

CHAPTER 1

THE FUNDRAISING WORLD IS A TOUGH PLACE

A. INTRODUCTION

I. Context of Fundraising: Competition and Expectations

Fundraising is a critical activity for most charities and not-for-profit organizations. Without funds, these organizations could not carry out their activities. Without fundraising, Canadian society, Canadians and others throughout the world would not obtain the benefits from a vibrant charitable and not-for-profit sector — a sector that operates in most areas of our lives.

The charitable and not-for-profit sector is essential to Canada's economic and social well-being. The sector provides the goods and services that Canadians value and hold dear — health care, education, recreation, social services, culture and community engagement. Indeed, it would be difficult to find a Canadian who has not been substantially affected by the activities of the sector, either as a recipient or provider (or both).

The sector is a substantial part of the Canadian economy.¹ Including the “big three” (hospitals, universities and colleges), the sector represents approximately 8.5 per cent of the Gross Domestic Product (GDP) of Canada. Even without the “big three”, it is substantial at 4.0 per cent. Over 12 per cent (two million full-time equivalents or “FTEs”) of the “economically active population” is employed in or volunteers for the

¹ The following figures are from Michael Hall, *et al.*, *The Canadian Nonprofit and Voluntary Sector in Comparative Perspective* (Toronto: Imagine Canada, 2005) at 7 to 9. The report sets out the results of a joint study by Johns Hopkins University and Imagine Canada, funded by the Voluntary Sector Initiative of the Government of Canada, which places Canada in an international context.

sector on a full-time or part-time basis. Without the “big three”, the figure is about 9.0 per cent; again, a significant proportion of Canadians who are in the workforce. By comparison, manufacturing as a whole employed about 2.3 million Canadians. Canada ranked second in the world, based on this comparative study of 37 countries. Only the Netherlands had a higher proportion (14.4 per cent) of its workforce employed in or volunteering for the sector.

Not all of these individuals who were “economically active” are employees. Of the two million full-time equivalents overall, about 1.5 million are paid employees. This figure, because it is “FTE”, includes both full-time and part-time employees. Without hospitals, universities and colleges, the numbers are about one million FTEs who are paid employees. Interestingly, volunteers account for 549,000 FTEs of which only about 25,000 are volunteers in hospitals, universities and colleges. The savings to charitable organizations is substantial, especially when one considers that about one-third of all FTEs in the remainder of the charitable sector is “staffed” by volunteers.

Generally, there are three sources of revenues for charitable and not-for-profit organizations — government, fees and philanthropy.² Overall, organizations obtained about 51 per cent of their revenues from government, 39 per cent from fees, and nine per cent from philanthropy. “Overalls”, however, mask the reality for most organizations. In addition, these “overall” figures include hospitals, universities and colleges who are recipients of large amounts of provincial, federal and territorial funding.

Taking out the big three, though, the overall numbers do change but not by overwhelming proportions. Government is 39 per cent and fees are 48 per cent, leaving philanthropy at 12 per cent. These numbers are averages and as the saying goes, a person can drown in a pool of water that is only on average three inches in depth. The reality for many organizations is that they do not receive government funding, or their fee revenue (“earned income”) is minimal due to the nature of the organization or the services that it provides. In addition, the “government” category is large and includes highly competitive processes such as Heritage Canada, the Ontario Trillium Foundation, the Ontario Arts Council and their equivalents throughout Canada.

There are over 80,000 organizations registered as charities by the Canada Revenue Agency — competing for the volunteers, for financial

² *Ibid.*, at 15 to 17.

resources and for other resources. Registered charities have special privileges under the *Income Tax Act*.³ In common with most not-for-profit organizations, registered charities are generally exempt from income taxation. Registered charities may also issue receipts for income tax purposes, allowing donors to obtain a credit which may be used to reduce income tax payable.

The number of “not-for-profit organizations” is not known. Unlike charities, there is no legal requirement in many cases to register or otherwise be officially noticed. Likely, the number of not-for-profit organizations amount to a few hundred thousand, when corporations without share capital, trusts and unincorporated associations are taken into account. A significant number of these organizations are probably very small and *ad hoc* or established to address a specific issue or concern. The degree of sophistication, size and scope will, of course, vary substantially from chambers of commerce to neighbourhood groups that are organized to construct and maintain the outdoor hockey rink.

The figures quoted earlier illustrate how large and important the sector is to Canada and to Canadians. They also indicate the potential for competition that exists in the fundraising market. The competition can be, and often is, very strong both to attract and to retain donors and volunteers. Some charities, such as hospitals, universities and colleges, as noted above, are large and have the human and financial resources to devote to very sophisticated and professionally run campaigns. The majority of charities are relatively small, with annual revenues of less than \$250,000. They compete with each other and with other groups in their community for donations, grants and other revenues, usually for smaller amounts than what may interest the hospital foundation engaged in a major capital campaign. They are less likely to use professional fundraisers or to have employees with experience or expertise in fundraising. The intermediate-sized charities, with revenues of more than \$250,000, but not the millions of dollars of the larger charities, must compete with both ends of the spectrum.

There are several challenges facing the sector.⁴ The retrenchment of government funding in the 1990s was and remains a significant one. Overall funding was reduced but the approach also changed — from core funding to project funding. The reduction in funding (or a failure to keep up with demand) in health, education and social services, placed many organizations in direct or indirect competition with hospitals, universities

³ R.S.C. 1985, c. 1 (5th Supp.).

⁴ *Ibid.*, at 25 to 27.

and colleges. Those organizations were in a much better position to raise funds from all sources than most other organizations.

