charity; however, no relief from taxation shall be available in any taxation year with respect to such gifts (other than such gifts to a college or university at which the resident or a member of the resident's family is or was enrolled) to the extent that such relief would exceed the amount of relief that would be available under the Income Tax Act if the only income of the resident for that year were the resident's income arising in the United States. The preceding sentence shall not be interpreted to allow in any taxation year relief from taxation for gifts to registered charities in excess of the amount of relief allowed under the percentage limitations of the laws of Canada in respect of relief for gifts to registered charities.

¹⁰⁹ This tax relief is in addition to the tuition fees for a student in full-time attendance at a university outside Canada for a course, of at least 13 consecutive weeks in duration, leading to a degree under paragraph 118.1(5)(b) of the *Income Tax Act* and tuition fees (if they total more than \$100) for courses at a post-secondary school level paid to a university, college or other educational institution in the United States to which a student living near the Canada-United States border commutes pursuant to paragraph 118.1(5)(c) of the *Income Tax Act*. See also Canada Revenue Agency, *Interpretation Bulletin* IT-516R2, "Tuition Tax Credit," December 9, 1996.

¹¹⁰ Letter between Canada and the United States, September 26, 1980 (CCH). The letter confirms "certain understandings" between the two governments in relation to the Treaty with regard to the French term "société," exemption organizations, and the taxation of Canadian multinationals in the United States.

lineal descendants and adopted descendants.” This would include donations made by students, alumni and their family members. In this case, the universities do not need to be prescribed pursuant to Regulation 3503 and named in Schedule VIII to the *Regulations* to the *Income Tax Act*, as explained further below. Pursuant to Article XXI(5) of the Treaty, similar reciprocal relief is applicable to donations by a U.S. donor to a Canadian charity that is a Canadian college or university at which the donor, or a member of the donor's family, is or was enrolled.

Secondly, under the *Income Tax Act*, Canadian donors are permitted to make charitable donations to foreign universities prescribed to be a university if their student body ordinarily include students from Canada.¹¹¹ Pursuant to Regulation 3503 of the *Income Tax Act*, these universities are those named in Schedule VIII to the *Regulations* to the *Income Tax Act*. CRA has indicated that in order to be recognized as a prescribed university, it must be a “university” and its student body must “ordinarily” include students from Canada. CRA clarified that the qualifying entities must be the universities themselves, and that an entity, *e.g.*, a centre or a foundation, whose activities and funds are dedicated to achieving the goals or the activities of a particular university would not qualify.¹¹² Institutions desiring to obtain this status must make an application to the International Tax Directorate.¹¹³ CRA periodically reviews the list and has had institutions removed that have not had significant numbers of Canadian residents attend as students.¹¹⁴

¹¹¹ Subparagraph 110.1(1)(a)(vi) and paragraph 118.1(1)(f) of the *Income Tax Act*.

¹¹² Canada Revenue Agency, Information Letter CIL-1997-006, April 23, 1997.

¹¹³ See Canada Revenue Agency, Information Letter CIL-1998-025, September 9, 1998. The application to become a prescribed university must include the following: (1) a letter or certificate from the appropriate educational authority in the country in which the institution is located confirming that it is empowered to issue degrees at least at the baccalaureate level according to the academic standards and statutory definition prevailing in that country; (2) a copy of a recent calendar or syllabus which describes course curriculum; and (3) enrolment records for the last ten years which indicate the number of Canadian students per semester or program year, and information such as their names, Canadian addresses, and degree program.

¹¹⁴ Arthur B.C. Drache, “Schedule VIII Universities Under Review”, 7(8) *Canadian Not-For-Profit News* (Carswell) 58-59 (August 1999).

The main differences between a U.S. prescribed university and a U.S. college or university that receives gifts from its students, alumni and their family members are that the former is required to be approved through an application process, and is not limited to receiving gifts from its students, alumni and their family members.

e) Small charities

Small charities are defined in CRA's Small and Rural Charities Initiative, to be registered charities with total annual revenues under \$100,000, as reported annually on Form T3010, Registered Charity Information Return. In 2006, there were 83,372 registered charities in Canada. Small charities accounted for 54% of all registered charities.¹¹⁵ According to CRA, small charities depend more on earned income from non-government sources and donations than on government funding; and small charities also tend to have few, if any, employees and rely mainly on volunteers to deliver their services, leading to concerns for both retention and recruitment. Accordingly, small charities have been provided with a few preferred treatments, examples of which are set out below.

