

Occasional Paper

Joining in the Jurisprudence: Public Interest Litigation and Interventions in the Law of Charity

Andrew Valentine



The Pemsel Case
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"The law of charity is a moving subject"
– Lord Wilberforce

About Us

Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.



The Pemsel Case
FOUNDATION

Suite 1150, 10060 Jasper Avenue,
Edmonton, Alberta, T5J 3R8

www.pemselfoundation.org

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Joining in the Jurisprudence: Public Interest Litigation and Interventions in the Law of Charity*

1. Introduction: The need for development in the law of charity

This paper examines a basic question: how, as a practical matter, can public interest organizations contribute to the development of charity law jurisprudence in Canada? This could include educational organizations devoted to advancing the public's understanding of the law of charity and to upholding that law, or, potentially, umbrella organizations constituted to represent the interests of the voluntary sector. By "development," I do not simply mean "expansion," *i.e.*, to encompass more purposes and activities under the definition of "charity" or to permit charities greater latitude in their activities and operations. The question, rather, is how can a public interest organization either initiate or participate in litigation so as to bring before the courts novel issues or issues that have to date received scant judicial treatment. The goal of participation in such cases would be to enable these issues to receive fuller consideration by courts, thereby contributing to a better understanding of the existing charity law jurisprudence and a clearer and more coherent body of case law on the subject.

Such jurisprudential development would seem welcome in this area of law. There is a relative paucity of jurisprudence in Canada dealing with charity law issues. In 1999, in the (still) current leading Canadian decision on the meaning of charity,¹ Iacobucci J. noted that the Supreme Court of Canada had not previously considered the meaning of charity in over 25 years.² Since 1985, the year in which the Federal Court of Appeal heard the first appeal from a refusal by the Canada Revenue Agency ("CRA") Charities Directorate to register an organization as a charity,³ there have been relatively few cases dealing squarely with the meaning of "charity" for the purposes of the *Income Tax Act*. In particular, there have been very few cases in which the appeal of an organization that was refused registration by the CRA has reached a judicial decision.⁴ While there are more cases dealing with this question in the context of appeals from revocation of registration, many key questions have yet to reach the courts.

It is also true that many Canadian decisions on key points in the law of charity have been rendered on the basis of poor facts, which lead to conclusions that obscure the more contentious

* The author wishes to thank Roshni Veeparen, Summer Law Student at Miller Thomson LLP, for her research assistance with this paper.

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

² *Ibid.* at para. 127. The Supreme Court of Canada had previously addressed the meaning of charity in *Jones v. T. Eaton Co.* [1973] S.C.R. 635 (focusing on the meaning of "relief of poverty") and in *Towle Estate v. Minister of National Revenue*, [1967] S.C.R. 133.

³ *Scarborough Community Legal Services v. Minister of National Revenue*, [1985] 2 F.C. 555 (C.A.).

⁴ For example, *Earth Fund/Fond pour la Terre v. Minister of National Revenue*, 2002 FCA 498; *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)*, 2007 SCC 42; *News to You Canada v. Minister of National Revenue*, 2011 FCA 192; *Travel Just v. Canada (Revenue Agency)*, 2006 FCA 343.

or uncertain aspects of an issue.⁵ Conclusions reached in these cases are sometimes cited by CRA to justify positions that (at least arguably) go beyond the scope of the original decision.⁶

Furthermore, the ongoing development of charity law jurisprudence in other jurisdictions – most notably the United Kingdom – may be less applicable in the future as a supplement to Canadian jurisprudence. Canadian common law on charity law issues derives largely from jurisprudence developed in the United Kingdom. The legal meaning of “charity” in Canada, for example, derives from a 400-year-old English statute⁷ (now repealed in the UK but still the source of the Canadian common law definition of “charity”) and subsequent jurisprudence in the UK addressing its various components.⁸ Thus, the UK has historically been a valuable source of jurisprudence that can supplement gaps in the law in Canada. This is due in part to the comparative age of the UK system and the development of a richer body of jurisprudence over a much longer period of time.

