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CHAPTER 1

Introduction: Charitable and Not-for-profit Organizations

A OVERVIEW

The charitable and not-for-profit organizations witnessed substantial growth and change towards the end of the 20th century — and a number of developments strongly suggested that growth and change would continue. The growth seems to have continued a pattern over the previous decade where political and social dynamics and a stronger role for charitable and not-for-profit organizations in Canadian society required expansion of the sector.

Charitable organizations registered with the Canada Customs and Revenue Agency alone as of 2000 was more than 77,400. The Charities Directorate receives annually almost 4,000 applications for registration, of which close to 3,300 are registered.[1] The numbers of not-for-profit organizations is not known, but active ones probably exceed 175,000. Over just a few years, it is readily apparent how quickly the number of charities alone will increase — which will create its own dynamics for fundraising, volunteers, governance and other issues.

As an industry, charitable organizations are one of Canada's largest. The sector is involved in a wide array of activities and services, including public policy development, programme delivery and member services. Approximately 1.3 million Canadians are employed either full or part-time by charities alone. These charities have assets of over $100 billion and annual revenues of $90 billion. More than 7.5 million Canadians volunteer their time to charities and not-for-profit organizations — amounting to more than a billion hours each year. The volunteered time represents another 580,000 full-time jobs.[2]

Accountability received an enhanced focus. The sector itself recognized the importance of accountability and the public's perception that the sector was accountable. Accountability may mean different things in different contexts; nevertheless, organizations that provide public bene-

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1 *Registered Charities Newsletter*, Newsletter No. 11, December 3, 2001, Canada Customs and Revenue Agency.

2 These statistics are derived from *Working Together: A Government of Canada/Voluntary Sector Joint Initiative – Report of the Joint Tables*, August 1999, at pp. 16 to 19.

fits and, in return, receive benefits from society, need to be accountable. They are accountable to their members but also to various regulators, donors, beneficiaries and, perhaps equally important, the public in general.

The sector moved on the issue of accountability in the late 1990s. The Ontario Law Reform Commission's *Report on the Law of Charities*[3] was a potential new beginning. It made significant recommendations on the reform of the law of charities and not-for-profit organizations — recommendations which the Government of Ontario seemed to have largely ignored. The Panel on Accountability in the Voluntary Sector was established in 1997 and broadly consulted the sector and the public. Its 1998 discussion paper, *Helping Canadians Help Canadians: Improving Governance and Accountability in the Voluntary Sector* and its final report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*[4] focussed attention on the importance of governance and accountability. The recommendations are discussed throughout this text.

A number of other institutions have also examined charitable and not-for-profit organizations and their role in Canadian society. The statistics compiled in *Caring Canadians, Involved Canadians: Highlights from the 1997 National Survey of Giving, Volunteering and Participating*[5] provided benchmarks and information about the sector that were necessary for public policy discussions and decisions. The Canadian Policy Research Networks carried out significant research and issued several background and discussion papers to better inform the overall discussion.[6]

These reports, and the work and discussion generated by them, had another important effect. They engaged the Government of Canada with the sector. Arguably, the late 1990s and early 21st century have led to a joint recognition between the federal government and the sector of the importance of working together to achieve mutual goals. Unfortunately, the provincial governments have largely declined to participate. Nevertheless, a "joint initiative" has arisen from the work of the federal government and the voluntary sector. Substantial work is being done at joint tables with representation from the sector's evolving leadership and relevant departments, including Industry Canada, the Canada Customs

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3 (Toronto: Queen's Printer, 1996).

4 Panel on Accountability in the Voluntary Sector (Ottawa, February 1999).

5 Statistics Canada (Ottawa: Ministry of Industry, 1998, revised October 2000). A number of organizations were involved in preparing this survey, including the Canadian Centre for Philanthropy, Non-Profit Sector Research Initiative, Human Resources Development Canada, Canadian Heritage and Volunteer Canada.

6 See, for example, K.M. Day and R.A. Devlin, *The Canadian Nonprofit Sector*, CPRN Working Paper No. 2 (Ottawa: Renouf Publishing Co. Ltd., 1997). Universities also became involved in the research and analysis. See, for example, P.J. Monahan with E.S. Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (North York: York University, 2000).

and Revenue Agency, Ministry of Finance and so forth to find solutions to the issues and problems that exist in the sector.[7]

It is expected that over time — perhaps longer than desired — there will be reform in the law of charitable and not-for-profit organizations. The federal reforms may spur provincial governments into further action at that level. In the mean time, the legal system exists as is. And it is one that is confusing and often antiquated.

The legislative frameworks have not kept up with the growth in numbers or size of charitable and not-for-profit organizations. Essential concepts, such as what is "charitable", are based on the common law and not readily transparent or understandable to officers, directors and members of the organizations. This text attempts to assist those involved in the organizations and those providing legal and other advice to establish and maintain charitable and not-for-profit organizations within the legal framework.

Both charitable and not-for-profit (or "non-profit") organizations are operated on a "not-for-profit" basis. That is, neither may distribute profits to their members and must devote their resources to carrying out their objects. Both also provide some level of public benefit, although what is or is not a public benefit is much more restrictive for charitable organizations. A not-for-profit organization may, for example, be primarily a private, not-for-profit social club. This type of club would not normally be eligible to be a charitable organization.

Charitable objects are concerned with the relief of poverty, the advancement of education, the advancement of religion, or other purposes that are beneficial to the community. These four categories of charitable objects are based on the *Statute of Uses, 1601*[8] and the English common law.

The *Statute of Uses* was an early attempt to legislate charitable activities and to ensure that funds were not misapplied. The preamble listed a number of charitable objects. The list was used by the court in *Morice v. Bishop of Durham*[9] and its items became the generally accepted categories of charitable objects. A series of other cases, including *Income Tax Special Purposes Commrs. v. Pemsel*,[10] entrenched the four categories.

The Canadian courts have adopted much of the English law in carrying out their supervisory role over charities. These categories have also been accepted for use in various legislative and regulatory schemes. These categories, as interpreted by the courts, are used by the Canada Customs and Revenue Agency in deciding whether or not an organiza-

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7 *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (Ottawa, August 1999) set the initial stage for this joint activity.

8 (Imp.), 1601, 43 Eliz. I, c. 4. See Hubert Picarda, *The Law and Practice Relating to Charities* (London: Butterworths, 1977) for a fuller discussion of the *Statute of Uses*.

9 (1805), 10 Ves. 522, 32 E.R. 947, [1803-13] All E.R. Rep. 451 (L.C.).

10 [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.).

tion is a charitable organization.[11] The categories are also used in the *Charities Accounting Act*,[12] which provides the Public Guardian and Trustee with a supervisory jurisdiction over charities in Ontario.

The courts will look to the spirit and intent of the *Statute of Uses* in deciding whether or not an activity or object is charitable in nature. What is covered under "poverty", for example, has expanded to reflect changing social conditions.[13] The "advancement of education" is not restricted to teaching. It includes research if the research is of educational value to the person conducting the research or if it advances knowledge, which in turn may be taught.[14] More recently, the Supreme Court of Canada provided further insight into what "advancement of education" means in a modern, multi-cultural society.[15] The courts take a broad interpretation of the advancement of religion.[16] The fourth category, "other purposes beneficial to the community", is the category that is most subject to the changes that occur in society.

In all four categories, the objects or purposes must provide a general benefit to the public to be charitable. This benefit may be limited in its application to a portion of the community. If so, that portion must be significant. What is or is not significant will depend upon the context, including what the objects or purposes are and what the common understanding of the public is. The case law, especially the English case law, is extensive. Decisions are made on the basis of analogy to previous cases on the evidence that is before the court. The definition, however, is not static. Because it relies, in part, on the common understanding, it develops and evolves with society and its needs and conditions.

B INTRODUCTION

The law governing charitable and not-for-profit organizations is very confusing and generally underdeveloped. It is far from clear on a number of major issues, including the liability of directors, officers and members. The statutory provisions at the federal and provincial level are antiquated. Unlike the business corporations statutes, they have not been modernized for decades. Since the 1960s, attempts have been made to do so at both levels of government, but without very much success.

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11 See Information Circular No. 80-10R, "Registered Charities: Operating a Registered Charity" (Revenue Canada (Taxation), Dec. 17, 1985).

12 R.S.O. 1990, c. C.10.

13 *Minister of Municipal Affairs of New Brunswick v. (Maria F.) Ganong Old Folks Home* (1981), 129 D.L.R. (3d) 655 (N.B. C.A.) and *Re St. Catharine's House* (1977), 2 A.R. 337 (C.A.).

14 *Wood v. R.*, [1977] 6 W.W.R. 273 (Alta. T.D.); *Seafarers Training Institute v. Williamsburg (Township)* (1982), 39 O.R. (2d) 370 (Dist. Ct.).

15 *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10.

16 *Re Armstrong* (1969), 7 D.L.R. (3d) 36 (N.S. S.C.).

Instead of comprehensive legislated changes, problems have been addressed through policies and practices that have developed over the years within the existing legislative framework. At times, there have been inconsistencies in the legislation, leading to problems that have needed fixing. In the case of incorporation, the issuance of the letters patent is discretionary. Applicants for incorporation under the federal and provincial statutes do not have a right to become incorporated. An application may be refused if the applicants have not complied with the policy requirements. In Ontario, for example, all applications for incorporation by letters patent of a "charitable corporation" must receive prior approval of the Public Guardian and Trustee and include a number of clauses that restrict the objects and activities of the corporation. Unless the application includes those clauses, the letters patent will not be issued.