A number of other critical changes occurred, to varying degrees. Overhead or core activities were no longer funded; rather, funding was restricted to direct program costs. This approach also took hold in a number of foundations, which compounded the problem. Basic infrastructure of an organization can fall behind, making it even more difficult for that organization to survive, much less succeed in its mission. At the same time, governments and foundations became more aware of financial accountability — indeed, to the extent that federal programming after the “sponsorship scandal” is increasingly focused on financial accountability to the detriment of the ability of organizations to deliver.

These trends make it difficult for organizations to plan — not just strategically but also for operational purposes. The capacity of the organization suffers, which over time will potentially result in it being less relevant and resilient.⁵

There are other constraints or difficulties for organizations that are fundraising with the public. The public tends to be a small group who provides financial resources and volunteer time. While it is difficult to determine what the limit is on both, there does appear to be a limit which is being or has been approached. Unless society can ensure that more people give time and money, the competition will become more intense.

The public has also adopted some of the characteristics of government over the last several years. Donors are increasingly demanding detailed reporting and strict accountability. Donations or foundation grants are for projects as opposed to “core funding”. Corporations, understandably, view sponsorships and donations as part of their corporate strategic plan — thus, areas for financial or other support will be targeted to communities in which the corporation operates, the types of businesses that are relevant to the corporation (for example, health care for life insurance companies) or to projects with a high visibility.

⁵ See also Katherine Scott, *Funding Matters: The Impact of Canada's New Funding Regime on Nonprofit and Voluntary Organizations*, Summary Report (Ottawa: Canadian Council on Social Development, 2003). Two articles in *The Philanthropist* highlight the issues. Denise O'Connor's “The Dark Side of Contracting with Government: The Case of VHA Hamilton and the Province of Ontario” (2004) 19 *Philanthrop*. 201-210; and Karine LeVasseur and Susan D. Philips, “Square Pegs in Round Holes: Vertical and Horizontal Accountability in Voluntary Sector Contracting” (2004) 19 *Philanthrop*. 211-231, explore comparable difficulties with respect to government contracting.

Organizations, therefore, have to make choices. They can bemoan the reality, but this approach without concerted effort to change approaches that have become common will have no helpful impact on the organization. Organizations can adapt to the processes and priorities of the funders, be they government, corporations, foundations or individuals. This approach risks, in the longer term, relevancy, resiliency and capacity of the organization as it develops programs to chase the dollars. The organizations can look at the situation from a more strategic approach, recognizing the reality but attempting to develop a strategic fundraising campaign that meshes with its own strategic plan and the reality of fundraising. This approach may include developing longer-term relationships with targeted funders with whom the organization can identify a common strategic approach. Or the organization can flounder without any direction other than the flow of the current. These are not necessarily good choices but those are the choices at an individual organizational level.

There are several different approaches to fundraising — direct solicitation, grants applications, charitable gaming, sponsorships and special events (from art auctions to walkathons) are the typical ones. Organizations should not ignore a fundraising tool that is more readily within the control of the organization — earned income. Earned income, such as fees, is too often overlooked as a form of revenue. A theatre group should determine, for example, if the price of its tickets is appropriate. Too high? Too low? The level needs to be balanced with its charitable objects if it is a charity and not simply treated as a “business activity”. Nevertheless, too often charitable organizations do not even consider earned income as a legitimate way to raise funds to carry out charitable activities and to benefit the public.

The approach to be taken by a charity or not-for-profit organization will depend to some extent at least on the expertise and experience that is available to the organization. Size does matter and the officers and directors of an organization need to ensure that the fundraising campaign is one that can be implemented in a prudent and responsible manner.

It is a given that charities and not-for-profit organizations must fundraise and, in many cases, use a variety of methods to do so. Fundraising, though, does not occur in a vacuum. The charitable and not-for-profit sector is part of Canadian society and operates within its legal, political and social structure. Canadians have certain expectations of charities and not-for-profit organizations. These expectations may not be clearly articulated, but they are readily apparent to most — especially

when something goes wrong. When a charitable or not-for-profit organization falls short of the expectations, it becomes readily apparent.

The charitable or not-for-profit organization will suffer as a result of any such failure, especially where the public — rightly or wrongly — perceives the failure to be caused by less than ethical behaviour. The organization may lose credibility with the public or community leaders. Or supporters will decide not to donate their time, money or other resources to the organization. Equally important, the charitable and not-for-profit sector may suffer from the actions of a few. The early 21st century has witnessed this issue very forcefully throughout Canada.

A charitable or not-for-profit organization's reputation in the community is an essential factor in its longer-term success in fundraising. William Shakespeare, in *Othello* (Act III, Scene 3), recognized the importance of reputation with Iago's comment to Othello:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name,
Robs me of that which not enriches him
And makes me poor indeed.

The long-term success of charitable and not-for-profit organizations and for the sector itself is dependent upon ensuring that there is no reason for reputations of the organizations or their officers and directors to be stolen or damaged. The central purpose of this text is to assist the officers and directors of charitable and not-for-profit organizations to keep within the expectations of Canadians — especially those that are of a legal nature — to build and strengthen reputations as part of fundraising activities.

II. Factors that Strengthen the Reputation

The organization's clear recognition of the role of fundraising is a key factor that strengthens its reputation. Fundraising is necessary for the charitable or not-for-profit organization to carry out its activities and to fulfill its objects. It is not, however, the reason why most organizations were created. Officers and directors need to ensure that an appropriate balance is achieved in the organization's priorities. While it needs to raise the funds necessary to deliver its goods and services, a charitable or not-for-profit organization cannot devote or use its resources such that

the organization's purpose becomes solely or primarily to raise funds — whether through traditional fundraising or through earned income.

There is no clear, unequivocal point at which this event may occur. In some cases, when the organization is undergoing severe financial constraints, the officers and directors may by necessity focus on fundraising. Arguably the officers and directors would be negligent if they did not do so in certain circumstances. There are also some organizations whose essential purpose is to raise funds for other organizations. Hospital foundations, for example, fall into this category of organizations. But even with these types of organizations, there is a fundamental rationale for their existence — to raise funds not for the sake of raising funds but to provide funding for hospitals to carry out their charitable activities.