However, the advent in the UK of the *Charities Act 2006*,⁹ which codifies issues previously left to the common law, means that charity law jurisprudence in the UK may become less relevant to Canada. For example, the scope of what is charitable at law is now codified under the *Charities Act*, whereas Canada continues to rely on the common law “four heads of charity” set out in *Special Commissioners of Income Tax v. Pemsel*.¹⁰ Thus, for example, “advancement of amateur sport” is recognized as a charitable purpose under the *Charities Act*,¹¹ but has not been recognized as a charitable purpose at common law in Canada.¹²

Because of the gaps in Canadian charity jurisprudence, charities must rely on policy statements from government regulators, most notably CRA, for guidance on these issues. This is problematic. Government agencies are not courts. They are not dispassionate interpreters of the law but rather agencies tasked with a specific governmental agenda that has different imperatives than the voluntary sector. CRA, for example, is tasked primarily with enforcing the *Income Tax Act* to collect tax revenue and minimize improper tax loss.¹³ This mandate naturally leads CRA to take a

⁵ For example, *House of Holy God v. Canada (Attorney-General)*, 2009 FCA 148 (whether a maple syrup business operated by a church is a related business); *International Pentecostal Ministry Fellowship of Toronto v. Canada (National Revenue)*, 2010 FCA 51 (whether CRA has the constitutional jurisdiction to register and de-register charities under the *Income Tax Act*).

⁶ For example, at a presentation given at the CBA/OBA National Charity Law Symposium, the Manager of CRA Appeal Branch, Client Redress Centre, cited *International Pentecostal Ministry Fellowship*, *supra* note 5, as fairly blanket confirmation of CRA’s constitution jurisdiction to regulate charities. As discussed below, the scope of the decision seems to be much narrower.

⁷ The meaning of “charity” in Canada, for example, derives originally from the *Statute of Charitable Uses*, 43 Eliz. 1, c. 4 (commonly known as the *Statute of Elizabeth*), which was passed in 1601 in England. It was repealed by section 13(1) of the *Mortmain and Charitable Uses Act 1888*, c. 42.

⁸ The modern formulation of the “four heads of charity” derives from a decision of the House of Lords in 1891 in *Special Commissioners of Income Tax v. Pemsel*, [1891] AC 531 (H.L.), which, in turn, interpreted an earlier UK decision in *Morice v. Bishop of Durham* (1805), 32 E.R. 947 at 951. This has been adopted in Canada as the legal meaning of charity: *Vancouver Society*, *supra* note 1, at para. 144.

⁹ (U.K.), 2006, c. 50.

¹⁰ *Supra* note 8.

¹¹ *Charities Act 2006*, (U.K.), 2006, c. 50, s. 2(2)(g).

¹² The Supreme Court of Canada, in considering whether advancement of amateur sport should be recognized as a charitable purpose, noted its inclusion in the *Charities Act* and stated that “substantial change in the definition of charity must come from the legislature and not the courts”: *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)*, 2007 SCC 42 at para. 44.

¹³ CRA states its mission as follows: “To administer tax, benefits, and related programs, and to ensure compliance on behalf of governments across Canada, thereby contributing to the ongoing economic and social well-being of Canadians.” Available at: http://www.cra-arc.gc.ca/gncy/prgrms_srvcs/mssn-eng.html.

conservative view on many of the core questions that face charities: *e.g.*, what is a charity?, what is a gift?, what are the boundaries of a charity’s operations? While this mandate is entirely appropriate for CRA, the absence of jurisprudence considering contrary interpretations means that CRA’s interpretation tends to win by default and form the basis upon which the voluntary sector is regulated.

The voluntary sector – which includes registered charities, common law charities, and non-profit organizations – has been changing rapidly in recent years, often through innovations borne of necessity in trying financial times. These have included new structures to generate revenue, as well as new ways of thinking about the meaning of terms like “charity”, “public benefit”, etc. The expanding world of social enterprise, with all the variations and legal challenges that it presents, jumps out as an obvious example.¹⁴ There is a need to make sure that the jurisprudence keeps up so as to bring greater certainty within the voluntary sector on both the basic meaning of charity and on the boundaries within which charities and non-profit organizations operate.

This article will consider ways in which a public interest organization can work to support the development and clarification of charity law jurisprudence in Canada.