The confusion in the law and the failure to amend the statutory provisions to address and to take into account changes in society has made it more difficult for directors, officers and members to understand their legal obligations and roles. Individuals who participate in charitable and not-for-profit organizations are, for the most part, sincere in their attempts to make improvements to society, communities and institutions. They are not as often prepared for the potential legal, financial and practical consequences of their involvement. They may be "at sea" and unsure of what steps to take to address problems or issues. They may not have sufficient financial resources to pay for the expertise needed in an organization on an ongoing basis.

The confusion and underdevelopment of the law also make it difficult for lawyers to provide legal advice to clients. There are few texts on the subject. The cases often comment on the lack of legal developments in this area and the need to make analogies to other forms of law, including trust and business law.[17] The policies and practices may not be readily available or explicable. The law is not "transparent".

This text attempts to assist lawyers to better understand the complexities (legal and practical) of the law of charitable and not-for-profit organizations and to provide legal services to their clients in this area of law. It attempts to make the law, policies and practices more transparent. It distinguishes between "charitable" and "not-for-profit" organizations and reviews the options for legal structures (trust, unincorporated organization, corporation or co-operative corporation without share capital), and their advantages and disadvantages. It discusses the procedure for establishing and maintaining the legal structures, and provides precedents for each. The text also examines the major legal issues for officers, directors, trustees and members of charitable and not-for-profit organizations. Finally, it reviews the law of taxation as it applies to charitable and not-for-profit organizations and the procedures for apply-

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[17] See, for example, *Re Public Trustee and Toronto Humane Society et al.* (1987), 60 O.R. (2d) 236 (H.C.).

ing for registration as a charitable organization with the Canada Customs and Revenue Agency.

The practice of law in this area is complicated by more than the lack of transparency in the law itself. Very often, the individuals organizing an association are unclear on what their objectives are, how they want to achieve those objectives and how to structure their organization. In some groups, there may be significant differences of opinion and principles that need to be resolved or at least recognized. It is not at all unusual for groups to be divided on what appear to be, to an outsider, relatively unimportant issues. In providing legal advice and services, a lawyer should take care to ensure that he or she understands the context of the charitable or not-for-profit organization and its members.

C DEFINING CHARITABLE AND NOT-FOR-PROFIT ORGANIZATIONS

There are no clear definitions of charitable or not-for-profit organizations that are used by all. Rather, the definitions used by various regulators, standards-setting bodies, and the courts and in legislation have evolved and continue to evolve. The federal *Income Tax Act*,[18] for example, defines a charitable organization, in part, in subs. 149(1) as "an organization whether or not incorporated, all the resources of which are devoted to charitable activities carried on by the organization itself ...". That subsection defines "non-profit organization" as a "club, society or association that, in the opinion of the Minister, was not a charity ... and that was organized and operated exclusively for social welfare, civic improvements, pleasure or recreation or for any other purpose except profit ...". A 1977 federal government proposal for a new *Canada Non-Profit Corporations Act* (which has not been enacted) would have defined charitable corporation more broadly to include any activities that were primarily for the benefit of the public.[19]

Section 118 of the Ontario *Corporations Act*[20] was amended in 1994 to broaden the possible objects of the corporation. Until the amendment, corporations were limited to objects that were charitable, educational, agricultural, scientific, artistic, social, patriotic and so forth. The 1994 amendment permits incorporation if the corporation "has objects that are within the jurisdiction of the Province of Ontario". The amendment would appear to permit corporations to have objects that are commercial in nature. However, the corporation is not a "business corporation". The corporate name cannot suggest that it is a business corporation and any profits from any commercial activities must accrue to the corporation

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18 R.S.C. 1985, c. 1 (5th Supp.).

19 "Detailed Background Paper for the Canada Non-Profit Corporation Bill" (Ottawa: Department of Consumer and Corporate Affairs, 1977).

20 R.S.O. 1990, c. C.38, s. 118 [am. S.O. 1994, c. 27, s. 78(5)].

for its objects. The profits from the commercial activities may not be distributed to other persons. The restrictions on charitable corporations from carrying on business activities are not affected by the 1994 amendment.

Section 154 of the *Canada Corporations Act*[21] retains the list approach for permitted objects. A corporation may be incorporated under Part II of the *Canada Corporations Act* for objects that are "of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects". In addition, the purposes to be carried out must fall within the legislative authority of the Parliament of Canada.

The Public Legal Education Society of Nova Scotia uses a less precise definition. It defines a not-for-profit organization as "any group of people acting together to achieve some purpose other than personal monetary gain".[22] It also notes that the term not-for-profit organization "can relate to many different groups with many different objectives".[23] The Nova Scotia *Societies Act* provides for the incorporation of a wide range of not-for-profit organizations that "promote any benevolent, philanthropic, patriotic, religious, charitable, artistic, literary, educational, social, professional, recreational, or sporting, or any other useful object, but not for the purpose of carrying on any trade, industry or business."[24]

Charitable and not-for-profit organizations are not, however, only those legal entities that are not "businesses". Legally, they have existed for centuries and have provided goods and services for their members and for the community that would otherwise not be as readily available. The legal restriction on distribution of profits does not necessarily mean that charitable or not-for-profit organizations do not or are not to operate in a business-like fashion. Efficiency and effectiveness in the provision of goods and services is as important to officers and directors of charitable and not-for-profit organizations as it is for business organizations. How well either charitable and not-for-profit organizations or business organizations operate will usually depend more on their governance than on their legal status.

Charitable and not-for-profit organizations have a number of characteristics in common. First, both are "not-for-profit" in nature. Neither a charity nor a not-for-profit organization are intended to make a profit or to distribute profits to their members. This characteristic clearly distinguishes them from other forms of associations or organizations which are intended to make profits, including business corporations, partnerships, limited partnerships and sole proprietorships.

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21 R.S.C. 1970, c. C.32, s. 154.

22 Thelma Costello, ed., *Non Profit Organizations: A Nova Scotia Guide* (Halifax: Public Legal Educational Society of Nova Scotia, 1983), at 2.

23 *Ibid*.

24 R.S.N.S. 1989, c. 435, s. 3(1).

Both types of organizations must usually be organized for some "public benefit", although this term is difficult to define with precision. Generally, public benefit includes activities or objects that are intended to provide some benefits to the public or a specified or identifiable group of the public. What will be considered to be a public benefit is even more restrictive for charitable organizations. For example, a not-for-profit social club for members may be incorporated as a not-for-profit corporation but its social club objects are not charitable.

Charitable and not-for-profit organizations must devote their assets to furthering their objects and not to other purposes. As a result, the activities of these organizations are more restricted than those of, for example, a business corporation. If the charitable or not-for-profit organization operates any business activity, that activity must usually be incidental to the objects of the organization and the income and profits from the activity must be used to further the objects of the organization. Charitable organizations, in particular, are restricted in the types and size of business activities in which they may be involved. In Ontario, for example, the *Charitable Gifts Act*[25] regulates the ownership and sale by charities of business entities.

There are critical differences between charitable and not-for-profit organizations. Each is a distinct type of legal entity with different legal obligations and rights. Both types of organizations may be intended to be "not-for-profit" in the sense that they are not to distribute "profits" to their members. Organizations that have charitable objects, however, are more narrow in the types of public benefits that they will provide. In return, charitable organizations receive substantial privileges to carry out their objects.

A major privilege is the opportunity for registration with the Canada Customs and Revenue Agency as a charitable organization for purposes of the *Income Tax Act*.[26] Under the Act, the organization does not have to pay federal income tax on its income and it can issue charitable income tax receipts for donations received from others. Charitable organizations, in particular those that are registered with the Canada Customs and Revenue Agency, may receive additional privileges and exemptions from other forms of taxation, including provincial corporate taxes, goods and services taxes, retail sales taxes and municipal assessments.[27]

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25 R.S.O. 1990, c. C.8.

26 R.S.C. 1985 c. I (5th Supp.), s. 149.1.

27 Part IX (Goods and Services Tax), *Excise Tax Act*, R.S.C. 1985, c. E-15 [am. S.C. 1990, c. 45]. See also *Corporations Tax Act*, R.S.O. 1990, c. C.40, s. 57; *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, s. 9(2); R.R.O. 1990, Reg. 1012, s. 12; O. Reg. 1013/90, ss. 14 and 22; *Assessment Act*, R.S.O. 1990, c. A.31, s. 3.

Not-for-profit organizations may also receive some exemptions or privileges, but they are more restricted.[28]

D WHAT IS "CHARITABLE"

I THE ENGLISH LAW

(1) Defining "Charitable"

The definition of "charitable" or "charity" is central to the distinction between charitable and not-for-profit organizations. The case law concerning charities is considerable, especially in England. In England, the Charity Commissioners were established by the *Charitable Trusts Act, 1853*.[29] The Commissioners were continued and modernized by the *Charities Act, 1960*[30] and more recently by the *Charities Act, 1993*.[31] The Charity Commissioners apply case law and legislation to perform a supervisory role over charitable organizations. This supervisory role arises out of the need to protect the public interest in charitable monies. There are no similar comprehensive legislative provisions governing Canadian charities. Only Ontario has legislation that is intended to administratively regulate certain aspects of charitable organizations — the *Charitable Gifts Act*,[32] the *Charitable Institutions Act*,[33] and the *Charities Accounting Act*.[34]

The *Charities Accounting Act* provides some guidance. It defines "charitable purpose" as being:

- relief of poverty;
- advancement of education;
- advancement of religion; or
- any other purpose beneficial to the community not falling under the other three purposes.