The development and maintenance of a strong, positive reputation in the community depends upon the organization's accountability to its members and the broader community in which it operates. There are three elements of accountability. The first is relatively well-known and involves traditional financial accountability. Organizations must be able to “account” for the funds through the establishment of proper accounting books and records, financial statements (audited or unaudited depending on the circumstances) and operating in accordance with generally accepted accounting principles. This form of accountability is primarily concerned with ensuring that funds are expended for the purposes for which they were raised and not for fraudulent or similar purposes or improprieties.

Organizations and their officers and directors are also accountable to the organization's membership and stakeholders for their management of the affairs of the organization. The organization must be operated in an effective and efficient manner — is it providing its goods and services at a reasonable cost? Is it meeting its objectives? Is it being prudent?

There is a third and increasingly important form of accountability. Charitable and not-for-profit organizations must be accountable to the public and their communities for how funds are raised, for the use of those funds and for their priorities. This form of accountability reflects society's more sophisticated and developing understanding of the role of charitable and not-for-profit organizations in Canadian society. It also recognizes that society has high expectations of these organizations, expectations that must not only be met but be shown to have been met in the operations of the organizations. This form of accountability also speaks to issues such as the relevance and resilience of the organization. Is it doing what the public wants? Or needs?

Society may hold charitable and not-for-profit organizations accountable for fundraising activities and use of funds in a number of forums. In some cases, there are formal, institutional structures that have been put into place by legislation or by the common law. The Ontario Public Guardian and Trustee, for example, has a statutory role under the *Charities Accounting Act*⁶ and the *Charitable Gifts Act*.⁷ The superior courts in the provinces have a common law role to play in the supervision of charities, which is sometimes supplemented by legislation. Similarly, the Canada Revenue Agency plays an essential role with respect to taxation and the exemption from taxation of certain types of fundraising under the *Income Tax Act* and the *Excise Tax Act*.⁸

Charitable and not-for-profit organizations are also held accountable in the court of public opinion. The community will assess organizations against the community's expectations of the organizations. It is critical, therefore, for organizations to account to the public for their use of the funds, ensuring to the extent possible that the funds were raised through appropriate methods and that they are expended on appropriate activities. The public will forgive mistakes, provided that the mistake is recognized and measures are put into place to avoid further mistakes. It is less willing to forgive illegal or unethical behaviour, especially if repeated, even if it was for a good cause.

There are a wide variety of fundraising activities available to organizations. An organization needs to identify those that are acceptable to it, its supporters and, in context of its activities and reputation, the community in which it operates. Fundraising by door-to-door solicitation is a traditional form of fundraising in Canada. This type of fundraising is, however, under pressure given public perceptions of safety. Using children, therefore, to go door-to-door in the evening may be considered a questionable method to raise funds. More recent forms of fundraising, such as charitable gaming, may be appropriate for some charities, but for others it raises serious moral and ethical issues.

Telemarketing is a more modern form of fundraising that has also raised the hackles of the public. People generally do not like being disturbed at home by the telephone ringing during supper, or of having messages mysteriously being left in their voice mail from people they have never heard of and do not want to speak to at any time. Yet, given the pressure exerted by charities on Industry Canada not to restrict the

⁶ R.S.O. 1990, c. C.10, as amended.

⁷ R.S.O. 1990, c. C.8.

⁸ R.S.C. 1985, c. E-15 (am. S.C. 1990, c. 45).

use of telemarketing by charities, it would appear that telemarketing is a successful means of raising funds.

Society has also begun to identify new concerns and issues. For example, many donors have become concerned about the use of their personal information. They want to protect their privacy. Activities, such as sharing or renting lists of names, that were common and acceptable at one time are no longer as accepted by the community. Individuals who were treated at a hospital may — and do — object to finding out that they are now on a mailing list for either the hospital's or the hospital foundation's fundraising campaign. Some individuals who have had loved ones treated and die at a hospital take particular umbrage at receiving campaign literature directed at the family.

Intellectual property has also become an issue — both in the use of the intellectual property of others by charitable or not-for-profit organizations and the protection of the organization's intellectual property. Society places greater emphasis on the value of intellectual property now than it did only a few years ago.

Efficiency is another topic that has become prominent in recent years. The community expects charitable and not-for-profit organizations to be efficient in their fundraising and in their use of funds. While few, if any, expect the organizations to be ruthlessly efficient and business-like, organizations that have inexplicably high “administrative costs” are not viewed favourably. Donors are also more inclined to make larger donations if they are satisfied that their donation will meet the needs of more than just one charity or not-for-profit organization. It is more efficient to build one theatre that meets the needs of most of the community's performing arts groups than to build a theatre for each group. This approach, though, may result in a loss of vision for the individual organizations and of their relevancy.

There are, of course, other factors that are generally applicable to charitable and not-for-profit organizations. For example, the activities must fall within the objects or purposes of the organization. This text will attempt to provide guidance to officers and directors who deal with the major factors in a variety of fundraising activities. The focus will be on compliance with the legal requirements and expectations, but keeping an eye on the ethical and “political” context in which charities and not-for-profit organizations exist. The officers and directors have legal responsibilities for the operations of the charity or not-for-profit organization, including its fundraising activities. They must exercise due diligence and, equally important, be able to demonstrate that they have done so, throughout the fundraising campaign.

Before examining in more detail the types of fundraising activities and their legal contexts, it is important to be clear on what are charitable and not-for-profit organizations. The next part of this chapter reviews the commonalities and differences between a “charity” and a “not-for-profit” organization. The differences in particular explain why some fundraising activities are open to one but not the other.