(i) Annual filing requirements

For fiscal periods ending on or after January 1, 2009, all registered charities have to file a newly redesigned annual Registered Charities Information Return T3010B. The T3010B form is, in part, CRA's response to many requests from registered charities to simplify the information return and reduce the filing burden for small charities that may have limited resources for addressing administrative requirements.¹¹⁶ The T3010B now consists of a core form and a number of topic-related schedules. In many respects, the T3010B requires more information to be provided by charities. However, for small

¹¹⁵ See Canada Revenue Agency's website at <http://www.cra-arc.gc.ca/tx/chrts/cmmnctn/src/menu-eng.html>.

¹¹⁶ See Canada Revenue Agency's website at <http://www.cra-arc.gc.ca/E/pbg/tf/t3010b/>; <http://www.cra-arc.gc.ca/E/pub/tg/t4033b/README.html>; and <http://www.cra-arc.gc.ca/E/pbg/tf/t3010b/t3010b-09e.pdf>. See also Terrance S. Carter, "Commentary on the New T3010B Annual Information Return", *Charity Law Bulletin* No. 158, February 26, 2009 (online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb158.pdf>).

charities, they are only required to complete the core form, unless they meet certain criteria that would require them to complete the schedules.

(2) Political and advocacy activities

Within the parameters of political activities that are allowed within the current system, CRA distinguishes between large and small charities.

The *Income Tax Act* requires charitable organizations to devote all of their resources to charitable activities carried on by the organization itself,¹¹⁷ and charitable foundations (including both public and private foundations) to be operated exclusively for charitable purposes.¹¹⁸ The *Income Tax Act* further provides that a charity is considered to have devoted “substantially all” of its resources to charitable purposes even if the charity engages in some political activities, provided that (a) the charity devotes part of its resources to political activities, (b) those political activities are ancillary and incidental to the charity’s charitable activities (or charitable purposes in the case of charitable foundations), and (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.¹¹⁹

Because the *Income Tax Act* does not define what is meant when charities are required to devote “substantially all” of its resources to charitable purposes, CRA has interpreted this to mean 90% or more, which consequently means that CRA considers “a charity that devotes no more than 10% of its total resources a year to political activities to

¹¹⁷ See definition of “charitable organization” in subsection 149.1(1) of the *Income Tax Act*. Subsection 149.1(6) provides that “a charitable organization shall be considered to be devoting its resources to charitable activities carried on by it to the extent that (a) it carries on a related business; (b) in any taxation year, it disburses not more than 50% of its income for that year to qualified donees; or (c) it disburses income to a registered charity that the Minister has designated in writing as a charity associated with it.”

¹¹⁸ See definition of “charitable foundation” in subsection 149.1(1) of the *Income Tax Act*.

¹¹⁹ Subsections 149.1(6.1) and (6.2) of the *Income Tax Act*.

be operating within the substantially all provision.”¹²⁰ However, CRA has administratively decided to allow exceptions to their interpretation of the “substantially all” requirement for charities with smaller revenues because the 10% rule would “have a negative impact on smaller charities” and would result in “hardship”:

- Registered charities with less than \$50,000 annual income in the previous year can devote up to 20% of their resources to political activities in the current year.
- Registered charities whose annual income in the previous year was between \$50,000 and \$100,000 can devote up to 15% of their resources to political activities in the current year.
- Registered charities whose annual income in the previous year was between \$100,000 and \$200,000 can devote up to 12% of their resources to political activities in the current year.¹²¹

CRA’s policy on political activities provides no particular rationale for categorizing smaller charities in this manner, nor does it provide any further explanation of why the 10% rule would necessarily have a negative impact on charities with annual incomes of less than \$200,000. Nevertheless, this administrative policy is a clear indicator that CRA considers smaller to be more worthy of assisting with regard to their engaging political activities.