However, the statute does not provide a comprehensive definition of charity that is clear and apparent for most cases. The fourth purpose, in particular, is very wide in scope, open to interpretation and difficult to use with any precision.

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28 See Revenue Canada's Interpretation Bulletin, "Non-Profit Organizations," IT-496, February 18, 1983, for a discussion of the exemption from income tax for some not-for-profit organizations.

29 (U.K.), 1853, 16 & 17 Vict., c. 137.

30 (U.K.), 1960, 8 & 9 Eliz. 2, c. 58.

31 (U.K.), 1993, c. 10.

32 R.S.O. 1990, c. C.8.

33 R.S.O. 1990, c. C.9.

34 R.S.O. 1990, c. C.10.

Popular definitions of charity focus on the "poor" in society. The legal definitions of charity are somewhat broader, although no precise definition has been developed. A series of English cases attempted to define in rough terms what is charitable but "no comprehensive definition of legal charity has been given either by the legislature or in judicial utterance", according to Viscount Simonds in *I.R.C. v. Baddeley*.[35]

The generally accepted definition is that of Lord Camden found in *Jones v. Williams*.[36] Lord Camden defines charity as "a gift to the general public use which extends to the poor as well as to the rich". A later case, *Perin v. Carey*[37] did not advance the definition much further when Wayne J. commented that "charity, in a legal sense, is rather a matter of description than of definition".

American case law is no more conclusive. Gray J. in *Jackson v. Phillips*[38] said:

> A charity, in the legal sense, may be more fully defined as a gift to be applied consistently within existing laws, for the benefit of an indefinite number of persons either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

The definitions used in the cases from the 19th century are "not broad enough" for some commentators.[39] The law recognizes a much wider definition of charity and the types of objects a charity may have. Objects that are recognized as being charitable in the twentieth century, for example, include the activities of humane societies and cultural organizations.

The issue of defining or classifying charitable objects and charitable purposes arose out of the *Statute of Uses, 1601*[40] (also known as the *Charitable Uses Act* and the *Statute of Elizabeth I*). The *Statute of Uses* was not enacted to define charity or charitable objects or purposes, but rather to reform the abuses in the law of uses, an early form of trusts. Prior to the sixteenth century, there was little need to regulate charities. Most of the charitable purposes in England were undertaken by the church or by local manors and guilds. Individuals would donate or be-

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35 [1955] A.C. 572, at 583 (H.L.).

36 (1767), Amb. 651; 8(1) Digest (Repl.) 322, as quoted in Herbert Picarda, *The Law and Practice Relating to Charities* (London: Butterworths, 1977), at 7; and, in *Halsbury's Laws of England*, 4th ed., Vol. 5(2) Charities (London: Butterworths, 1974), para. 505.

37 (1860), 24 How. 465, at 494, as quoted in Picarda, *supra*, note 36, at 8.

38 (1867), 14 Allen 539, at 555, as quoted in Picarda, *supra*, note 36, at 8. See also *Corpus Juris Secundum*, Vol. 14 (Brooklyn, N.Y.: The American Law Book, 1939), cited as 14 C.J.S. Charities 5.

39 Picarda, *supra*, note 36, at 8.

40 (Imp.), 1601, 43 Eliz. 1, c. 4. See Picarda, *supra*, note 36, for a fuller discussion of the *Statute of Uses*.

queath property to the church, which would use the property for what would be recognized as charitable purposes. The ecclesiastical courts were responsible for the supervision of the administration of the property donated or bequeathed.

Changes to the institutional structure of medieval England resulted in a greater opportunity and need for other institutions to become involved in social welfare. Gradually, by the early sixteenth century, the ecclesiastical courts lost jurisdiction over the supervision of the trusts to the Court of Chancery. Supervision was, however, lax and it became apparent that funds were being misapplied. This development, combined with the enactment of the Elizabethan "poor laws" and greater governmental interest in the relief of poverty, led to the *Statute of Uses*. The statute established an administrative framework to supervise the administration and allocation of property that was subject to a use or trust.

A list of charitable objects was included in the preamble to the *Statute of Uses*. The list was extensive and included:

> The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the 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.

Some scholars have noted the similarity between the list in the preamble of the statute and that in the *Vision of Piers Plowman*, a poem from circa 1377.[41] This similarity is consistent with the view that the definition of charity should reflect the values and needs of a society at any given time. These values and needs change. For example, today it is not generally acceptable to establish a scholarship fund for Caucasian, male, protestant students, yet it was in the early part of the twentieth century. This type of scholarship is now prohibited by the *Ontario Human Rights Code*.[42]

The *Statute of Uses* is not law in Canada; however, the list in the preamble has been used to assist in deciding what is or is not a charity, a charitable object or a charitable purpose. The first major attempt to use the preamble was in the English case of *Morice v. Bishop of Durham*.[43] The case arose from a will in which a testatrix bequeathed the residuary of her estate for "such objects of benevolence and liberalities as the Bishop of Durham in his own discretion shall most approve of". The

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41 Picarda, *supra*, note 36, at 9.

42 R.S.O. 1990, c. H.19. See *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 20 A.C.W.S. (3d) 736 (Ont. C.A.); revg. (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263 (H.C.).

43 [1803-13] All E.R. 451, at 453, 10 Ves. 522, 32 E.R. 947 (L.C.).

bequest was challenged by the next of kin on the grounds that the bequest was not for charitable purposes because the objects were not certain.

Counsel for the Bishop argued that the prevailing view was that a trust need only result in a public benefit for it to be considered a charity. Sir Samuel Romilly, for the next of kin, argued that the objects were not charitable because a public benefit would not necessarily be derived from the bequest. The court ruled, at trial, that charity in law must involve more than just a public benefit. On appeal, Romilly expanded on his argument that the definition must be restricted. He attempted to reconcile the case law into four categories:

> There are four objects, within one of which all charities, to be administered in this court, must fall. 1st, relief of indigent; in various ways: money: provisions: education: medical assistance: etc. 2dly, the advancement of learning: 3dly, the advancement of religion; and 4thly, which is the most difficult, the advancement of objects of general public utility.[44]

Lord Chancellor Eldon held that the trust in the *Bishop of Durham* case was not charitable in nature and that the legal definition of charity was restricted to those articulated in the *Statute of Uses* and other purposes that were analogous to those purposes. This overall approach to determining if an object is charitable remains the judicial and administrative approach today.

Although the *Statute of Uses* was replaced by the *Mortmain and Charitable Uses Act*[45] and by subsequent legislation reforming charitable law in England, it continues to be used as a guide. Russell L.J. commented in *Incorporated Council of Law Reporting for England and Wales v. A.G.*[46] that:

> The Statute of Elizabeth I was a statute to reform abuses; in such circumstances and in that age the courts of this country were not inclined to be restricted in their implementation of Parliament's desire for reform to particular examples given by the Statute: and they deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned, by applying as the test whether any particular case of abuse of funds or property was within the "mischief" or the "equity" of the Statute.
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> For myself, I believe that this rather vague and undefined approach is the correct one, with analogy, its handmaid, and that when considering Lord Macnaghten's fourth category in *Pemsel's* case ... the courts, in consistently saying that not all such are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law,

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44 *Ibid.*, (All E.R.), at 455.
45 (U.K.), 1888, 51 & 52 Vict., c. 42.
46 [1972] 1 Ch. 73, at 88, [1971] 3 All E.R. 1029 (C.A.).

> but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political purpose) which could not have been within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.

Lord Russell in the *Incorporated Council of Law* case referred to *Pemsel's Case* or the *Income Tax Special Purposes Commrs. v. Pemsel*.[47] *Pemsel's Case* is considered to be the major judicial approval of the classification of charitable purposes and charitable objects. In *Pemsel's Case*, Lord Macnaghten adopted Romilly's classification system. The case arose from a decision of the Inland Revenue Commissioners to restrict the types of charities that would not be subject to taxation on their income. Chancellor of the Exchequer Gladstone was concerned with the loss of tax revenue that resulted from the exemption. He also noted that the exemption amounted to a subsidy from the government to the wealthier charities. The less wealthy charities, which raised money through subscriptions, received little benefit from the tax exemption. Although no legislative action was taken at that time, the Inland Revenue Commissioners altered their administrative practice so that only those organizations that were involved in the relief of poverty were exempted. In 1886, the Commissioners refused to grant an exemption to the Protestant Episcopal Church, also known as the Moravian Church. The refusal led to *Pemsel's Case*.