B. DEFINING CHARITABLE AND NOT-FOR-PROFIT: WHAT YOU CAN OR CANNOT DO

I. Commonalities and Differences

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 do so.⁹ The federal *Income Tax Act*, for example defines a “charitable organization” in s. 149.1(1) as “an organization, whether or not incorporated, all the resources of which are devoted to charitable activities carried on by the organization itself ...”. Section 149(1)(l) 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 improvement, pleasure or recreation or for any other purpose except profit ...”.

The *Canadian Oxford Dictionary*¹⁰ takes a less official approach to the definitions of “charitable” and “non-profit”, one that is more consistent with what most people would consider to be charity. “Charitable” focuses on the “need” of people and “helping” them. Similarly, non-profit is simply not making a profit.

Bill C-21 in the 38th Parliament, which was an attempt to modernize the federal not-for-profit corporations legislation, took a slightly different approach. It did not discuss directly “charitable” versus “non-charitable”;

⁹ For an excellent discussion of the definition of “charitable”, see “A Working Definition of Charity”, Chapter 6 of Volume 1, Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Queen’s Printer, 1996). See also Ronald Hirshborn and David Stevens, *Organizational and Supervisory Law in the Nonprofit Sector*, CPRN Working Paper No. CPRN 01 (Ottawa: Canadian Policy Research Networks, Inc., 1997).

¹⁰ *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998).

it avoided the issue by categorizing organizations as “soliciting” or “non-soliciting” corporations.¹¹

Definitions develop within the context in which the person defining the term intended to use it. The *Income Tax Act* definition is more legalistic and intended to establish legal categories. That approach makes sense given that economic benefits will flow depending upon whether or not an entity is determined to be “charitable” or “non-profit”. The dictionary definition, on the other hand, is consistent with the approach that the layperson would use.

There are some commonalities between “charitable” and “not-for-profit” in these definitions. Neither is a business entity and, therefore, are not intended to create and distribute profits. This characteristic distinguishes this sector from the business sector of Canadian society, even where the sectors provide similar goods or services, such as food or accommodation. Charitable and not-for-profit organizations also provide some form of public benefit, although there may be a greater degree of private benefit with a not-for-profit organization. They both must devote all of their resources to their objects and not for other purposes.

Thus far, it is apparent that there are common characteristics between charities and not-for-profits, but there are also distinctions between the two. The law of charities and the legal definition of “charitable” have developed out of trust law, whereas the law of not-for-profit organizations is not based on trust law. Trust law is a creature of the law of equity and the equitable courts of England. The law of not-for-profit organizations is more contractual in nature and developed out of the common law courts of England.

II. Court Definition of “Charitable”

I. Overview

This text is not intended to review in detail the case law in the court of equity and the court of common pleas. It is not a “legal text”. It is important to understand the “legal” definition of “charitable” that has been developed by the courts because some forms of fundraising are

¹¹ Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*. The Bill was at committee stage (Industry Committee) but died on the order paper (Nov. 29, 2005) with the calling of the 2006 federal election.

available to “charities” but not to “non-profits” or “not-for-profits”. An understanding of the definition will also assist officers and directors to understand their “legal” roles better and to minimize risks of non-compliance with “legal” obligations and requirements.

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*¹² and the English common law.

The *Statute of Uses, 1601* 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*¹³ and became the generally accepted categories of charitable objects. A series of other cases, including *Income Tax Special Purposes Commissioners v. Pemsel*,¹⁴ 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 Revenue Agency in deciding whether or not an organization is a charitable organization. The categories are also used in the *Charities Accounting Act*, 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, 1601* 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. 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 advances knowledge, which in turn may be taught. The courts take a broad interpretation of the advancement of religion. The fourth category, “other purposes beneficial to the community”, is the category that is most subject to the changes that occur in society.

¹² (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, 1601*.

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

¹⁴ [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.).

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 are the objects or purposes and what the public generally considers to be charitable. 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.

Popular definitions of “charity” focus on the “poor” in society. The legal definition of “charity” is 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*.¹⁵

2. *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”. The “public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty” under Canadian common law.¹⁶ Whether or not an object or purpose has a public benefit is a question of fact based upon the evidence before the court.¹⁷

The public benefit, to be viewed as charitable, must benefit the whole community or a significant part of or appreciably important class within the community. What is a sufficient or significant part of the community is not always clear. However, in *Oppenheim v. Tobacco Securities Trust Co.*¹⁸ 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 that the quality which distinguishes them from other

¹⁵ [1955] A.C. 572 at 583 (H.L.).

¹⁶ *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue – M.N.R.)*, [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10 at para. 147.

¹⁷ *National Anti-Vivisection Society v. I.R.C.*, [1947] 2 All E.R. 217 at 219 (H.L.).

¹⁸ [1951] 1 All E.R. 31 (H.L.).

members of the community ... must be a quality which does not depend on their relationship to a particular individual.¹⁹

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 general public does not benefit from the object or purpose. For example, a community non-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.²⁰

The intention of any donor or of the persons establishing the charitable organization is not determinative in making the assessment. The court is concerned with its ability to control the administration of any charitable trust as a public benefit. 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.²¹

What is or is not a public benefit 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 early 21st century, no longer be seen as such. As with the overall judicial approach to “charitable”, the interpretation of “public benefit” evolves to accommodate changes in society and the needs of society.²²

This concept of “public benefit” appears to be consistent with the approach taken by Canada Revenue Agency. Canada Revenue Agency in 2002 began to make available policy statements on important issues to assist the organizations. In *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, CRA comments that term “public benefit” has over the past decade received considerable discussion. It identifies several “sub-requirements” to meet the public benefit test:²³

¹⁹ *Ibid.*, at 34.