2. Judicial Issues

Before considering the means by which an organization might intervene or otherwise participate in litigation with a view to advancing arguments on different points of charity law, it will be useful to summarize the various categories of issues that might warrant such participation.

(a) Constitutional/jurisdictional challenges

There are a few possible areas in which constitutional challenges might be brought with respect to charities. Such challenges might involve a claim that a particular law or administrative action contravenes the division of powers in the Canadian *Constitution Act* or contravenes the *Charter of Rights and Freedoms*.

With respect to the division of powers between the federal and provincial governments, section 92(7) of the Canadian *Constitution Act* grants jurisdiction to the provinces to oversee the activities of charities in the province.¹⁵ In addition, laws in respect of property and civil rights fall under provincial jurisdiction pursuant to section 92(13), which is generally recognized as giving the provinces jurisdiction over the law of trusts, including charitable trusts. It is the provinces,

The CRA Charities Directorate, which administers the sections of the Act related to charities, states its mission similarly: “Our mission is to promote compliance with the income tax legislation and regulations relating to charities through education, quality service, and responsible enforcement, thereby contributing to the integrity of the charitable sector and the social well-being of Canadians.” Available at: http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/mssn_vsn-eng.html .

¹⁴ For a discussion of social enterprise and some of the legal issues that extend to conducting social enterprise in Canada, see Susan Manwaring & Andrew Valentine, “Social Enterprise in Canada: Structural Options” paper prepared for Social Innovation Generation at MaRS Discovery District (December 2011), available at: <http://www.marsdd.com/news-insights/mars-reports/social-enterprise-canada-structural-options/> .

¹⁵ Under section 92(7) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vic. c. 3 reported in R.S.C. 1985, App. II, No. 5, the provincial government has jurisdiction over “the Establishment, Maintenance and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.”

therefore, that hold the general jurisdiction to oversee the activities of charities in each province and their treatment and use of charitable property.

However, notwithstanding this general provincial jurisdiction, the federal government, through its regulation of the federal tax exemption and tax receipting privileges of registered charities, has assumed by far the largest role in regulating the day-to-day conduct of registered charities. Its constitutional authority to do so is limited, however, to regulating the tax aspects of a registered charity.¹⁶ In some areas – in particular its purported authority to regulate the fundraising activities and internal governance of registered charities – it is arguable that CRA has overstepped its constitutional authority.¹⁷

To date there has been only one constitutional challenge alleging that CRA lacks the jurisdiction to regulate charities.¹⁸ The case involved a charity facing revocation for an obvious set of violations of the *Income Tax Act*.¹⁹ The charity raised as a defense that CRA lacked the authority to de-register it as a charity, on the basis that the provinces have exclusive jurisdiction over charities. The Federal Court of Appeal dismissed this argument in two short paragraphs, noting that Parliament has authority over the registration and de-registration of charities. While the case was rightly decided within its ambit, it must be noted that the case did not deal with any of the most controversial aspects of the federal government's assertion of jurisdiction.

It is also possible that charity issues may arise in the form of *Charter* challenges. One such example occurred in the context of a challenge to the property tax exemption for religious organizations in Ontario.²⁰ Among other things, the taxpayer argued that an exemption from property tax for premises *owned* by a church, but not extended to property *rented* for religious purposes, violated several sections of the *Charter* (the General Division of the Ontario Court of Justice ultimately dismissed this argument). The constitutional protections in section 11 of the *Charter* related to criminal proceedings were also recently considered in the context of the third party civil penalties provided for in section 163.2 of the Act.²¹

A *Charter* argument was raised, unsuccessfully, in the *Vancouver Society* case, as discussed below, but was rejected without being subject to extended analysis.²² It therefore does not provide much guidance as to when *Charter* considerations might apply in the context of the Canadian law of

¹⁶ *Constitution Act*, 1867, section 91(3).