The Moravian Church had received, in 1813, lands which were to be held in trust. The income from the lands was to be applied to the establishment and maintenance of missionaries. The Commissioners took the position that the legal definition of charity, for income tax purposes, did not include the purposes of the Moravian Church. Pemsel, the treasurer, took the position that charity should be given a broader interpretation, such as in trust law. Lord Macnaghten, writing for the majority of the House of Lords, ruled in favour of the Moravian Church. He commented:

> With the policy of taxing charities I have nothing to do. It may be right, or it may be wrong; but speaking for myself, I am not sorry to be compelled to give my voice for the respondent. To my mind it is rather startling to find the established practice of so many years suddenly set aside by an administrative department of their own motion, and after something like an assurance given to Parliament that no change would be made without the interposition of the Legislature.[48]

He outlined the four "principal divisions" of charitable purposes:

> "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

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47 [1891] A.C. 531 (H.L.).

48 *Ibid*., at 591.

> religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[49]

Lord Macnaghten emphasized in his judgment that there is a legal definition of "charity". By its nature, that legal definition may exclude some objects that non-lawyers might consider to be charitable in nature.[50] Unless the context requires otherwise, statutory references to "charity" are to be construed within the legal sense of charity that has been judicially developed.[51]

There are distinctions between the objects or purposes of the charitable organization, the means by which it is to carry out those objects or purposes and the consequences of carrying them out. A charitable organization may carry out its objects or purposes using powers that are not charitable.[52] For example, it may have the power to sell goods and services provided that it does so to carry out its charitable objects.

(2) Defining "Public Benefit"

The essential element in all four divisions of charitable objects or purposes is whether or not there is a public benefit. There must be a public benefit for the object or purpose to be charitable in its "legal sense". Whether or not an object or purpose has a public benefit is a question of fact based upon the evidence before the court.[53]

The public benefit, to be viewed as charitable, must benefit the whole community or a significant part of an appreciably important class within the community.[54] What is a sufficient or significant part of the community is not always clear. However, in *Oppenheim v. Tobacco Securities Trust Co.* the Court noted that the words "section of community" are a convenient indicator that: "the possible (I emphasize the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community ... must be a quality which does not depend on their relationship to a particular individual".

The assessment of this component of the test depends upon the charitable object or purpose that is being assessed. Certainly, the benefit cannot be a "private" one in which the numbers are so insignificant that the

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49 *Ibid.*, at 583.

50 *Shaw (Public Trustee) v. Day*, [1957] 1 All E.R. 745, at 752. See *Halsbury's Laws of England*, Vol. 5(2) Charities, for a thorough discussion of what is or is not charitable in law in England.

51 *Pemsel's Case, supra*, note 47, at 580; *Chesterman v. Federal Taxation Commr.*, [1926] A.C. 128 (P.C.); *Adamson v. Melbourne and Metropolitan Board of Works*, [1929] A.C. 142 (P.C.).

52 *Chichester Diocesan Fund and Board of Finance Inc. v. Simpson*, [1944] A.C. 341, at 371; *McGovern et al., v. A.G. et al.*, [1982] Ch. 321, [1981] 3 All E.R. 493 (Ch.).

53 *Nat. Anti-Vivisection Society v. Inland Revenue Commrs.*, [1948] A.C. 31, [1947] 2 All E.R. 217, at 219 (H.L.).

54 *Oppenheim v. Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31 (H.L.); *Verge v. Somerville*, [1924] A.C. 496 (J.C.P.C.); *Re Cranston, Webb v. Oldfield*, [1898] 1 I.R. 448.

general public does not benefit from the object or purpose. For example, a community not-for-profit theatre may not be used by all members of a community; however, if it is available for general public use and will be used by a substantial portion of the public, it would probably be viewed as providing a "public benefit". If the object or purpose has a general public utility and comes within the "spirit and intendment" of the preamble to the *Statute of Uses, 1601* it will usually be held to be charitable.[55]

The intention of any donor or of the persons establishing the charitable organization is not relevant in making the assessment. The court is concerned with its ability to control the administration of any charitable trust as a public benefit. Lord Russell, in *Re Hummeltenberg*,[56] concluded that the intention of the donor may be a factor in the assessment but it is not decisive. He commented that:

> So far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trust might be established in perpetuity for the promoting of all kinds of fantastic (though not unlawful) objects of which the training of poodles to dance might be a mild example. In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

The test of what is or is not a public benefit is not the opinion of the donor or creator of the charitable trust; nor is it the personal opinion of the judge reviewing the matter. Rather, it appears to be related to what most people in a society would view as being of a public benefit. Lord Simonds, in *National Anti-Vivisection Society v. I.R.C.*, reviewed several of the cases on public benefit. Quoting from earlier cases, he wrote:

> The question remained whether the object of the societies was charitable and after stating that the objects must be one by which the public, or a section of the public, benefits, the Lord Justice proceeds:
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> ... but what is the test or standard by which a particular gift is to be tried with a view of ascertaining whether it is beneficial in this sense? I am of opinion that it does not depend upon the view entertained by any individual — either by the judge who is to decide the question or by the person who makes the gift.

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55 *National Anti-Vivisection v. Inland Revenue Commrs.*, [1947] 2 All E.R. 217, at 220 (H.L.). See also *Incorporated Council of Law Reporting for England and Wales v. A.G.*, [1972] 1 Ch. 73, [1971] 3 All E.R. 1029 (C.A.); *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow (City) Corp.*, [1967] 3 All E.R. 215 (H.L.).

56 [1923] All E.R. 49, at 51 (Ch. D.).

He answers the question by saying:

> There is probably no purpose that all men would agree is beneficial to the community: but there are surely many purposes which everyone would admit are generally so regarded, although individuals differ as to their expediency or utility. The test or stand is, I believe, to be found in this common understanding.[57]

The concept of public benefit would appear to be based on a common understanding within a society. What is or is not a public benefit, therefore, is not static but will develop as the common understanding evolves. It will depend upon the social conditions at the time of the assessment. What once was considered to be a public benefit may, in the 21st century, no longer be seen as such. As with the overall judicial approach to the term "charitable", the interpretation of "public benefit" evolves to accommodate changes in society and the needs of society.[58] Lord Simonds noted in *National Anti-Vivisection* that:

> A purpose regarded in one age as charitable may in another be regarded differently.... A bequest in the will of a testator dying in 1700 might be held valid upon the evidence then before the court, but, upon different evidence, held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established, can ever fail. If, by a change in social habits and needs, or, it may be, by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if, with increasing knowledge, it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of the trustees of an established charity to apply to the court ... and ask that a *cy-pres* scheme be established.... A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed ... I cannot share the apprehension of Lord Greene, M.R., that great confusion will be caused if the court declines to be bound by the beliefs and knowledge of a past age in considering whether a particular purpose is to-day for the benefit of the community, but, if it is so, then I say that it is the lesser of two evils.[59]

In short, what is or is not a public benefit in law depends upon the conditions of society at any particular time and the common understanding within that society of what is or is not a public benefit.

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57 [1947] 2 All E.R. 217, at 237 (H.L.).

58 See *Gilmour v. Coats*, [1949] 1 All E.R. 848, at 853 (H.L.); *Re Campden Charities* (1881), 18 Ch. D. 310; *A.G. v. Marchant* (1866), L.R. 3 Eq. 424 (Ch.).

59 *Nat. Anti-Vivisection v. Inland Revenue Commrs.*, [1947] 2 All E.R. 217, at 238.

(3) Relief of Poverty

An object or purpose that is intended to relieve poverty will usually be charitable in nature. Poverty does not mean, however, that the individuals who will be eligible for assistance need to be destitute. Being "poor" is a relative term. It depends upon the overall economic and social conditions that exist in a society, the needs of individuals in that society and how society has changed.[60] The English case law is extensive on interpreting relief of poverty and applying it to different fact situations.[61]

(4) Advancement of Education

The advancement of education does not require an element of poverty, although assistance for the poor to become educated would, of course, be a charitable object or purpose. The advancement of education is a charitable object or purpose in and of itself. The intent appears to be to ensure that human knowledge continues to be improved and that the public finds out about these advances in knowledge.[62] The advancement of education, though, must have a public and not a private benefit. As a result, private research for private gain would not be a charitable purpose. The results of any research must be useful, be disseminated to the public, and benefit a sufficient portion of the public to be charitable.[63] The education of classes of persons within society may also be a charitable purpose.[64] Continuing education of professionals provides a private benefit and not a public benefit. As a result, it would not be a charitable purpose.[65] Similarly, education that is intended to advance a political point of view or party is not charitable.[66]

(5) Advancement of Religion

An object that is intended to advance a particular religion is charitable in nature, provided that the object is otherwise lawful.[67] The promotion of spiritual teachings generally or with respect to a particular religion

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60 *Trustees of Mary Clark Home v. Anderson*, [1904] 2 K.B. 645; *Re Coulthurst's Will Trusts*, [1951] 1 All E.R. 744, at 785.

61 See *Halsbury's Laws of England*, Vol. 5(2), Charities, paras. 16–23, for a more detailed review of the cases.

62 *Incorporated Council of Law Reporting for England and Wales v. A.G.*, [1971] 3 All E.R. 1029, at 1046 (C.A.).

63 *McGovern et al. v. A.G. et al.*, [1981] 3 All E.R. 493, [1982] Ch. 321 (Ch.), quoting from *Re Besterman's Will Trusts*, an unreported case of January 21, 1980. See also *Halsbury's Laws of England*, Vol. 5(2), Charities, para. 24.

64 *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, [1951] 1 All E.R. 31, at 33 (H.L.).

65 *Chartered Insurance Institute v. Corpn. of London*, [1957] 2 All E.R. 638 (D.C.).