²⁰ *National Anti-Vivisection Society v. I.R.C.*, [1947] 2 All E.R. 217 at 220 (H.L.).

²¹ *Ibid.*, at 237.

²² *Gilmour v. Coats*, [1949] 1 All E.R. 848 at 853 (H.L.).

²³ CPS-024, at para. 2, March 10, 2006.

- The benefit should generally be tangible.
- The beneficiaries must be the public-at-large or come from a sufficient segment of the public as determined by the charitable purpose being considered.
- The organization may not otherwise benefit private individuals except under certain limited conditions.
- Subject to some exceptions, the organization cannot exist for the benefit of its members. Professional associates and trade unions are not typically considered charitable at law.
- The organization cannot restrict delivery of the benefits to a certain group or class of persons without adequate justification.
- The organization cannot charge fees for its services where the effect of the charge would be to unduly exclude members of the public.

The policy statement continues in some detail about the meanings of “benefit” and “public”, and what sort of proof is required to fall within the policy statement. Establishing what is or is not providing a “public benefit” is particularly difficult for the fourth head of the definition of charitable — such other purposes that are beneficial to the community not falling under the other three purposes.

At times, the discussion does tend to become circular, not only within the policy statement but in the case law and in legal literature. 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. The requirement of a charitable organization being for the benefit of the community “is a necessary, but not a sufficient, condition for a finding of charity at common law”.²⁴

3. The Four Horsemen: Poverty, Education, Religion and Other Purposes Beneficial to the Community

The four categories of charitable purposes developed in England formed the basic concept and definition of charity in Canada. The courts and various departments and agencies of government categorize purported charitable and non-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 rigorous 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

²⁴ *Vancouver Society of Immigration and Visible Minority Women v. Canada (Minister of National Revenue)*, [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10 at para. 148.

problem is in determining what is not beneficial to the community or to the public in a charitable sense.²⁵

(a) *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. The type of suffering or distress includes mental illness,²⁶ blindness²⁷ and the neglect of children.²⁸ The relief of poverty category has expanded since the early 20th 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*²⁹ is an example of how the category has changed with the times. It is also consistent with the approach taken in the English cases. Chief Justice Hughes 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.³⁰

Individuals should no longer be disqualified from receiving benefits under a charitable bequest because they also receive government assistance. Courts must maintain currency with social conditions and realities, according to the Alberta Court of Appeal in *London, England (Public Trustee) v. Synod of the Diocese of Edmonton*.³¹ The court based its decision in part on “the liberal interpretations which the courts over

²⁵ Professor Neil Brooks, “Charities: The Legal Framework” (Ottawa: Secretary of State, February, 1983), a background paper for the Secretary of State for Canada, at 21-24.

²⁶ *Moorcroft v. Simpson*, [1921] O.J. No. 88, 64 D.L.R. 231 (S.C.).

²⁷ *Re McDonald*, [1980] B.C.J. No. 1274, 105 D.L.R. (3d) 681 (S.C.).

²⁸ *Re Kinny*, [1903] O.J. No. 175, 6 O.L.R. 459 (H.C.J. Chambers).

²⁹ [1981] N.B.J. No. 307, 129 D.L.R. (3d) 655 (C.A.).

³⁰ *Ibid.*, at 663-64.

³¹ [1977] A.J. No. 359, 2 A.R. 337 (C.A.) (*sub nom. Re St. Catherine’s House*).

the years [have] given to the word ‘charity’.”³² 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.

(b) Advancement of Education

The second category of charity, the advancement of education, has also received a broad interpretation in the Canadian courts, even before the Supreme Court of Canada’s decision in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue)*.³³ Advancement of education includes the provision of financial assistance to students³⁴ and for publication of “an unknown Canadian author”.³⁵ 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.³⁶

However, if the underlying purpose of the purported charity is not “exclusively charitable,” but has economic or political objectives, it may not fall within this category. For example, in *Re Co-operative College of Canada and Saskatchewan Human Rights Commission*,³⁷ 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.³⁸ 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.³⁹

The simple “presentation to the public of selected items of information and opinion on the subject of pornography ... cannot be regarded as

³² *Ibid.*, at para. 24.

³³ [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10.

³⁴ *Re Spencer*, [1928] O.J. No. 238, 34 O.W.N. 29 (S.C.).

³⁵ *Re Shapiro* (1979), 6 E.T.R. 276 (Ont. S.C.).

³⁶ *Re Russell Estate; Wood v. Alberta*, [1977] A.J. No. 542, [1977] 6 W.W.R. 273 (T.D.).

³⁷ [1976] 2 W.W.R. 84 (Sask. C.A.).

³⁸ *Positive Action Against Pornography v. M.N.R.*, [1988] F.C.J. No. 134, [1988] 2 F.C. 340 (C.A.).

³⁹ *L.I.U.N.A. Local 527 Members’ Training Trust v. Canada (Minister of National Revenue)*, [1992] T.C.J. No. 466, 47 E.T.R. 29.

educational in the sense understood by this branch of the law”.⁴⁰ In order to qualify as an advancement of education, there must be some element of training or instruction in the dissemination of information. However, the *Vancouver Society of Immigrant and Visible Minority Women* case makes it clear that “the law regarding the educational head of charity should be modified and in that respect it is worth considering the slightly more expansive approach taken by the English courts”.⁴¹

The Canada Revenue Agency has begun to recognize the sophistication of this charitable purpose, in particular in a modern world where society needs to balance various interests. What is “political” as opposed to “educational”? What is “lobbying” in the guise of an “educational publication” versus “legitimate public debate of issues for educational purposes”?

The CRA articulated its position on this issue in February 2006 in Policy Commentary CPC-027. The Policy Commentary notes that the Supreme Court of Canada had identified the following criteria to determine whether a purpose or activity is charitable under advancement of education:

- There must be a structure and a genuinely educational purpose.
- There must be a teaching or learning component.
- There must be a legitimate, targeted attempt to educate others.