(3) Fundraising activities

In recent years, the issue of fundraising for charities has been the subject of much public interest in Canada. CRA has recently released a guidance on fundraising by

¹²⁰ Canada Revenue Agency, “Political Activities”, (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>) at s.9. See also , Arthur B.C. Drache, “Political Activities: A Charitable Dilemma” *The Philanthropist* 2:4 (1980), at 21; Ian Morrison, “Redefining “Charities” in the Income Tax Act” *The Philanthropist* 3:3 (1983) at 10; Richard Bridge, “The Law Governing Advocacy by Charitable Organizations: The Case for Change” *The Philanthropist* 17:2 (2002), at 2; Adam Parachin, “Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes” (2008) 45 *Alta. L. Rev.* 871.

¹²¹ *Ibid.*

charities,¹²² and the major impetus for doing so was to respond to the media and general public's increasing demand for accountability with regard to charitable fundraising.¹²³ The premise of CRA's new guidance on fundraising is to ensure that the amount of funds that a charity spends on fundraising is reasonable.

When assessing whether the fundraising activities conducted by a charity is acceptable, CRA will consider a range of factors, including the ratio of fundraising costs to fundraising revenue. Another factor that will be considered by CRA is the size of the charity, because it might have an impact on fundraising efficiency. CRA explains that it generally considers that charities with revenues of less than \$100,000 have a small constituency, and therefore CRA is prepared to provide greater flexibility when assessing small charities.¹²⁴

f) Charities that support causes with limited appeal

In relation to fundraising activities conducted by charities, CRA's new guidance on fundraising¹²⁵ also indicates that CRA will give special consideration to charities established to further causes with limited appeal, which could create particular fundraising challenges when CRA evaluates a charity's fundraising efficiency.¹²⁶ CRA gives examples such as "conducting research into the prevention and cure of an emerging disease, that is relatively unknown, and charities with causes that are less popular with

¹²² Canada Revenue Agency, Guidance on Fundraising by Registered Charities, CPS-028 (11 June 2009), (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-eng.html>); and *Additional information on Guidance, Fundraising by Registered Charities*, (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-ddn-eng.html>). For an overview, see Terrance S. Carter, "The Revised CRA Guidance on Fundraising: Improved But Still Challenging", *Charity Law Bulletin* No. 169, June 25, 2009 (online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb169.pdf>).

¹²³ See, for example, Kevin Donovan, "Watchdog sets charity rules" *Toronto Star*, May 5, 2008 (online: <http://www.thestar.com/article/421451>). .

¹²⁴ Canada Revenue Agency, "Additional information on Guidance CPS-028, Fundraising by Registered Charities", (online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-ddn-eng.html> at s. 9).

¹²⁵ *Ibid* at s. 9.

¹²⁶ *Ibid*.

the general public, such as those supporting the rehabilitation of violent offenders.”¹²⁷ As such, CRA’s new fundraising guidance indicates that a new class of charities furthering causes with limited appeal will be afforded preferential treatment by CRA when assessing their fundraising efficiency.

g) Charities with high level of volunteer involvement

i) Related business

Of the three types of registered charities,¹²⁸ charitable organizations and public foundations can carry on business activities that are related to their purposes (i.e. “related businesses”), but cannot engage in any unrelated businesses; while private foundations may not carry on any business activity at all.¹²⁹

There are two kinds of related businesses: one that is linked to a charity’s purpose and subordinate to that purpose, and one that is run substantially by volunteers. In relation to a related business that is linked to a charity’s purpose and subordinate to that

¹²⁷ *Ibid.*

¹²⁸ There are three types of registered charities, namely charitable organizations, public foundations and private foundations (subsection 248(1) of the *Income Tax Act*). Public foundations and private foundations are collectively referred to as “charitable foundations.” (See definition for “charitable foundation”, “charity”, “public foundation” and “private foundation” in subsection 149.1(1) in the *Income Tax Act*.) These entities differ in a number of respects, including organizational form, source of funding, relationship between directors/trustees and their control by major donors, disbursement quota obligations, business activities, granting activities, borrowing activities, and control of other corporations, etc. For a detailed explanation of the differences between them, see Theresa L.M. Man and Terrance S. Carter, “A Comparison of the Three Categories of Registered Charities,” *Charity Law Bulletin* No. 73, July 21, 2005 (online: <http://www.carters.ca/pub/bulletin/charity/2005/chylb73.pdf>).