66 *Re Hopkinson, Lloyds Bank Ltd. v. Baker*, [1949] 1 All E.R. 346 (Ch. D.); *Bonar Law Memorial Trust v. Inland Revenue Commrs.* (1933), 49 T.L.R. 220.

67 *Bowman v. Secular Society Ltd.*, [1917] A.C. 406 (H.L.); *Nat. Anti-Vivisection Society v. Inland Revenue Commrs.*, [1947] 2 All E.R. 217, at 220 (H.L).

fall within this category of charitable objects. As with all charitable objects, there must be a demonstrable public benefit to the religious object.[68] A purely contemplative order of nuns, for example, does not provide a sufficient degree of public benefit to be charitable.[69]

(6) Other Purposes Beneficial to the Community

The English case law with respect to the fourth category of charity — other purposes beneficial to the public — is very extensive.[70] As discussed above, there must be a general public benefit that falls within the spirit and intent of the preamble to the *Statute of Uses, 1601*. Private charities do not fall within this category. Gifts for a particular individual are also not charitable in nature.[71]

II THE CANADIAN CASE LAW

(1) General Comments

The four categories of charitable purposes developed in England formed the basic concept and definition of charity in Canada.[72] The courts and various departments and agencies of government categorize purported charitable and not-for-profit objects and organizations into one of the four divisions. Canadian commentators have noted that there is a wide acceptance that the first three divisions are of "public benefit". The fourth division, however, is vague and open-ended and has been used more out of convenience than always as a result of rigourous analysis. It probably includes any organization that would fall within the first three divisions because they are all, by definition, "beneficial to the community" or to the public. The problem is in determining what is not beneficial to the community or to the public in a charitable sense.[73]

(2) Relief of Poverty

The definition of what is or is not relief of poverty is fairly broad in Canada. There does not, for example, have to be a specific "public aspect" for a trust to qualify under this category of charity.[74] The type of

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68 *Cocks v. Manners* (1871), L.R. 12 Eq. 574, at 585 (H.L.).

69 *Gilmour v. Coats*, [1949] 1 All E.R. 848 (H.L.).

70 See *Halsbury's Laws of England*, Vol. 5(2), Charities, paras. 37–51.

71 *Ibid*., paras. 52–57.

72 *Scarborough Community Legal Services v. M.N.R.*, [1985] 2 F.C. 555, at 577 (C.A.); *Guaranty Trust Co. of Can. v. M.N.R.*, [1967] S.C.R. 133.

73 Professor Neil Brooks, "Charities: The Legal Framework," a background paper for the Secretary of State for Canada, 1983, at 21-22, 24.

74 *Jones v. T. Eaton Co*., [1973] S.C.R. 635; affg. [1971] 2 O.R. 316 (*sub nom. Re Bethel*) (C.A.).

suffering or distress includes mental illness,[75] blindness[76] and the neglect of children.[77]

The relief of poverty category has expanded since the early twentieth century and is intended to reflect the changing needs of Canadian society. *Minister of Municipal Affairs of New Brunswick v. (Maria F.) Ganong Old Folks Home* is an example of how the category has changed with the times. It is also consistent with the approach taken in the English cases. Hughes C.J.N.B. commented that:

> Social conditions have vastly changed in this Province since 1934 when Mrs. Ganong's will took effect. Social security and other financial assistance provided by Government and otherwise have nearly extinguished the class of persons who formerly were regarded as "poor" or "needy"....
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> Formerly the Courts held the view that if a gift for the benefit of aged persons was to be upheld there must be an element of poverty.... In recent years, however, the English Courts have departed from that view and I think it is now recognized that the words "aged, impotent, and poor" in the preamble to the Statute of Elizabeth I are to be read disjunctively so that aged persons need not also be poor to come within the preamble.[78]

Individuals should no longer be disqualified from receiving benefits under a charitable bequest because they also receive government assistance.[79] Courts must maintain currency with social conditions and realities, according to the Alberta Court of Appeal in *Re St. Catharine's House*.[80] The Court based its decision in part on "the liberal interpretations which the courts over the years [have] given to the word 'charity'". The Alberta Court of Appeal looked to the spirit and intent of the *Statute of Uses, 1601* and the subsequent case law to assist in reaching its decision.[81]

(3) Advancement of Education

The second category of charity, the advancement of education, has also received a broad interpretation in the Canadian courts. It includes the provision of financial assistance to students[82] and for publication of "an

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75 *Moorcroft v. Simpson* (1921), 64 D.L.R. 231 (Ont. H.C.).
76 *Re McDonald* (1980), 105 D.L.R. (3d) 681 (B.C. S.C.).
77 *Re Kinny* (1903), 6 O.L.R. 459 (In Chambers).
78 (1981), 129 D.L.R. (3d) 655, at 663-64 (N.B. C.A.).
79 *Re Forgan* (1961), 29 D.L.R. (2d) 585 (Alta. S.C.).
80 (1977), 2 A.R. 337 (C.A.).
81 *Ibid.*, at 348.
82 *Re Spencer* (1928), 34 O.W.N. 29 (S.C.).

unknown Canadian author".[83] The advancement of education is not restricted to teaching, but includes research, provided that the research is of educational value to the person conducting the research or advances knowledge, which may in turn be taught.[84]

However, if the underlying purpose of the purported charity is not "exclusively charitable," but has economic or political objects, it may not fall within this category. For example, in *Co-op College of Can. v. Sask. Human Rights Comm.*,[85] the Saskatchewan Court of Appeal held that the college had educational purposes, but these were primarily to educate members of the co-operative and credit union movement. The educational purposes provided a private and not a public benefit. Similarly, if the educational purposes are inextricably connected to a political purpose, such as the promotion of social change with respect to pornography, the object will not be charitable.[86] A trust established by a trade union and an employer to retrain employees would not come within this category because it does not provide a sufficient degree of public benefit.[87]

The simple "presentation to the public of selected items of information and opinion on the subject of pornography ... cannot be regarded as educational in the sense understood by this branch of the law".[88] The activities contemplated by the objects or purposes must be more than just the provision of information about national unity. In order to qualify as an advancement of education, there must be some element of training or instruction in the dissemination of information.[89]

"Advancement of education" and what it means in a modern society was at issue in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*[90] The Supreme Court, in a 4 to 3 majority, dismissed the Society's appeal from the Minister and refused to register it as a charitable organization. The case is also important for the role of the court in keeping the common law definition relevant. However, all agreed with the following comments of Mr. Justice Iacobucci on what "advancement of education" means:

> In my view, there is much to be gained by adopting a more inclusive approach to education for the purposes of the law of charity. Indeed, compared to the English approach, the limited Canadian definition of education as the "formal training of

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83 *Re Shapiro* (1979), 6 E.T.R. 276 (Ont. S.C.). But see the annotation of Professor John Smith, which argues that the trust does not satisfy the requirements because the money could be used to produce something that is not beneficial to the public.

84 *Wood v. R.*, [1977] 6 W.W.R. 273 (Alta. T.D.); *Seafarers Training Institute v. Williamsburg* (1982), 39 O.R. (2d) 370 (T.D.).

85 [1976] 2 W.W.R. 84 (Sask. C.A.).

86 *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.).

87 *L.I.U.N.A., Local 527, Members' Training Trust v. R.* (1992), 47 E.T.R. 29.

88 *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340, at 349 (C.A.).

89 *Canada UNI Assn. v. M.N.R.* (1992), 151 N.R. 4, [1993] 1 F.C. D-31 (C.A.).

90 [1999] 1 S.C.R. 10.

> the mind" or the "improvement of a useful branch of human knowledge" seems unduly restrictive. There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view. Notwithstanding the limitations posed by the existing jurisprudence, to adopt such an approach would amount to no more than the type of incremental change to the common of which the Court has approved in such decisions as *Watkins v. Olafson*, [1989] 2 S.C.R. 750, and *Salituro.*
>
> To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education which is of little use in modern Canadian society. As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of special benefit to the community, or advancing a common goal. In the case of education, the good advanced is knowledge or training. Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose - that is, to advance the knowledge or abilities of the recipients - and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.[91]

The majority had some limitations to this interpretation. It was concerned that education not be broadened beyond recognition. There must be actual teaching or learning components. There must be some legitimate, targeted attempt at educating others whether through formal or informal instruction, training, plans of self-study or otherwise. An opportunity for people to educate themselves is not sufficient. Another concern is that while education may be directed toward a practical end, at some point it ceases to be an end and becomes an activity. That activity must be independently determined to be charitable.[92]

(4) Advancement of Religion

Although not all religious purposes are recognized as being charitable in Canada, the courts seem to take a very broad interpretation of what a valid religious purpose is. Religious purposes are charitable if they instruct or edify the public either directly or indirectly. In *Re Brooks*,[93] the Saskatchewan Court of Queen's Bench held that a gift "to the work of the Lord" was charitable and not void for uncertainty. The Nova Scotia

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91 *Ibid.*, at paras. 168 to 169. The dissenting opinion agreed with the definition of "advancement of education" set out in para. 169, at para. 77 of Mr. Justice Gonthier's opinion.

92 *Ibid.*, at paras. 171 to 172.

93 (1969), 68 W.W.R. 132 (Sask. Q.B.).