¹⁷ We have questioned the limits of CRA's constitutional authority to regulate fundraising through its Guidance on Fundraising by Registered Charities: see Susan Manwaring & Andrew Valentine, "Comments on CRA Fundraising Guidance" *Canadian Tax Journal* (2010) Vol. 58, No. 3, 751-70. CRA's authority to regulate the corporate or trust governance of registered charities through the "ineligible individual" rules introduced in the 2012 Federal Budget has also been questioned: see Karen J. Cooper, "New Ineligibility Requirements for Directors, Officers and Staff of Registered Charities" paper presented at 2012 CBA/OBA National Charity Law Symposium (May 4, 2012).

¹⁸ *International Pentecostal Ministry v Canada (Minister of National Revenue)*, *supra* note 5.

¹⁹ The charity faced revocation on the basis that it had failed to maintain adequate books and records, issue donation receipts meeting the prescribed standard in the Act, accurately report all tax receipted gifts, and retain documents establishing its activities and expenditures outside Canada (*ibid.* at para. 1).

²⁰ *Girgenti v. Ontario Regional Assessment Commissioner, Region 12* (1993), 100 D.L.R. (4th) 488 (Ont. Gen. Div.).

²¹ *Guidon v. R.*, 2012 TCC 287, holding that Section II Charter protections apply to 163.2 penalties; *Guidon v. R.*, 2013 FCA 153, in which the Federal Court of Appeal held that they do not. Leave to appeal to the Supreme Court of Canada has been granted.

²² *Vancouver Society*, *supra* note 2, at paras. 207-9.

charities. One can imagine a range of *Charter* challenges being brought in the context of the rules in the *Income Tax Act* applicable to charities and charitable donations. This might include, for example, a challenge against the limits imposed on political activities or political speech by registered charities. It might also involve challenges related to the availability of donation tax credits for donations to certain institutions, as was tried recently (and unsuccessfully) in the case of *Fluevog v. R.*²³

It is thus clear that a constitutional challenge could arise in the context of a range of proceedings, from the application of the *Income Tax Act* to property tax exemptions. To the extent that the constitutional challenges arise in the context of a charity defending itself against administrative action, the venue in which the challenge would arise would depend on the nature of the administrative action. Constitutional challenges arising as a defence to proposed revocation of charitable registration, for example, would likely originate in the Federal Court of Appeal.

(b) Disputes under the Income Tax Act

Disputes under the *Income Tax Act* that relate to charities mostly arise in one of two broad contexts. The first category involves disputes related to a *charity's* compliance with the rules in the Act. The second category relates to *donor* compliance with the Act. There is clearly potential overlap between these categories, and a given fact scenario may well give rise to government action against both the charity and its donors that ultimately ends up in a court proceeding.

There are also a few issues relevant to charities that do not fall into either of the above categories. This includes, for example, the scope of the clergy residence deduction under paragraph 8(1)(c) of the Act,²⁴ and the scope of director or third-party liability for donation arrangements found to contravene the Act.²⁵

(i) Charity compliance

Given that charities are registered under the *ITA* and are subject to an array of regulation under the Act – which constitutes the primary source of a registered charity's day-to-day compliance obligations – disputes under the *Income Tax Act* comprise the main form of litigated disputes involving charities. There are numerous issues related to a charity's compliance that might be addressed in such litigation.

Some examples of issues that would fall into this category include the following:

- the meaning of “charity” for the purposes of determining eligibility for charitable registration;
- the scope of permitted political activities by registered charities;

²³ 2011 FCA 338. The issue in the case was the availability of a donation tax credit in respect of certain payments to Swim Canada, a registered Canadian amateur athletic association. CRA took the position that the taxpayer could not claim a credit because no gift had occurred; Mr. Fluevog received consideration in the form of swimming lessons for his children. Mr. Fluevog argued that because a full tax credit would be available for a gift to a religious school providing religious education to his children, the disallowance of a tax credit for payments to an RCAA amounted to discrimination against him on the basis of religion, which he argued violated section 15 of the *Charter*.

²⁴ For summary of the elements of the clergy residence deduction, see Canada Revenue Agency, Interpretation Bulletin IT-141R *Clergy Residence Deduction*.

²⁵ See, for example, *R. v. Leo-Mensah*, 2010 ONCA 139.