¹²⁹ Paragraphs 149.1(6)(a), 149.1(2)(a) , 149.1(3)(a) and 149.1(4)(a) of the *Income Tax Act*.

purpose, it is a question of fact whether or not these tests are met. The criteria for these two requirements are set out in CRA's policy on related business.¹³⁰

The second type of related business is a business that is run substantially by volunteers. The *Income Tax Act* defines "related business" in relation to a charity as "[including] a business that is *unrelated to the objects of the charity* if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment." [emphasis added]¹³¹ CRA takes the position that "substantially all" means 90%, and that "[t]he people "employed" in the business means the people the charity "uses" to operate the business. It includes those working for the charity under contract as well as the charity's direct employees."¹³² In practice, CRA requires a business to be run by at least 90% volunteers, which is generally ascertained through a head count of the ratio of paid versus unpaid workers over the duration of one fiscal year.

As such, the legislation provides far more flexibility to charities that are able to operate businesses using substantially all volunteers, even though such business are neither linked nor subordinate to the purpose of the charities. Charities that are able to utilize a volunteer workforce to operate a business are therefore at a significant advantage over those who cannot.

ii) Fundraising activities

¹³⁰ Canada Revenue Agency, *Policy Statement CPS-019*, *supra* note 49. See also Arthur B.C. Drache, "Charities, Non-Profits, and Business Activities," Report of Proceedings of Forty-Ninth Tax Conference, 1997 Tax Conference (Toronto: Canadian Tax Foundation, 1998), 30:1-12; Arthur B.C. Drache, "Related Business: What's Okay and What's Not," *The Philanthropist* 19:4 (2005) at 273; Raymond Dart, "Charities in Business, Business in Charities, Charities and Business – Mapping and Understanding the Complex Non-profit/Business Interface" *The Philanthropist* 18:3 (2004) at 181. See also Terrance S. Carter and Theresa L.M. Man, "Business Activities and Social Enterprise: Towards a New Paradigm", paper presented at The 2009 National Charity Law Symposium hosted by the CBA and OBA Charity and Not-for-Profit Law Sections and the Continuing Legal Education Committee in Toronto, Ontario, May 7, 2009 (online: <http://www.carters.ca/pub/article/charity/2009/tsctlm0507.pdf>).

¹³¹ Subsection 149.1(1) of the *Income Tax Act*.

¹³² Canada Revenue Agency's policy on related business, *supra* note 49 at paras. 18-19,

When assessing whether the fundraising activities conducted by a charity is acceptable, CRA's new guidance on fundraising indicates that CRA would consider a range of factors.¹³³ In this regard, the guidance lists a number of best practices that will generally decrease the risk of CRA finding the fundraising activities to be unacceptable. One of these practices is the use made of volunteer time and volunteered services or resources.

In this regard, CRA indicates that contributions of volunteers and voluntary contributions of resources may reduce the costs of fundraising, which may not be apparent from a financial analysis of the activities. Use of volunteers and voluntary contributions demonstrates a commitment to minimizing the expenditures associated with fundraising activities. For purposes of this guidance, volunteers are defined as unpaid individuals assisting in campaigns, events, or other fundraising, either by soliciting donations or by directly or indirectly assisting in obtaining donations, but do not include those involved in a fundraising campaign, event, or activity through their own participation or attendance. Individuals who seek contributions from others tied to their participation in, or completion of, a marathon or like event are considered participants, but not volunteers.

h) Private foundations

As mentioned above, there are three types of registered charities, namely charitable organizations, public foundations and private foundations. Private foundations are subject to more stringent regulatory restrictions as explained below.

The requirements of what would cause a charity to be designated as a private foundation would need to be referenced to the definition of what would constitute a charitable organization or public foundation. A charity that does not meet the requirements to be designated as either a charitable organization or public foundation will be designated as a private foundation. In this regard, in order to be designated as a

¹³³ *Supra* note 124 at s. 10(f).

charitable organization or public foundation, more than 50% of the directors or trustees of the charity must deal with each other and with each of the other directors or trustees at arm's length, and not more than 50% of the capital of the charity may be contributed by a donor or a donor group (except some organizations, i.e. the federal government, provincial governments, municipalities, other registered charities that are not private foundations, and non-profit organizations). The *Income Tax Act* has been proposed to be amended so that the second branch of the requirement is changed to permit a charitable organization or public foundation to receive more than 50% of the capital of the charity from a donor or a donor group, as long as such person or group does not control the charity in any way or represent more than 50% of the directors or trustees of the charity. The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be private foundations by virtue of such gifts. However, funds received from the federal government, provincial governments, municipalities, other registered charities that are not private foundations, and non-profit organizations are permitted. Charities that do not meet either of these requirements will be designated as private foundations.