Supreme Court ruled in *Re Armstrong*[94] that a direction to a trustee to make payments to a church for ancillary projects was within the category where the projects were related to the activities of the church.

The courts have turned down some objects on the grounds that they were not for the advancement of religion. In *Jewish Nat. Fund v. Royal Trust Co.*,[95] the Supreme Court of Canada held that a bequest to the Jewish National Fund for the purpose of a tract or tracts "of the best lands available in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies" was not a trust for a religious purpose.

What is "religion" is a legal question, based on the evidence before the court. It is not necessarily dependent upon the religious beliefs of the individuals involved. Thus, a belief that farming is the only activity compatible with religious life does not make farming a religious or charitable activity.[96] A trust for the encouragement of the study of comparative religions also would not qualify as a charitable trust, although it could qualify under the second category, the advancement of education.[97] In order to qualify under the advancement of religion, the court must be able to answer the question "What religion does the organization advance and how does it advance it?"

(5) Other Purposes Beneficial to the Community

The fourth category of charity, for other purposes that are beneficial to the community, is the most broad and difficult to consider. Often charitable objects that fail to meet the criteria for the first three categories may be considered under this category. A bequest to a conservation group meets the requirements[98] as do humane societies.[99] Neither would have qualified under the first three categories of charitable objects and purposes.

A municipality in Canada is not a charity but an "artificial being" that is invisible, intangible and exists only in contemplation of law, according to *Northumberland & Durham v. Murray & Brighton Public School Trustees*.[100] A municipality is a political body and not a charitable organization or a charity; a gift to a municipality for a local public pur-

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94 (1969), 7 D.L.R. (3d) 36 (N.S. S.C.).

95 [1965] S.C.R. 780, at 793.

96 *Hutterian Brethren Church of Wilson v. R.*, [1980] 1 F.C. 757, at 759 (C.A.), quoting *Hofer v. Hofer*, [1970] S.C.R. 958, at 980. But see also Mr. Justice Ryan's discussion of this issue at 764-66 in *Hutterian Brethren*.

97 *Re Russell, v. R.* (1977), 1 E.T.R. 285 (T.D.).

98 *Re Hogle*, [1939] O.R. 425 (H.C.).

99 *Re Toronto Humane Society* (1920), 18 O.W.N. 414 (H.C.J.); *Re Johnston*, [1968] 1 O.R. 483 (H.C.J.).

100 [1939] O.W.N. 565 (H.C.J.); see also *Auckland Harbour Bd. v. Commr. of Inland Revenue*, [1959] N.Z.L.R. 204.

pose may be, however, a valid charitable bequest.[101] Although governments clearly provide services that are of a public benefit, their role in society is to govern. A government is not a charitable organization even if the services that it provides, if provided by a charitable organization, are a charitable activity. A sanitorium where the county treasurer held the endowment fund in trust for the benefit of the institution was charitable.[102] Similarly, a trust for the beautification of property within the view of public highways, controlled by a government department, could be a charitable trust.[103] In both cases, the "charitable trust" was only being held by the office holder; it did not make the office-holder a charitable organization.

In *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General)*[104] the British Columbia court dealt with the distinction between charitable and government in context of the use of proceeds from lottery licences. The Attorney General argued that the use of proceeds by government for education and health care were charitable purposes. Mr. Justice Owen-Flood disagreed. He commented:

> I see no merit in this contention. While it may be true that the *Criminal Code* does not require that the same charitable or religious aim must exist between the licensee of the bingo event and the end to which the proceeds from that event are eventually put, it goes without saying that Government responsibility for health care and education is not a matter of charity but rather one of duty. It is a novel proposition of the respondent that government funds directed to health care and education constitutes an act of charity. In any event, just as it would have ill behooved Robin Hood to have robbed from charity to give to other charities, likewise, it ill serves Government, even with the best of motives, to in effect expropriate charitable and religious funds.[105]

Not all purposes that have a public benefit will be considered charitable. For example, an organization whose objects included encouraging awareness of railway history and preservation of railway structures and rolling stock could fall within this category. However, if the activities are too member-oriented and not oriented towards the public, it would not have the requisite public character to qualify.[106]

A gift may also be used for a charitable purpose outside Canada. In *Re Levy Estate*,[107] the Ontario Court of Appeal found that the executor

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[101] *Re Wright* (1917), 12 O.W.N. 184 (H.C.J.).

[102] *Lapointe v. Ontario (Public Trustee)* (1993), 1 E.T.R. (2d) 203.

[103] *Re Cotton Trust for Rural Beautification* (1980), 9 E.T.R. 125 (P.E.I. S.C.). The government department, however, is obliged to use the funds only for the purposes set out in the trust document.

[104] (1998), 52 B.C.L.R. (3d) 284 (S.C.).

[105] *Ibid.*, at 21.

[106] *National Model Railroad Assn. v. Seventh Division, Pacific Northwest Region M.N.R.*, [1989] 2 F.C. D-1, 31 E.T.R. 268 (C.A.).

[107] (1989), 68 O.R. (2d) 385 (C.A.).

of an estate may be limited in selecting objects in a foreign country that are charitable in Ontario, but that the charitable trust was still valid. The Court was not concerned with the practical arrangements in determining whether a charitable trust was created.

In *Re Laidlaw Foundation*, the Court recognized a broader view of what is or is not beneficial to the community. Mr. Justice Southey adopted the following statement defining community:

> The community must be a definite community or section of the community; it must be identifiable as such; it must be of appreciable importance; and it must not depend on any personal relationship to a particular individual or individuals.[108]

He continued that an Ontario court should not "pay lip service" to the preamble of the *Statute of Uses* because it is "highly artificial and of no real value in deciding whether an object is charitable". In this case, a donation to amateur sporting associations was an acceptable charitable donation under the *Charities Accounting Act* because amateur athletics promoted health, which has a public benefit.[109]

The Federal Court of Appeal has dealt with what is or is not included in this fourth category in a number of taxation cases. In *Native Communications Society v. M.N.R.* the Court summarized the case law (both English and Canadian):

> A review of decided cases suggests that at least the following proposition may be stated as necessary preliminaries to a determination whether a particular purpose can be regarded as a charitable one falling under the fourth head ...
>
> a) the purpose must be beneficial to the community in a way in which the law regards as charitable by coming within the "spirit and intendment" to the preamble to the *Statute of Elizabeth* if not within its letter.
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> b) whether a purpose would or may operate for the public benefit is to be answered by the courts on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity.[110]

The Court quoted — with approval — Lord Wilberforce that "the law of charity is a moving subject".[111] The Court was also cognizant of a special legal position in Canadian society occupied by Aboriginal peoples arising out of s. 35 of the *Constitution Act, 1982* and the large role that the state plays in their lives. It concluded that a newspaper that included political news, nonetheless, had objects within the fourth category. The newspaper was used for more than conveying news; it made the readers

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[108] (1984), 18 E.T.R. 77, at 113, 58 O.R. (2d) 549 (Div. Ct.).

[109] See also the annotation to this case in 18 E.T.R. 77, at 120–32.

[110] [1986] 3 F.C. 471, at 479–80 (C.A.). Case citations deleted.

[111] *Ibid.*, at 480. *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow City Corpn.*, [1968] A.C. 138, at 154 (H.L.).

aware of cultural activities and attempted to foster language and culture. The Court commented that "it would be a mistake to dispose of this appeal on the basis of how this purpose or that may or may not have been seen by the courts in the decided cases as being charitable or not. This is especially so of the English decisions relied upon, none of which are concerned with activities directed toward aboriginal people".[112]

The special position of Aboriginal peoples was also addressed in *Gull Bay Development Corp. v. R.*[113] This case and *Native Communications Society* appear to stand for the proposition that because of the special relationship at law and in the Constitution between the federal government and Aboriginal peoples (in particular, status Indians), there may be a broader interpretation of what is or is not a public benefit in a First Nation community. However, both cases also noted that the activities must be carried out for charitable purposes. The achievement of the charitable purposes may have been inherently an indirect result of the organization's activities, however, there was still a requirement to do so. The organization could indirectly accomplish what could not be accomplished directly by the alternative structures, such as the Band Councils.[114] It is not clear to what extent these two cases reflect a substantive legal difference or would be available in other circumstances not involving Aboriginal persons. The cases used in *Gull Bay* would suggest that it does not represent a significant departure from the previous case law; it may, instead, build on the practical approach of the law of charities — what the results will be, not necessarily the method of achieving the results.

Mr. Justice Marceau in *Toronto Volgograd Committee v. M.N.R.* discusses the difference between "purposes" and "activities". He notes that the classification system used since the *Pemsel* case was with respect to "charitable trusts" and their purposes while the *Income Tax Act* is concerned with "activities". He comments that:

> When used with respect to *activities* and in the context of tax law, some adaptation will undoubtedly be required to make it capable of identifying those activities sufficiently beneficial to be entitled to the very special tax treatment conferred by the Act. For one thing, it seems to me obvious that the vagueness of the fourth heading is particularly troubling when applied to activities as it appears almost totally meaningless if not somehow reformulated with more precise language. But the point I really wish to make here is that, to be assigned validly and usefully to one of the four headings of the classification, activities must necessarily ... be considered with respect to their immediate result and effect, not their possible eventual consequence. In other words, the activity will draw its charita-

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[112] *Ibid.*, at 482.