It is not sufficient simply to provide an opportunity for people to educate themselves, such as by making materials available. The definition of “education”, though, extends beyond traditional academic subjects and includes practical topics and skills, such as life skills. The caveat is that the acquisition of the skill by the individual will provide a benefit to the community.

CRA notes education may be advanced through the use, creation, publication and distribution of magazines. The proviso is that the contents of the publication must be predominantly educational in the sense understood by the law. The magazine may, therefore, contain some material that would not otherwise be considered educational provided that it is limited and ancillary and incidental to the main educational purpose. This content could include advertising, games, entertainment, and opinions.

⁴⁰ *Positive Action Against Pornography v. M.N.R.*, [1988] F.C.J. No. 134, [1988] 2 F.C. 340, at 349 (C.A.).

⁴¹ [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10 at para. 166.

It should be noted that one publication in particular was successful in obtaining registration as a charity under this new approach or perhaps the approach articulated in CPS-027 came about as a result of that registration. The publisher, though, appears to be ensuring that it remains on the “educational side” of the equation through seminars, workshops, symposia and other more traditional forms of bringing about education for the public benefit.

(c) 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 is a valid religious purpose. Religious purposes are charitable if they instruct or edify the public either directly or indirectly. In *Re Brooks Estate*,⁴² 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 Supreme Court ruled in *Re Armstrong*⁴³ 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 Inc. v. Royal Trust Co.*,⁴⁴ 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”⁴⁵ 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.⁴⁶ 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.⁴⁷ In order to qualify under the advancement of religion, the

⁴² [1969] S.J. No. 50, 68 W.W.R. 132 (Q.B.).

⁴³ (1969), 7 D.L.R. (3d) 36 (N.S.S.C.).

⁴⁴ [1965] S.C.J. No. 50, [1965] S.C.R. 784.

⁴⁵ *Ibid.*, at 793 S.C.R.

⁴⁶ *Hutterian Brethren Church of Wilson v. The Queen*, [1980] 1 F.C. 757, at para. 3 (C.A.).

⁴⁷ *Re Russell*, [1977] A.J. No. 54, 1 E.T.R. 285 (T.D.).

court must be able to answer the question “What religion does the organization advance and how does it advance it?”

(d) 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. The promotion of agriculture or the attraction of tourists may meet the requirement⁴⁸ as do humane societies.⁴⁹ Neither would have qualified under the first three categories of charitable objects and purposes.

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.⁵⁰

In *Re Laidlaw Foundation*,⁵¹ 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.⁵²

He continued that an Ontario court should not “pay lip service” to the preamble of the *Statute of Uses, 1601* because it is “highly artificial and of no real value in deciding whether an object is charitable”.⁵³ 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.⁵⁴

⁴⁸ *Commissioner of Inland Revenue v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; *Re Knowles*, [1938] O.R. 369 (Ont. C.A.); CRA Policy Statement CPS-005 (April 22, 1991).

⁴⁹ *Re Toronto Humane Society*, [1920] O.J. No. 548, 18 O.W.N. 414 (H.C.J.).

⁵⁰ *Seventh Division, Pacific Northwest Region, National Model Railroad Assn. v. M.N.R.*, [1989] F.C.J. No. 63, 31 E.T.R. 268 (C.A.).

⁵¹ (1984), 13 D.L.R. (4th) 491, 18 E.T.R. 77 (Ont. Div. Ct.).

⁵² *Ibid.*, at 119 E.T.R.

⁵³ *Ibid.*

⁵⁴ See also annotation to this case in 18 E.T.R. 77 at 120-32.

Canada Revenue Agency appears to have recognized broader societal trends in a number of areas. CRA, for example, has identified a distinction between self-help groups and members groups.⁵⁵ It also recognized that the promotion of racial equality may be charitable notwithstanding earlier case law. It did so through connecting the objects to the *Canadian Charter of Rights and Freedoms* and government (federal and provincial) statements and programs that have the intention of eradicating racism. It is essential, though, that the organization does not have “political” activities.⁵⁶ Tangentially, CRA has also recognized the role of ethnocultural organizations in ensuring that new Canadians can participate fully and equally in Canadian society.⁵⁷

(e) Activities

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 document although not charitable ones in the legal sense”.⁵⁸

The issue of “activities” versus “purposes” or “objects” was also discussed in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue)*.⁵⁹ Both the majority and the minority reasons discuss the differences at some length. For example, in the minority reasons for judgment, Gonthier J. commented:

A common source of confusion in this area is that judges and commentators alike often conflate the concept of ‘charitable purposes’ and ‘charitable activities’. The former is a long-established concept in the common law of charitable trusts. The latter is a much more recent innovation: it is contained in the *ITA*, but has no history in the common law.⁶⁰

Mr. Justice Iacobucci, writing for the majority, noted that:

Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms ‘purposes’ and ‘activities’ almost interchangeably. Such

⁵⁵ CPS-016, September 7, 2000.

⁵⁶ CPS-021, September 2, 2003.

⁵⁷ CPS-023, June 30, 2005.

⁵⁸ *Toronto Volgograd Committee v. M.N.R.*, [1988] F.C.J. No. 212, [1988] 3 F.C. 251 at 268 (C.A.).

⁵⁹ [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10.

⁶⁰ *Ibid.*, at para. 52.

inadvertent confusion inevitably trickles down to the taxpayer organization, which is left to wonder how best to represent its intentions to Revenue Canada in order to qualify for registration. In fact, as may become clear shortly, the Society may have suffered exactly this difficulty in drafting its purpose clause.⁶¹

Charitable organizations, or those that want to be considered to be charitable, need to be careful in how and where they distinguish between their charitable purposes and their charitable activities.