- compliance with the “own activities” requirement when conducting foreign activities;
- compliance with the rules regarding business activities pursued by registered charities;
- receipting issues, which could encompass valuation issues, whether a gift has been made, whether receipts issued contain information required under the Act;
- application of excess business holding rules; and
- application of the governance rules relating to “ineligible individuals.”

Procedurally, these issues are typically addressed in the context of a judicial review of an administrative decision by CRA to either revoke the registration of an existing charity or to refuse the registration of a proposed charity. When the CRA Charities Directorate audits an existing charity and concludes that it is committing a serious violation of the *Income Tax Act* – by, say, failing to observe the restrictions on political activities or failing to maintain direction and control over its resources in a foreign jurisdiction – it may propose revocation of the charity’s charitable registration.²⁶ Likewise, if upon review of an application for charitable registration, CRA concludes that an organization’s purposes do not fall within the legal meaning of charity or its proposed activities would not comply with the ITA, it will issue a notice of refusal of registration. In both cases, charities have the ability to appeal the administrative decision of the Charities Directorate. Because of the wide range of issues that can result in proposed revocation or refusal to register, judicial review applications may review CRA’s interpretation and application of any number of issues under the Act, including its interpretation of the common law meaning of “charity.”

The *Income Tax Act* sets out the appeals procedure in response to a proposed revocation or refusal to register. The normal procedure is as follows:

- 1) CRA Charities Directorate proposes revocation of registration of an existing charity for cause, or refuses to register an applicant organization.²⁷ It does so by issuing a Notice of Intent to revoke registration or a Notice of Refusal of Registration. This step occurs after the Charities Directorate has provided the organization with the opportunity to make representations in its defence to the Directorate.
- 2) In the context of proposed revocation, the charity has 30 days from the date of issuance of the Notice of Intent to seek a judicial extension of the waiting period before CRA is permitted to publish a Notice of Revocation in the *Canada Gazette*.²⁸ Publication of a Notice of Revocation in the *Gazette* is what makes revocation effective. If CRA will not agree voluntarily to postpone publication pending the exercise of the charity’s objection and appeal rights, charities have the option of seeking an injunction to postpone publication until they have exercised these rights.²⁹

²⁶ As discussed below, CRA also has the ability to impose intermediate sanctions on a charity, including the suspension of receipting privileges or various monetary penalties for non-compliance. Appeals of these matters are typically brought before the Tax Court of Canada.

²⁷ *ITA*, s. 168.

²⁸ *ITA*, para. 168(2)(b).

²⁹ *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114; *Choson Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311; *Millennium Charitable Foundation v. Minister of National Revenue*, 2008 FCA 414; *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265.

- 3) The organization may file a Notice of Objection to the decision of the Charities Directorate within 90 days of the date the Notice of Intent was issued.³⁰ This objection is filed with the CRA Appeals Directorate, a separate division of CRA.
- 4) If the Appeals Directorate confirms the decision of the Charities Directorate (or does not confirm or vacate the decision within 90 days of the service of the notice of objection), the charity may appeal to the Federal Court of Appeal by way of judicial review of CRA's decision to revoke.³¹
- 5) If the Federal Court of Appeal dismisses the application, the organization has the option of seeking leave to appeal to the Supreme Court of Canada.

Judicial review differs from a trial *de novo* in several important respects. First, judicial review proceeds on the basis of the factual evidence that formed the basis of the administrative decision under review. It is not, in other words, a new trial based on new evidence, and it is generally not possible to introduce new evidence in the context of a judicial review. Second, the standard of review in a judicial review application is sometimes less than a standard of correctness. To the extent that the issue in question is the interpretation of the law (for example, the common law definition of charity), the courts will review CRA's decision on a standard of correctness. However, where the question is whether a given violation of the Act is sufficiently serious to warrant revocation (or refusal to register), the court reviews only to ensure that CRA's decision was reasonable.³² This structure results in deference to the position of the government, and, unsurprisingly perhaps, the case law frequently upholds what is, in the view of some commentators,³³ a conservative interpretation of the Act.

It should also be noted that in addition to litigation dealing with the substantive issues listed above, various cases have also been litigated involving the procedural aspects of the objection and appeal process. In particular, several cases have considered when it is appropriate for a court to issue an order staying publication of a Notice of Revocation (which makes revocation effective) pending the exercise of a charity's objection and appeal rights.³⁴ Courts in these cases have held that applicants must meet the general test for an interlocutory injunction set out by the Supreme

³⁰ *ITA*, ss. 168(4).