[113] [1984] 2 F.C. 3 (T.D.).

[114] See *Toronto Volgograd Committee v. M.N.R.*, [1988] F.C. 251, at 255 (C.A.). Mahoney J. refers only to the *Native Communications* case; however, his comment would appear to be consistent with the rationale set out in *Gull Bay Development Corp. v. R.*, *supra*, note 113, at 20-21.

> ble quality from what it itself accomplishes not from what may eventually flow from it or be somehow indirectly achieved by it.

It is not clear how the courts will reconcile these different approaches and whether or not such will affect the special position of Aboriginal people. However, it is clear from the separate written reasons of the appellant judges that the activities undertaken by the purported charitable organization or proposed to be undertaken are relevant to the assessment, for income taxation purposes, of whether or not the organization is charitable.

An assessment of the activities would appear to provide a better basis on which to determine if the organization will be a charity. If reliance were placed only on the constituting documents, it would "enable an organization to conduct its affairs in a manner necessary to satisfy that test for the purposes of securing registration but allow it to pursue other activities authorized by its constituting documents although not charitable ones in the legal sense".[115] The Federal Court, in the *Native Communications*, *Gull Bay* and *Toronto Volgograd* cases appears to have taken a practical approach to determine charitability, at least for purposes of income taxation.

At least one case, *Notre Dame de Grâce Neighbourhood Assn. v. M.N.R.*, has considered expanding the principles set out in the *Native Communications* case to a non-Aboriginal situation. MacGuigan J. noted that the objects were ones which enlightened opinion would regard as qualifying under the advancement of education. He continued that:

> In light of this decision [*Native Communications*] there may well be an argument to be made that an organization similarly dedicated to the interests of the urban disadvantaged as the British Columbia society was to the interests of the native people should qualify as a charity. But, on the facts, this is not such a case.[116]

Its activities, and the ambivalence about its ultimate purposes, resulted in the Notre Dame de Grâce Neighbourhood Association not qualifying as a charitable organization, under either an "enlightened opinion" about the advancement of education or as a benefit to the public. Its purposes may have qualified; but its activities took it beyond either category into political activism.[117]

One must have regard to all circumstances to determine what types of activities, purposes or objects are within one of the four categories of charities. Analogies to objects that have or have not been accepted by the courts, the Canada Customs and Revenue Agency, the Ontario Public Guardian and Trustee or other regulatory bodies having jurisdiction

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[115] *Ibid.*, at 268.
[116] 85 N.R. 73, at 77, [1988] 3 F.C. D-39 (C.A.).
[117] *Ibid.*, at 80.

over charitable matters are the best gauge of whether or not a contemplated object is charitable. Very often the decision is a result of drawing a fine distinction, a fact that the Supreme Court of Canada recognized in *Blais v. Touchet*[118] when it noted:

> Fine distinctions have been made from time to time and it is not always easy to see why in one case a court would decide that a case fell on the charitable side of the line and in another case on the non-charitable side.

These fine distinctions become even more difficult to draw if the charity is also involved in business activities or political activities.

(6) Modernizing the Definition of "Charity" — Judicial Activism or Legislation?

The Supreme Court, in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*[119] examined for modern times the concept of "advancement of education". The Society had applied for registration as a charity but was refused by the Minister of National Revenue, largely on the grounds that it had not constituted itself exclusively for charitable purposes.

This case became an important focal point for the reform of the law of charities as it wound its way to the Supreme Court of Canada. A number of intervenors were permitted by the Supreme Court who argued that the Court ought to take a role in revising the law of charities. Ultimately, however, the legal issue went before the Court, and the Society lost its appeals at the Federal Court of Appeal and Supreme Court of Canada levels. At the Supreme Court, the justices were split 4 to 3.

Mr. Justice Iacobucci wrote the majority opinion. He commented:

> Considering the law of charity in Canada continues to make reference to an English statute enacted almost 400 years ago, I find it not surprising that there have been numerous calls for its reform, both legislative and judicial. This appeal presents an opportunity to reconsider the matter. Not only is this Court invited to consider, for the first time in more than 25 years, the application of the law as it presently exists, but we also face the interesting questions of whether the time for modernization has come, and if so, what form that modernization might take. The answers to these questions will decide the ultimate issue before us: whether the appellant qualifies for registration as a charitable organization under the *Income Tax Act*.[120]

Mr. Justice Iacobucci continued that "the starting point for the determination of whether a purpose is charitable has, for more than a century,

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[118] [1963] S.C.R. 358, at 360.
[119] [1999] 1 S.C.R. 10.
[120] *Ibid.*, at para. 127.

been Lord Macnaghten's classification, set out in *Pemsel* ... of the purposes of the common law had come to recognize as charitable."[121] He noted that the Supreme Court had implicitly adopted the *Pemsel* classification in *The King v. Assessors of the Town of Sunny Brae* and explicitly in *Guaranty Trust Co. of Canada v. Minister of National Revenue*.[122] He continued, with respect to the issue of "benefit to the public" that some confusion had been created where the Court commented in *Guaranty Trust* that the *Pemsel* scheme is subject to the consideration that the purpose must also be for the benefit of the community or of an appreciably important class of the community. This phrasing created confusion with the fourth head of charity.[123]

The issue of "public benefit" does appear to have a greater role in Canada than under *Pemsel*. Justice Iacobucci continued:

> 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 what Professor Waters calls ... 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 centres on who is the recipient.[124]

He recognizes that this analysis is a difficult one. And that it has called for reform, including by Mr. Justice Strayer of the Federal Court of Appeal in *Human Life International in Canada Inc. v. M.N.R.* where Strayer J.A. comments that the definition of charity "remains ... an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators and the courts".[125]

But what is the role of the courts in providing this clarification? It is a limited one, according to the majority. Essentially, the role of the court in modernizing the law is limited in a democracy to "those incremental

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[121] *Ibid.*, at para. 144.
[122] *Ibid.*, at para. 147. Respectively, [1952] 2 S.C.R. 76 and [1967] S.C.R. 133.
[123] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, *supra*, note 119, at para. 147.
[124] *Ibid.*, at para. 148.
[125] *Ibid.*, at para. 149. *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202 (F.C.A.).

changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society".[126]

The dissenting opinion of Mr. Justice Gonthier concluded that the Society was charitable. It disagreed with the majority opinion and found that the Society fell within the fourth head of charity and that its objects were not vague. However, importantly, it also commented on the modernization of the common law definition of charity. Mr. Justice Gonthier wrote:

> The Society and the intervenors invited this Court to modify the existing categorizations of charitable purposes set out in *Pemsel* in favour of a broader test. Given my view that the existing *Pemsel* classification scheme is sufficiently flexible to comprehend the Society's claim, and my view that the Society's purpose is charitable within that framework, we need not engage in such an exercise on the facts of this appeal. This is not to suggest that the courts are precluded from recognizing new charitable purposes, or indeed, from revising the *Pemsel* classification itself should an appropriate case come before us. The task of modernizing the definition of charity has always fallen to the courts. There is no indication that Parliament has expressed dissatisfaction with this state of affairs, and it is plain that had Parliament wanted to develop a statutory definition of charity, it would have done so. It has not. This leads me to conclude that Parliament continues to favour judicial development of the law of charity.[127]

To a large measure, the underlying issue in *Vancouver Society of Immigrant and Visible Minority Women* was not strictly a definition of charity at common law. Although this issue was important, it needs to be seen in context of the legislative regime that is in place, in which the common law plays a part. The provisions of the *Income Tax Act* also looked to the activities of the organization, not its purposes alone, in any assessment of eligibility for registration as a charitable organization. Nevertheless, from a modernization of the common law of charity, the judicial approach will clearly be a restrained one.

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[126] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, *supra*, note 119, at para. 150 quoting from *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670.

[127] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, *supra*, note 119, at para. 122.

III POLITICS AND BUSINESS — NON-CHARITABLE OBJECTS AND ACTIVITIES

Two areas have concerned the courts and regulators in interpreting the case law. Political objects and business activities have not usually been recognized as "charitable". Each is dealt with below.

(1) Political Objects

"Political" objects are not "charitable" objects notwithstanding that there may be a public benefit accruing from an organization entering into the political realm. Generally, an organization that is established with the purpose of altering the law will not be considered a "charitable" organization, regardless of the potential public benefits. In *Bowman v. Secular Society*,[128] the House of Lords noted that:

> The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable.... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

Similarly, a community legal services clinic is not a charitable organization if the essential part of its activities is devoted to influence the policy-making process.[129] An organization that was devoted to changing the law with respect to pornography was not undertaking charitable activities and was not, therefore, a charitable organization.[130] An activist neighbourhood association, even one devoted to the interests of the urban poor, would not qualify as a charitable organization.[131]

The courts do recognize, however, that a certain amount of political participation may be a legitimate, or at least not illegitimate, activity of a charitable organization. For example, a charitable organization that has only an "exceptional and sporadic activity" would probably not be deprived of its charitable registration for income taxation purposes "because one of its components or some incidental or subservient portion

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[128] [1917] A.C. 406, at 442 (H.L.). Quoted with approval in *Everywoman's Health Centre Society (1988) v. M.N.R.*, [1992] 2 F.C. 52, at 70.

[129] *Scarborough Community Legal Services v. M.N.R.*, [1985] 2 F.C. 555 (C.A.).

