Principles in Defining Charity

An excerpt from the forthcoming Halsbury's Laws of Canada charities title by Donald J. Bourgeois.

What is a charity? There are different approaches used to define what is or is not a charity, charitable object or charitable activity. The following excerpt from *Halsbury's Laws of Canada*'s title on charities and not-for-profit organizations, to be published in September 2008, reviews some of the approaches used in defining "charity" and "charitable".

Principles in Defining Charity

Popular focus on poverty 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*.[1]

Broader definition The generally accepted definition is that of Lord Camden found in *Jones v. Williams*.[2] 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*[3] 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 approach American case law is no more conclusive. Gray J. in *Jackson v. Phillips*[4] 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.

Statutes of Uses The issue of defining or classifying charitable objects and charitable purposes arose out of the *Statute of Uses, 1601*,[5] which is also known 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. A list of 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.

Judicial use of the *Statute of Uses* 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*.[6] 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 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.

Arguments – public benefit versus more than public benefit 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.[7]

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*[8] 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.* 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.
>
> 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, 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. [9]

Notes

1. [1955] A.C. 572 at 583 (H.L.).
2. (1767), Amb. 651; 8(1) Digest (Repl.) 322, as quoted in Herbert Picarda, *The Law and Practice Relating to Charities*. 3rd edition, (London: Butterworths, 1999).
3. (1860), 24 How. 465 at 494, as quoted in Picarda.
4. (1867), 14 Allen 539 at 555, as quoted in Picarda. See also *Corpus Juris Secundum*, Vol. 14 (Brooklyn, N.Y.: The American Law Book, 1939), cited as 14 C.J.S. Charities 5.
5. (Imp.), 1601, 43 Eliz. 1, c. 4
6. [1803-13] All E.R. 451 at 453 (L.C.), 10 Ves 522, 32 E.R. 947.
7. *Ibid.*, at 455.
8. (U.K.), 1888, 51 & 52 Vict., c. 42.
9. [1972] 1 Ch. 73 at 88 (C.A.), [1973] 3 All E.R. 1029.

Judicial categorization Lord Russell in the *Incorporated Council of Law* case referred to *Pemsel's Case* or the *Income Tax Special Purposes Commrs. v. Pemsel*.[1] *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*.

Lord Macnaghten's approach 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.[2]

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 religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[3]

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 nonlawyers might consider to be charitable in nature.[4] Unless the context requires otherwise, statutory references to "charity" are to be construed within the legal sense of charity that has been judicially developed.[5]

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.[6] For example, it may have the power to sell goods and services provided that it does so to carry out its charitable objects.

Notes

1. [1891] A.C. 531 (H.L.).
2. *Ibid*., at 591.
3. *Ibid*., at 583.
4. *Shaw (Public Trustee) v. Day,* [1957] 1 All E.R. 745 at 752.
5. *Pemsel's Case* at 580; *Chesterman v. Federal Taxation Commissioner*, [1926] A.C. (P.C.); *Adamson v. Melbourne and Metropolitan Board of Works*, [1929] A.C. 142 (P.C.).

6. *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. 492 (Ch.).

Canadian approach The four categories of charitable purposes developed in England formed the basic concept and definition of charity in Canada.[1] The Supreme Court, in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*[2] 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. Mr. Justice Iacobucci 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.[3]

Mr. Justice Iacobucci continued that "the starting point for the determination of whether a purpose is charitable has, for more than a century, been Lord Macnaghten's classification, set out in *Pemsel* ... of the purposes of the common law had come to recognize as charitable."[4] 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*.[5] 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.[6]

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

> 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 it if 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.[7]

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."[8]

Essential features In the *Vancouver Society* case, the Supreme Court noted that a charitable purpose is one that "seeks the welfare of the public"; it "is not concerned with the conferment of private advantage." Two features are necessary to be considered charitable – "(1) voluntarism (or what I shall refer to as altruism …); and (2) public welfare or benefit in an objectively measurable sense."[9] The analysis should focus more on the purpose of the charitable activity than on the activity itself.[10] The Court commented that
"it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature."[11]

The pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfillment of another, charitable, purpose and not as an end in itself.[12] Canadian courts have drawn a broader distinction between "activity" and "purpose", likely as a result of the cases flowing from the *Income Tax Act*. Whether an activity is charitable must be analysed in context of its purpose. An activity that is "at best ambiguous" – a letter to raise funds for a dance school might be considered charitable but a similar letter to a group of disseminators of hate literature would not.[13]

Role of Court in Modernizing the Definition 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 changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[14]

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 its 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.[15]

Minimalist role reiterated The Supreme Court of Canada reiterated a minimalist role for the court in modernizing the definition of charity in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency*).[16] The issue before the court was whether or not the court should recognize the promotion of sport as a charitable object for purposes of section 149.1 of the *Income Tax Act*. The Court, per Mr. Justice Rothstein for majority, commented that A.Y.S.A. did not claim to fall within the first three *Pemsel* heads and that the fourth head, other purposes beneficial to the public, was relevant. The Court quoted from its decision in *Vancouver Society* that the purposes must be of a public benefit or beneficial to the community in a way that law regards as charitable.[17] The Court also noted that it was possible for an organization, under the *Income Tax Act*, to be operated exclusively for social welfare and not be constituted for private advantage but which is not a charitable organization. It could be a non-profit organization, which is distinct from a charitable organization.[18] The Court concluded that, while it was:

> Sympathetic to the proposition that organizations promoting fitness should be considered charitable, there is no mention of these objects in the Letters Patent … [which] only refer to promoting soccer and increasing participation in the sport of soccer. A.Y.S.A.'s application to the CRA describes its "main objective" as being "to offer youths in the community the opportunity to develop and hone soccer skills through practice and competition so they can develop pride in their abilities and soccer skills." The application also mentions "physical fitness" and diversion from exposure to "anti-social behaviour". But these are clearly by-products of its main objective, the promotion of soccer. The fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable. If every organization that might have beneficial by-products, regardless of its purposes, were found to be charitable, the definition of charity would be much broader than what has heretofore been recognized in common law.[18]

While the assessment of what is charitable is not to be formalistic, it is to be based on the evidence. Rewriting the objects is not sufficient, if the organization's main objective and activities are not charitable at common law. While some sporting activities could be charitable,

such as horseback riding for children with disabilities or sports camps for children living in poverty, those objectives are ones well established as charitable. It remains imperative for the distinction in the *Income Tax Act* between "non-profit" and "charitable" to remain. And it is also "necessary to consider whether what is proposed is an incremental change". If the change is not an incremental one, it is not for the courts but for Parliament to make the change.[19]

Notes

1. *Scarborough Community Legal Services v. M.N.R.*, [1985] 2 F.C. 555 at 577 (F.C.A.); *Guaranty Trust Co. of Can. v. M.N.R.*, [1967] S.C.R. 133.
2. [1999] 1 S.C.R. 10.
3. *Ibid*., at para. 127.
4. *Ibid*., at para. 144.
5. *Ibid*., at para. 147. Respectively, [1952] 2 S.C.R. 76 and [1967] S.C.R. 133.
6. *Ibid*., at para. 147.
7. *Ibid*., at para. 148.
8. *Ibid*., at para. 149. *Human Life International*, [1998] 3 F.C. 202 (F.C.A.).
9. *Ibid*., at para. 147.
10. *Ibid*., at para. 37.
11. *Ibid*., at para. 148.
12. *Ibid*., at para. 152.
13. *Ibid*., at para. 158.
14. *Ibid*., at para. 152.
15. *Ibid*., at para. 122.
16. [2007] SCC 42 (CanLII). The appeal was dismissed by all of the judges. Mme. Justice Abella dismissed the appeal on other grounds which did not require an analysis by her of the common law definition of charity.
17. *Ibid*., at para. 27.
18. *Ibid*., at para. 29.
19. *Ibid*., at paras. 41 to 44.