(f) Governments

A municipality in Canada is not a charity but an “artificial being” that is invisible, intangible and existing only in contemplation of law, according to *Northumberland & Durham v. Murray & Brighton Public School Trustees*.⁶² A municipality is a political body and not a charitable organization or a charity; a gift to a municipality for a local public purpose may be, however, a valid charitable bequest.⁶³ 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, would be a charitable activity.

The British Columbia Supreme Court dealt with this issue, among others, in *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General)*.⁶⁴ In that case, British Columbia argued that the government’s scheme to allocate moneys from both charitable and government gaming was justifiable under section 207(1)(b) of the *Criminal Code*.⁶⁵ It took the position that the *Criminal Code* did not require that the charitable purpose for which the funds were raised at a bingo event necessarily was the charitable purpose on which the funds were actually expended. It was, it argued, sufficient that the funds be expended on “a charitable purpose”. Furthermore, it argued, the proposed uses of some those funds by the government for education and health care were charitable purpose.

Mr. Justice Owen-Flood concluded:

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

⁶¹ *Ibid.*, at para. 153.

⁶² [1939] O.W.N. 565 (H.C.J.), rev’d on other grounds [1940] 2 D.L.R. 28 (C.A.), aff’d [1941] S.C.R. 204.

⁶³ *Re Wright*, [1917] O.J. No. 468, 12 O.W.N. 184 (H.C.J.).

⁶⁴ [1998] B.C.J. No. 69 (S.C.), *per* Mr. Justice Owen-Flood, rev’d in part [2000] B.C.J. No. 634 (C.A.).

⁶⁵ R.S.C. 1985, c. C-46, as amended.

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.⁶⁶

While the decision was reversed in part, the comments distinguishing between “government” and “charitable” remain valid. There is an important difference that ought not to be ignored.

However, there are circumstances in which a government body may hold a charitable asset. A sanitarium where the county treasurer held the endowment fund in trust for the benefit of the institution was charitable.⁶⁷ Similarly, a trust for the beautification of property within the view of public highways, controlled by a government department, could be a charitable trust.⁶⁸ In both cases, the “charitable trust” was only being held by the officeholder; it did not make the officeholder a charitable organization.

It is far from clear how this aspect of the law of charity may be used in the future. As provincial governments download responsibilities onto municipal governments and, at the same time, reduce provincial funding available to those municipal governments, a reduction in municipal services seems inevitable. To what extent could charitable organizations become providers of what were, at one time, “municipal services” but are no longer provided? Could these services be provided by charitable organizations as “charitable activities”? Although it seems clear that a community arts centre operated by a municipality would not be a charitable activity, would it be charitable if operated by a charitable organization that is leasing the premises from the municipality? It is expected that the replacement of government provided goods and services with those supplied, in whole or in part, by charitable organizations will develop over the next several years.

What is or is not “charitable” in the modern context is sometimes a difficult determination. Very often the decision is a result of drawing a

⁶⁶ [1998] B.C.J. No. 69 (S.C.) at para. 46, rev'd in part [2000] B.C.J. No. 634 (C.A.).

⁶⁷ *Lapointe v. Ontario (Public Trustee)*, [1998] O.J. No. 2661, 1 E.T.R. (2d) 203 (Gen. Div.).

⁶⁸ *Re Cotton Trust for Rural Beautification* (1980), 9 E.T.R. 125 (P.E.I. S.C.).

fine distinction, a fact that the Supreme Court of Canada recognized in *Blais v. Touchet*⁶⁹ when it noted:

Fine distinctions have been made from time to time and its 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.

(g) Political and Business Activities

These fine distinctions become even more difficult to draw if the charity is also involved in business activities or political activities. “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*, the House of Lords noted that:

The abolition of religious tests, the disestablishment of the Church, the secularisation 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.⁷⁰

Similarly, a community legal services clinic is not a charitable organization if the essential part of its activities are devoted to influence the policy-making process.⁷¹ 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.⁷² An activist neighbourhood association, even one devoted to the interests of the urban poor, would not qualify as a charitable organization.⁷³

⁶⁹ [1963] S.C.J. No. 36, [1963] S.C.R. 358 at 360.

⁷⁰ [1916-17] All E.R. Rep. 1 at 18, [1917] A.C. 406 at 442 (H.L.). Quoted with approval in *Everywoman's Health Centre Society, (1988) v. M.N.R.*, [1991] F.C.J. No. 1162, [1992] 2 F.C. 52 at 70 (C.A.).

⁷¹ *Scarborough Community Legal Services v. The Queen*, [1985] 2 F.C. 555 (C.A.).

⁷² *Positive Action Against Pornography v. M.N.R.*, [1988] F.C.J. No. 340, [1988] 2 F.C. 340 (C.A.).

⁷³ *N.D.G. Neighbourhood Assn. v. Canada (Revenue Taxation Department)*, [1988] F.C.J. No. 481, 85 N.R. 73 (C.A.).

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 thereof cannot, when considered in isolation, be seen as a charity.”⁷⁴ 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.⁷⁵

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 Society v. Minister of National Revenue* decision, Décary 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.⁷⁶

Canada Revenue Agency has articulated its views on the political activities a number of times. Most recently, it has done so using the policy statement approach. CPS-022⁷⁷ is a lengthy policy statement and grows out of the Voluntary Sector Initiative of the late 1990s and early 21st century. There was a recognition that good public policy is dependent upon the contribution of experience, expertise, knowledge and ideas from all parts of Canadian society, including the charitable sector.

⁷⁴ *Scarborough Community Legal Services v. The Queen*, [1985] 2 F.C. 555 at 579-80 (C.A.).