[130] *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.).

[131] *Notre Dame de Grâce Neighbourhood Assn. v. M.N.R.*, [1988] 3 F.C. D-39, 85 N.R. 73 (C.A.).

thereof cannot, when considered in isolation, be seen as a charity".[132] An organization that is essentially a trust for the espousal of a political cause would not, however, benefit even if its objects were charitable in nature. A political cause, although laudable, is not a charitable cause.[133]

The courts, however, have not required that an organization provide services or undertake activities for which there is a public consensus in order to be considered "charitable". In the *Everywoman's Health Centre* decision, Decary J. commented that:

> With respect to the argument that there can be no charity at law absent public consensus, counsel for the respondent was unable to direct the Court to any supporting authority. Counsel was indeed at a loss to define what she meant by "public consensus", what would be the degree of consensus required and how the courts would measure that degree. 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.[134]

Charitable organizations may, however, undertake limited political activities. The activities must be ancillary or incidental to the objects of the charitable organization and related to those objects. A charitable organization cannot lobby for a specific political party or donate to a political party. Its role appears to be limited and a charitable organization must be able to account for all expenditures.[135] The law is not very clear, however, on what constitutes ancillary or incidental political activities. It would appear that expenditures in excess of 10 per cent of a charitable organization's revenue would raise concerns with the Canada Customs and Revenue Agency. However, that figure is, at best, a rough guideline and not determinative of what is or is not "ancillary or incidental" to the charitable objects.

The Canada Customs and Revenue Agency, as part of its review of the law, has attempted to clarify the law in this area. Its predecessor, Revenue Canada, noted in its 1990 Discussion Paper[136] that the *Income Tax Act* was amended in 1986 to permit registered charities to engage in

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[132] *Scarborough Community Legal Services v. M.N.R.*, [1985] 2 F.C. 555, at 579–80 (C.A.).

[133] *Toronto Volgograd Committee v. M.N.R.*, [1988] 3 F.C. 251, at 275 (C.A.).

[134] [1992] 2 F.C. 52, at 68–69 (C.A.).

[135] Section 149.1, *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For a discussion of this issue, see Information Circular No. 80-10R, December 17, 1985, "Registered Charities: Operating a Registered Charity" and Information Circular 87-1, "Registered Charities — Ancillary and Incidental Political Activities".

[136] Revenue Canada, "A Better Tax Administration", 1990 Discussion Paper, at 17–18.

limited, non-partisan political activities to support their charitable mandate. It commented, by way of an example, that a charity established to care for abused children could "press for changes in the law to assist it in pursuing that aim".[137] It is important to note that for the Canada Customs and Revenue Agency, the "pressing for changes in the law" are, in effect, charitable activities. Furthermore, only limited resources could be used for that purpose. What might be acceptable charitable activity for one charity might be political and, thus, non-charitable activity for another.

The issue of what is a political activity versus a charitable activity became prominent during the 1992 constitutional referendum. To clarify its interpretation of the law, Revenue Canada issued a news release advising charitable organizations with respect to participation in the referendum debate. The news release stated that a registered charity would not compromise its status by affirming a position on the referendum. The organization could also make that position known publicly and be associated with a public information campaign. No funds that were raised for charitable purposes, however, could be used for such political purposes.[138]

(2) Business Activities

Another concern for the courts, the Canada Customs and Revenue Agency and other regulators is the level of business activities that are undertaken by charitable organizations. The underlying premise for charitable (and not-for-profit) organizations is that they are not intended to make profits but to provide "public benefits". In addition, the assets of organizations should not be at risk, as they would be normally in a business activity. Another policy consideration is that charitable organizations, which benefit from tax exemptions, should not be competing unfairly in the marketplace with commercial entities that are subject to taxation. Any business activities must be "related" to the objects of the charitable organization.

The courts have reviewed the issue of what types of business activities may be undertaken by a charitable organization. In *McGovern et al. v. A.G. et al*[139] the Court commented that:

> The distinction is thus one between (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves

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[137] *Ibid.*, at 17.

[138] "Charitable Organizations and the Referendum", Revenue Canada Taxation News Release, September 23, 1992. This position would appear to be consistent with the Court's decision in *Canada UNI Assn. v. M.N.R.* (1992), 151 N.R. 4 (F.C.A.). In that case, the purpose for the organization was to promote politically Canadian unity.

[139] [1982] Ch. 321, at 341, [1981] 3 All E.R. 493 (C.A.).

form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status. The distinction is perhaps easier to state than to apply in practice.

The distinction has been very difficult to apply in Ontario. Anderson J. made a similar comment in *Re Public Trustee and Toronto Humane Society et al.* in which he stated that "the final statement is a classic understatement".[140] The *Charitable Gifts Act*[141] places statutory constraints on charitable organizations and their holding of shares or other interests of a business that have been gifted or vested to a charity. The term "business" and what it includes is not defined in that Act but has been considered in the cases. It would appear that a medical arts building owned by a public hospital may be an investment rather than a business undertaking.[142] An "exceptional and sporadic" activity probably would not be sufficient to deprive an organization of registration for income taxation purposes.[143] Assuming that the business activity is ancillary or incidental to the objects, and that it is not prohibited or restricted by the *Charitable Gifts Act*, any profits earned must be used exclusively for the charitable objects of that charitable corporation. In some cases, the profits may be used indirectly for charitable purposes. This issue is discussed further in chapters 9 and 10.

The Canada Customs and Revenue Agency has developed guidelines, based on the case law, to interpret what types of "related business" activities registered charities may undertake.[144] The business activity cannot become a substantial commercial endeavour. If the business activity is not a substantial commercial endeavour, it will be considered to be a "related business" activity where it meets the following four factors:

(1) The activity is related to the charity's objects or ancillary to them;

(2) There is no private profit motive, since any net revenues will be used for charitable activities;

(3) The business operation does not compete directly with other for-profit businesses;

(4) The business has been in operation for some time and is accepted by the community.

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[140] (1987), 60 O.R. (2d) 236, at 254 (H.C.).
[141] R.S.O. 1990, c. C.8.
[142] *Re Centenary Hospital Assn.* (1989), 69 O.R. (2d) 1 (H.C.).
[143] *Scarborough Community Legal Services v. M.N.R.*, [1985] 2 F.C. 555 (C.A.). Although this case dealt with political objects and activities, its reasoning would appear to be equally applicable to business activities.
[144] "A Better Tax Administration", *supra*, note 136 at 13–14.

The Canada Customs and Revenue Agency also notes that in some circumstances a business activity may not meet all four factors, but will still be considered as "related". For example, a hospital may compete with privately operated parking lots in providing a parking lot for patients and visitors to use. The Canada Customs and Revenue Agency's approach was adopted from the majority decision in the Federal Court of Appeal in *Alberta Institute on Mental Retardation v. Canada*.[145]

The business activity must not have become an end in itself. For example, commercial farming by an organization that, on the evidence, was the main activity of the organization would result in the organization not being eligible for registration for income taxation purposes. A commercial farming operation for a profit does not become a charitable activity for the sole reason that it is being carried out by a charitable organization to raise funds for its charitable activities.[146] In this case, the court found that the Hutterian Brethren had a business purpose as well as a religious purpose. The motivation of the individuals may have been for religious purposes, but the corporate entity carried out those activities for business purposes.[147]

A charitable organization may, subject to the legislation and its constituting documents, invest funds that are surplus to its immediate needs to earn income to carry out the charitable activities. However, the investments should not become, in effect, an activity of the organization. If the investments take on the character of being inventory for the purpose of making profits from business, the organization may be considered to be carrying on a business activity. If so, the organization may lose its "charitable" character and become a commercial or business enterprise even if the "profits" are subsequently used for charitable purposes.[148]

The courts may also view, for purposes of the *Charities Accounting Act* and the *Charitable Gifts Act*, the ownership of a medical arts building as an investment and not a business. The courts recognize that the activities should not be viewed in isolation in making a determination of whether or not an activity is a business.[149] These sources of revenue will become increasingly important to charitable organizations as governments continue to restrict funding levels for community, social and

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[145] [1987] 3 F.C. 286, at 298–99 (C.A.). But see the dissenting opinion of Pratte J. which would appear to have required a stronger relationship between the commercial activity and the charitable object for the business activity to be "a related business activity" for purposes of income taxation.

[146] *Hutterian Brethren Church of Wilson v. R.*, [1980] 1 F.C. 757, at 759 (C.A.). It is not easy, however, to reconcile this case with the *Alberta Institute on Mental Retardation v. Canada* case on this point.

[147] *Ibid.*, at 766, *per* Ryan J. This case is also not easily reconciled with the Trial Division's decision (Walsh J.) in *Gull Bay Development Corp.*, [1984] 2 F.C. 3, which considered but distinguished the *Hutterian Brethren* case.

[148] *Church of Christ Development Co. v. M.N.R.*, [1982] C.T.C. 2467, 82 D.T.C. 1461 (T.R.B.).

[149] *Re Centenary Hospital Assn.* (1989), 69 O.R. (2d) 1, at 19.

health services and traditional fundraising efforts are less effective. Care must be taken in drafting the objects of the organization and in implementing any business activities to ensure compliance with the law as it is interpreted and applied by the courts, the Canada Customs and Revenue Agency, the Public Guardian and Trustee and regulators.