³¹ *ITA*, ss. 172(3).

³² Decisions by CRA to revoke registration for cause are considered questions of mixed fact and law. The Federal Court of Appeal has confirmed more than once that such questions are reviewed on a standard of reasonableness: *Hostelling International Canada – Ontario East Region v. Canada (M.N.R.)*, 2008 FCA 396 at para. 7; *House of Holy God*, *supra* note 5, at para. 4.

³³ This point was noted, for example, in a submission of the Canadian Bar Association to the federal Minister of Justice and Attorney General of Canada, dated March 13, 2008, arguing that jurisdiction to hear appeals from a decision of the Charities Directorate to refuse to register an organization as a charity, or to revoke an organization's registered charity status, should be moved from the Federal Court of Appeal to the Tax Court of Canada. The submission stated:

The CBA submits that it would more appropriate for such appeals to be initiated in the Tax Court. This would give charities an opportunity to fully present their positions. Appeals to the Federal Court of Appeal are limited to a record with no viva voce record tested by way of cross-examination and without the benefit of any findings of fact made by a trial court. This substantially limits the ability of charities to establish that decisions of the Minister have been made in error. [Emphasis added.]

The letter is available at <http://www.cba.org/CBA/submissions/pdf/08-18-eng.pdf>.

³⁴ See footnote 29, above.

Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.³⁵ In order to obtain an injunction staying publication of a Notice of Revocation, the charity applicant must show (i) that there is a serious issue to be tried (*i.e.*, that its substantive objection to revocation raises a serious issue), (ii) that it will suffer irreparable harm if the injunction is denied, and (iii) that the balance of convenience favours the order.³⁶ Both the appropriateness of this test and its application in the context of a registered charity (as opposed to a business corporation, the context in which the test was developed) have been questioned.³⁷ Applications for orders staying publication of a notice of revocation proceed as motions to the Federal Court of Appeal.

Litigation may also address the imposition of intermediate sanctions by CRA. There is relatively little case law on this subject, as CRA has issued very few intermediate sanctions since their introduction in 2004. In one case, a charity sought an injunction postponing the imposition of a suspension of receipting privileges pending the exercise of its objection and appeal rights.³⁸ The case also applied the *RJR-MacDonald* test for an interlocutory injunction. The significant difference in applications seeking to postpone a suspension of receipting privileges and the cases above is that the application to postpone suspension of receipting proceeds in the Tax Court of Canada.³⁹ Indeed, all applications regarding the imposition of intermediate sanctions proceed in the Tax Court of Canada.⁴⁰ Unlike a judicial review, proceedings before the Tax Court generally involve new trials based on new evidence.

It is thus clear that most major charity litigation dealing with the *Income Tax Act* occurs currently in the Federal Court of Appeal and in the form of judicial review applications challenging CRA's administrative decision to propose revocation of registration or to refuse registration. Avenues by which an organization can participate in charity related litigation before the Federal Court of Appeal are of particular importance.

(ii) *Donor-related litigation*

The issues above all relate to the operation of registered charities and their compliance with the provisions of the *ITA*. Issues related to the law of charity also arise in the context of disputes with donors regarding the claiming of tax credits or deductions in respect of charitable gifts. These cases often take place alongside proceedings against the charity that issued the receipts in question, and both disputes tend to turn on the same factual and legal issues: *e.g.*, was a gift made?, was the property being gifted valued correctly?, etc. Legal issues related to the definition of gift and the issuing of official donation receipts (including the application of various anti-avoidance rules in the *ITA* related to charitable gifts) are litigated more frequently in the context

³⁵ [1994] 1 S.C.R. 311.

³⁶ See, for example, *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 at para. 13.

³⁷ Robert Hayhoe & Andrew Valentine, "Charity Suspension Postponements Unavailable?" (2008) *Canadian Tax Journal*, vol. 56 no.1, 167-176.

³⁸ *International Charity Assn. Network v. R.*, 2008 TCC 1.