These amendments were first introduced as part of draft technical amendments to the *Income Tax Act* released on December 20, 2002. These amendments have undergone various incarnations on December 5, 2003, February 27, 2004 and July 18, 2005, and were introduced as Bill C-33 in November 2006. Bill C-33 died on the Order Paper since the federal Parliament was prorogued on September 14, 2007. The proposed amendment was again re-introduced in Bill C-10 on October 29, 2007. Bill C-10 again died following the dissolution of the federal Parliament on September 7, 2008. At this time, these amendments are not currently before Parliament for enactment. However, once enacted, these amendments will become generally retroactive to January 1, 2000. Although the amendment to the definitions of charitable organizations and public foundations has not been enacted, CRA has begun reviewing applications for charitable status and for re-designation since July 2007 using the proposed new definition for charitable organization and public foundation.

A detailed description of the stringent rules that apply to private foundations, as compared to charitable organizations and public foundations) is beyond the scope of this paper.¹³⁴ In general, these rules include the following:

- Private foundations may not carry on any business activity, while charitable organizations and public foundations may carry on related business.¹³⁵
- Private foundations are required to disburse 100% (rather than 80%) of all amounts received from other registered charities in the immediately preceding taxation year.¹³⁶
- Since late 2007, private foundations are subject to excess corporate holdings rules which restrict shareholding held by private foundations to generally no more than 20%.¹³⁷
- Donation of non-qualifying securities to private foundations is subject to serious restrictions.¹³⁸
- Private foundations holding non qualified investments will be subject to a penalty tax if the interest payable to the foundations does not meet a minimum rate of return.¹³⁹

¹³⁴ For a detailed explanation, see M. Elena Hoffstein, "Private Foundations and Community Foundations," Report of Proceedings of Fifty-Ninth Tax Conference, 2007 Tax Conference (Toronto: Canadian Tax Foundation, 2008), 32:1-35.

¹³⁵ Paragraph 149.1(4)(a) of the *Income Tax Act*.

¹³⁶ *Supra* note 59.

¹³⁷ Paragraph 149.1(4)(c) of the *Income Tax Act*. See also Karen J. Cooper and Terrance S. Carter, "Federal Budget 2007 Highlights For Charities" *Charity Law Bulletin* No. 113 Mar 29, 2007 (online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb113.pdf>); Theresa L.M. Man and Terrance S. Carter, "Federal Budget 2008 - Highlights For Charities" *Charity Law Bulletin* No. 135, Feb 27, 2008 (online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb135.pdf>): and Robert B. Hayhoe and Andrew Valentine, "Excess Business Holdings Rules: Practical Advice on an Imaginary Problem" (Paper presented to the CBA/OBA 2008 National Charity Law Symposium, Toronto, May 7, 2008).

¹³⁸ A non-qualifying security is a share in a corporation that the donor does not deal with at arm's length and whose shares are not listed on a prescribed stock exchange (e.g., a share in a privately held company) or a debt obligation (e.g., a promissory note) issued by a company or person that is not at arm's length to the donor. A registered charity can only issue an official donation receipt to the donor of a non-qualifying security if the security is an excepted gift, or if within five years of acquiring the non-qualifying security: the charity disposes of the non-qualifying security, or the security ceases to be a non-qualifying security (e.g. a privately held company goes public and its shares become listed on a prescribed stock exchange). A non-qualifying security is considered to be an excepted gift if it meets all of the following criteria: it is in the form of a share, the charity that receives the non-qualifying security is a charitable organization or public foundation, the donor is at arm's length to the charity, and the donor is at arm's length to each of the charity's directors/trustees, See Hoffstein *supra* note 134.