⁷⁵ *Toronto Volgograd Committee v. M.N.R.*, [1988] F.C.J. No. 212, [1988] 3 F.C. 251 at 275 (C.A.).

⁷⁶ [1991] F.C.J. No. 1162, [1992] 2 F.C. 52 at 68-69 (C.A.).

⁷⁷ September 2, 2003.

Provided that the activities are not partisan, there appears to be more flexibility, although not as much as some had advocated.

The charitable organization may take part in some political activities as a way of furthering its charitable purposes. There is not complete freedom to do so or to support any cause. Interestingly, Canada Revenue Agency recommends that if the charitable organization wants to go beyond the limits permitted by law, it may establish a separate and distinct organization that is not registered to do so. Provided that the charitable organization does not fund or provide other resources to it, that new organization may carry out otherwise impermissible political activity.

There are four general rules under CPS-022 for a charitable organization:

- it cannot explicitly connect its views to any political party or candidate for public office;
- the issue must be connected to its purpose;
- its views must be based on a well-reasoned position; and
- public awareness campaigns do not become the charity's primary activity.

The policy statement continues in some detail to review what are “political activities” and how a public awareness campaign may stay within the permitted boundaries. It also discusses the releasing of texts of a representation to a public official or body, and how education as a charitable purpose differs from public awareness campaigns. The public awareness campaign issue is also an important one from the perspective of fundraising — some organizations have used public awareness campaigns about an issue as the major way to getting the fundraising campaign itself before the public. Any charitable organization that is involved in or anticipates being involved in “political activities” or public awareness campaigns ought to review thoroughly and understand policy statement CPS-022 and its detailed examples.

The underlying premise for charitable (and non-profit) organizations is that they are not intended to make profits but to provide “public benefits”. In addition, the assets of the organization 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 court has reviewed the issue of what types of business activities may be undertaken by a charitable organization. In *McGovern v. Attorney General*, 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 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.⁷⁸

The distinction has been very difficult to apply in Ontario. Justice Anderson, made a similar comment in *Re Public Trustee and Toronto Humane Society*,⁷⁹ in which he stated that “the final statement is a classic understatement”. The *Charitable Gifts Act*⁸⁰ 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.⁸¹ An “exceptional and sporadic” activity probably would not be sufficient to deprive an organization of registration for income taxation purposes.⁸² 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.

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 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.⁸³ 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

⁷⁸ [1981] 3 All E.R. 493, [1982] Ch. 321 at 341 (Ch. Div.).

⁷⁹ [1987] O.J. No. 534, 60 O.R. (2d) 236 at 254 (H.C.J.).

⁸⁰ R.S.O. 1990, c. C.8.

⁸¹ *Re Centenary Hospital Association*, [1989] O.J. No. 973, 69 O.R. (2d) 1 (H.C.J.).

⁸² *Scarborough Community Legal Services v. The Queen*, [1985] 2 F.C. 555 (C.A.).

⁸³ *Hutterian Brethren Church of Wilson v. The Queen*, [1980] 1 F.C. 757 at para. 3 (C.A.).

purposes, but the corporate entity carried out those activities for business purposes.⁸⁴

The courts may also view, for purposes of the *Charities Accounting Act*⁸⁵ 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.⁸⁶ These sources of revenue will become increasingly important to charitable organizations as governments continue to restrict funding levels for community, social and health services and traditional fundraising efforts are less effective.

Canada Revenue Agency has also produced a useful policy statement on related business. In CPS-019,⁸⁷ it attempts to answer the question “What is a related business?” starting with what is meant by “business” itself. CRA notes that a business is intended to earn profits. It is a commercial activity whereas much of what a charity does is not intended to be commercial in that context. A number of activities that a charity may carry out are intended to make a “profit”, but are not considered to be a business. These include, for example, soliciting for donations.

Earned revenue through the charging of fees is not necessarily a “business activity”. As discussed earlier in this chapter, fees are a potentially important source of earned revenue or funds for a charity to carry out its purposes. The program may charge fees but so long the characteristics of “altruism” and “public benefit” remain, the fees would not normally jeopardize the registration as a charity. The types of factors considered by the Canada Revenue Agency are:

- Is the fee structure designed to defray the costs as opposed to generate a profit?
- Is the charity paid by government to provide the program on the government’s behalf?
- Does the program offer services that are not otherwise available in the market?
- Are the fees established through reference to the charitable objective rather than a market objective?

⁸⁴ *Ibid.*, at para. 22, *per* Ryan J. This case is also not easily reconciled with the Trial Division’s decision (Walsh J.) in *Gull Bay Development Corp. v. Canada*, [1983] F.C.J. No. 1133, [1984] 2 F.C. 3, which considered but distinguished the *Hutterian Brethren* case.

⁸⁵ R.S.O. 1990, c. C.10, as amended.

⁸⁶ *Re Centenary Hospital Association*, [1989] O.J. No. 973, 69 O.R. (2d) 1 at 19 (H.C.J.).

⁸⁷ March 31, 2003.

Canada Revenue Agency developed a decision tree for identifying an unrelated business. Unrelated business, as noted above, is treated differently than a related business activity. The decision tree asks first if the particular activity is a business. Is it commercial in nature? Does the charity derive revenue for providing goods or services? Does the charity intend to profit from the activity? If “no”, the activity would not likely be a business activity. It is important to keep in mind that the charging of a fee is not alone decisive. In addition, the sale of donated goods alone is not considered to be the carrying on of a business activity. If “yes”, it may be a business activity. The focus is the systematic, regular basis on which the income-earning activity is carried out.

A charity may not have an unrelated business activity. In certain circumstances, the charity could “spin-off” the unrelated business activity to a for-profit business and treat it as a legitimate investment. However, there are severe limitations to this option in Ontario under the *Charitable Gifts Act*.