³⁹ *ITA*, 188.2(4).

⁴⁰ Subsection 189(1) of the Act provides that the Minister may at any time assess a taxpayer (including a registered charity) for any amount owing under Part V. Part V of the Act contains the intermediate sanctions available against registered charities for various forms of non-compliance. To the extent that the intermediate sanctions provide for a monetary penalty, this penalty can be assessed pursuant to subsection 189(7). Charities may file a notice of objection to such assessed penalties and, if confirmed, appeal to the Tax Court of Canada: ss. 189(8) and 169(1).

of appeals from donor reassessments rather than in the context of charity appeals from CRA penalties for improper receipting (though the latter certainly does occur).

On the donor side, as noted, cases typically proceed as appeals from notices of reassessment issued by CRA to donors. When CRA concludes that a charitable donation tax credit or deduction has been claimed improperly, it will typically issue a notice of assessment or reassessment to the taxpayer claiming the credit or deduction. Taxpayers then have the following appeal avenues after receipt of a notice of reassessment:

- Taxpayers can file a notice of objection with the Appeals Directorate of CRA, objecting to the notice of reassessment.⁴¹
- If the Appeals Directorate confirms the reassessment, the taxpayer can appeal to the Tax Court of Canada.⁴² Significantly, such appeals proceed as trials *de novo* rather than as judicial reviews.
- Taxpayers can appeal the decision of the Tax Court of Canada to the Federal Court of Appeal.⁴³
- Taxpayers have the option to seek leave to appeal to the Supreme Court of Canada from a decision of the Federal Court of Appeal.

The majority of foundational cases dealing with the definition of gift and the availability of charitable donation credits or deductions have proceeded on this basis.⁴⁴ Such gifting issues have been considered in particular in the context of reassessments of donors participating in charitable donation tax shelter arrangements.⁴⁵ As these cases are highly influential in interpreting the meaning of gift for the purposes of the *ITA*, as well as rules regarding appropriate valuation and the application of the split-receipting and anti-avoidance rules in the legislation, public interest organizations will want to consider their ability to participate in litigation addressing these issues.

(c) Provincial Trust law and charity law issues

Charities are subject not only to the rules under the *Income Tax Act*, but to provincial laws as well. Provinces have general jurisdiction to regulate the operations of charities in the province. Additionally, charities are subject to many of the trust law rules that apply to trustees in respect of trust property. These rules are also administered provincially.

The general oversight of charities is the responsibility of the provincial attorney general in each province. In Ontario, this authority has been delegated to the Public Guardian and Trustee (OPGT). The OPGT is tasked, among other things, with safeguarding the use of charitable property for the public interest. The OPGT therefore appears on behalf of the public interest in litigation

⁴¹ *ITA*, ss. 165(1).

⁴² *ITA*, ss. 169(1).

⁴³ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27.

⁴⁴ For example, *Friedberg v. R.*, [1992] 1 C.T.C. 1 (F.C.A.); *The Queen v. Burns*, [1988] 1 C.T.C. 201, 88 D.T.C. 6101 (F.C.T.D.); aff'd [1990] 1 C.T.C. 350 (F.C.A.); *The Queen v. McBurney*, [1985] 2 C.T.C. 214 (FCA); *The Queen v. Zandstra*, [1974] C.T.C. 503; *Coleman v. R.*, 2011 FCA 82.

⁴⁵ For example, *Klotz v. The Queen*, [2004] 2 C.T.C. 2892; *Canada (A.G.) v. Nash*, [2006] 1 C.T.C. 158 (F.C.A.); *Marechaux v. The Queen*, 2009 TCC 587, among many others.

addressing the application of trust and charity law issues in Ontario. It also has specific powers under the *Charities Accounting Act (Ontario)*⁴⁶ to monitor compliance and seek sanctions from the Superior Court of Ontario.