- Private foundations cannot incur debts other than debts for current operating expenses, the purchase and sale of investments or the administration of charitable activities. This restriction also applies to public foundations but not charitable organizations.¹⁴⁰

2. Provincial Legislation

In addition to the *Income Tax Act* and related issues at the federal level, provincial legislation may also have the effect of striating the charitable sector in a wide variety of ways within each province in Canada. A detailed survey of the various provincial legislation is beyond the scope of this paper. However, this section highlights examples from the province of Ontario as an illustration of how this striation might happen.

a) Religious charities holding an interest in a business

The *Charitable Gifts Act* (Ontario)¹⁴¹ poses a unique challenge for charities that wish to own a business in Ontario. At the federal level, CRA has indicated that a charitable organization may operate a business through a business corporation by holding shares or retaining a power to nominate the board of directors.¹⁴² However, subsection 2(1) of the *Charitable Gifts Act* provides that a charity is not permitted to own more than 10% of an “interest in a business that is carried on for gain or profit is given to or vested in a person in any capacity for any religious, charitable, educational or public purpose.” A charity, however, is permitted to invest in a business as a minority owner, provided that it does not “own”, either directly or indirectly, an interest in excess of 10%. If the charity is found to own more than 10% of an interest of a business, it would have to dispose of any interest in excess of 10% within seven years, although it might be possible

¹³⁹ A non-qualified investment is a share, right to acquire a share or debt owing to a private foundation by a person who does not deal at arm's length with the foundation. Non-qualified investments may give rise to tax payable by the debtor if the private foundation receives interest or dividends on them falling short of an amount based on the prescribed rate. See Hoffstein *supra* note 134.

¹⁴⁰ Paragraph 149.1(4)(d) of the *Income Tax Act*.

¹⁴¹ R.S.O. 1990, c. C.8.

¹⁴² Canada Revenue Agency's policy on related business, *supra* note 49 at paras. 47 and 48.

to obtain a court order to extend the seven-year period. However, subsection 2(2) provides for an exception to this rule for “any organization of any religious denomination”, which is not defined in the legislation. Therefore, religious organizations are provided with a significant advantage over other organizations that operate within the jurisdiction of Ontario.

b) Religious charities holding title to land through trustees

The *Religious Organizations’ Lands Act* (Ontario)¹⁴³ is essentially a statute that provides religious organizations with a number of powers to acquire, hold and manage real estate, even if these organizations are not generally treated as separate legal entities. Specifically, this statute provides religious organizations with the flexibility of being able to hold land through succession trustees without being incorporated.

Subsection 1(1) of the *Religious Organizations’ Lands Act* broadly defines the term “religious organization” as an association of persons (a) that is charitable according to the law of Ontario, (b) that is organized for the advancement of religion and for the conduct of religious worship, services or rites, and (c) that is permanently established both as to the continuity of its existence and as to its religious beliefs, rituals and practices. The major caveat to this power is that the organization must use the land for a religious purpose (s. 2), which includes, but is not limited to, being a place of worship; a residence for its religious leader; a burial or cremation ground; a bookstore; a printing or publishing office; a theological seminary or similar institution of religious instruction; and a religious camp, retreat or training centre.

Although there is a restriction on the purpose of the land use, the concept of a “religious purpose” is broad and encompasses a wide range uses. As such, the *Religious Organizations’ Lands Act*, combined with the exception for organizations of any religious

¹⁴³ R.S.O. 1990, c. R.23.

denominations in the *Charitable Gifts Act*, strongly indicates that religious charities are treated as being more worthy than others in Ontario.

c) Religious charities holding real property

Section 8 of the *Charities Accounting Act* (Ontario)¹⁴⁴ prohibits charities in Ontario from holding real property not used or occupied by the charity for more than three years. Specifically, if a charity holds property which has not been used or occupied by the charity for more than three years, and is not required for the use or occupation by the charity now or in the immediate future, then the Ontario Public Guardian and Trustee (the branch of the Ontario government responsible to oversee charities) may vest the property in itself, and then sell the property and use the sale proceeds for the charitable purposes of the charity in question. Therefore, this restriction would limit the ability of charities to lease out surplus real estate for an income stream for more than three years, or develop surplus land for commercial use in return for an income stream.

However, for unincorporated religious organizations governed by the *Religious Organizations' Lands Act* (e.g. unincorporated churches), they can lease real property for non charitable purposes for up to 40 years.¹⁴⁵

d) Property taxes

The *Assessment Act* (Ontario)¹⁴⁶ governs the taxation of real property in Ontario. Section 3 provides that all real property in Ontario is liable to assessment and taxation, but enumerates a comprehensive list of exceptions to this rule. No general exception is provided for registered charities under the *Income Tax Act*, so all charities must instead look for particular categories that may be applicable, generally depending on the

¹⁴⁴ R.S.O. 1990, c. C.10.

¹⁴⁵ Section 10 of *Religious Organizations' Lands Act*.

¹⁴⁶ R.S.O. 1990, c. A.31.

purposes for which the property is used by the charities. While the list of exceptions in section 3 is too lengthy to recite in its entirety, some examples include:

- churches or religious organizations;
- public educational institutions;
- non-profit philanthropic, religious or educational seminaries of learning;
- public hospitals;
- children's treatment centres;
- care homes;
- The Boy Scouts Association or The Canadian Girl Guides Association;
- non-profit philanthropic corporations for the purpose of a house of refuge, the reformation of offenders, the care of children (but not day cares);
- charitable, non-profit philanthropic corporations organized for the relief of the poor if the corporation is supported in part by public funds;
- public libraries and other public institutions, literary or scientific;
- agricultural or horticultural societies/associations; and
- non-profit theatres.

e) Summary

This overview of some of the key Ontario legislation affecting charities allows two general conclusions to be drawn. Firstly, it is clear that provincial legislation can create a system where certain charitable purposes may be treated as being comparatively more worthy than others. From the examples cited above, it is clear that religious organizations in Ontario receive preferential treatment than other charities. Secondly, it is also possible for charities in different provinces to be treated differently under provincial legislation and therefore the striation of charities can differ in one province from another, depending on the applicable provincial legislation, thereby creating a rather arbitrary distinction between provinces. Admittedly, this is part and parcel of a federal system of government.

D. CONCLUSION

Notwithstanding Lord Macnaghten's framework for the equality for charities, the Canadian combination of law, policy and administration in fact evidences preferences for certain types of charities. However, the various sources and instances of striation in this regard do not appear to reveal a single continuum by which to uniformly measure the comparative worthiness of Canadian charities. For example there is no evidence that Canada's charitable sector is being measured using the Ontario Law Reform Commission's "charity/philanthropy" distinction.

Nevertheless, there does appear to be a recurring preference for some types of charities over others, but not necessarily a clear rationale for doing so. For example, both large and small charities receive preferential treatments, although in different contexts. In this regard, the *Income Tax Act* can be seen to favour large, public, government-funded institutions, or particular causes of national importance. This is because the high donation ceilings and capital gains exemptions for publicly traded securities have combined to provide significant support for high-value donations to large charities. While there is no direct relationship between these provisions and the corresponding benefit to large charities, there is some statistical evidence to support the proposition that large charities have benefited more from donations of capital gifts than small charities.

In addition, universities receive clear and specific preferential treatment under current tax rules. As well, ecological gifts and gifts of cultural property have independent systems designed solely for the purpose of supporting charities committed to Canadian ecological and cultural preservation. Furthermore, the *Income Tax Act's* distinction between the three types of registered charities reveals a clear preference for publicly-accountable organizations, as illustrated by the stringent rules applicable to private foundations. Even a provincial tax statute, such as the *Ontario Assessment Act*, appears to be of greater benefit to organizations that are government-funded.

At the same time, there is also a preference shown in the administration of charities with regards to both small and religious organizations. The general rationale behind the preference for smaller charities is that they are less capable, and therefore they should not be required to meet standards as high as those for larger charities. Similarly, religious organizations appear to benefit uniquely, both in terms of the broad legal interpretation of “advancing religion”, as well particular benefits afforded by provincial statutes, such as the Ontario *Religious Organizations’ Land Act* and the *Charitable Gifts Act*.

The striation of charities cannot be said to be a significant factor on the landscape of Canadian charities, and as such it will not likely become a serious topic for policy debate in the foreseeable future in Canada. However, it is probable that striation of charities will continue to evolve at the micro level in Canada with regard to achieving various government policies that may arise. To this end, striking a balance between maintaining the presumption of equality between all charities, as evident in the development of the common law in Canada, while at the same time being able to meet specific government policy objectives from time to time, will no doubt continue to be an important part of what makes up the charitable sector in Canada.