The charity law and trust issues that arise in litigation in provincial superior courts include the following:

- disputes regarding the appropriateness of director or trustee remuneration;⁴⁷
- disputes regarding the appropriateness of fundraising expenses and practices;⁴⁸
- disputes as to whether a charity has used its funds in accordance with its charitable purposes and/or donor restrictions;⁴⁹
- disputes as to whether directors or trustees met their fiduciary duties to charity and public;⁵⁰ and
- disputes regarding the definition of charity for provincial purposes.⁵¹

Three provinces (Alberta, Saskatchewan, and Prince Edward Island) have also enacted fundraising legislation to regulate certain charitable fundraising activities in the province.⁵² While enforcement of these statutes is rare in practice, such that there are no reported cases under any of these statutes, charities that fail to abide by the regulations in these Acts could (at least in theory) be subject to penalties that could lead to litigation.

Disputes regarding the application of provincial trust and charity law rules to charities typically proceed in the superior court of justice in the province. The majority of cases addressing these issues have occurred in Ontario, where the OPGT has special authority to apply to courts for sanctions against charities that may not be complying with their charity and trust law obligations. Many of the cases above originated through applications of this nature by the Public Guardian and Trustee.

(d) Government funding cases

A public interest organization might also wish to participate in litigation arising from decisions by government or public agencies that relate to funding of organizations through particular government programs.

⁴⁶ R.S.O. 1990, c. C.10.

⁴⁷ *Ontario (Public Guardian & Trustee) v. Toronto Humane Society* (1987), 40 D.L.R. (4th) 111 (Ont. H.C.J.) [*Toronto Humane Society*]; *Re David Feldman Charitable Foundation* (1987), 58 O.R. (2d) 626; *Re Faith Haven Bible Training Centre* (1988), 29 E.T.R. 198 (Ont. Surr. Ct.); *Harold G. Fox Education Fund v. Ontario (Public Trustee)* (1989), 69 O.R. (2d) 742 (Ont. H.C.J.).

⁴⁸ For example, *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96 (Ont. S.C.J.).

⁴⁹ *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684.

⁵⁰ *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 608; *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society* 2010 ONSC 1953.

⁵¹ *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549 (Ont. Div. Ct.).

⁵² Alberta (*Charitable Fund-raising Act*, R.S.A. 2000, c. C-9), Saskatchewan (*Charitable Fund-raising Businesses Act*, S.S. 2002, c. C-6.2), and Prince Edward Island (*Charities Act*, R.S.P.E.I. 1988, c. C-4). Legislation formerly existed in Manitoba as well, in the form of *The Charities Endorsement Act*, C.C.S.M., c. C-60, but this statute was repealed effective January 1, 2014.

One case involving these issues involved a *Charter* challenge by parents of a child in a Jewish day school arguing that the non-funding of Jewish day schools by the Ontario government amounted to a violation of the *Charter of Rights and Freedoms*.⁵³ The applicants sought declarations that the parents and families of children in Jewish day schools are entitled to the benefit of funding by the Province of Ontario on a basis equivalent to the funding provided to Roman Catholic separate schools and to public schools, and an order requiring the Province of Ontario to provide funds to all such parents and families to cover the secular education of children provided in those schools. The application alleged that the failure to do so violated sections 2(a) (right to freedom of conscience and religion) and 15 (right to equality) in the *Charter*. The case does not appear to have reached a final decision, but is noteworthy for considering the status of various proposed interveners in the matter (as discussed below).

The Alberta Court of Queen’s Bench has recently certified a class action on behalf of nursing home residents in the Province of Alberta who were subject to accommodation rate increases which resulted, according to the Statement of Claim, in a 40% rise in long-term care fees charged to nursing home residents.⁵⁴ The Statement of Claim alleged that the Province reduced health care funding for nursing homes despite the rate increases. It also alleged that by raising the accommodation charge and failing to adequately fund health care, the Province acted in bad faith and with careless disregard for the interests of the class members. The Statement of Claim seeks various damages to compensate for the increased rate payments paid by class members, as well as various declarations that the Province violated the rights of the class members.

Litigation of this sort may proceed in any number of judicial forums, most likely provincial superior courts of justice. To the extent that causes of action include claims of *Charter* violations – which is to be expected – many of the considerations relevant to interventions and public interest standing in *Charter* or constitutional challenges will be relevant.

(e) Conclusion

The list of issues above does not purport to be exhaustive. It does, however, provide a general overview of the most common charity-related disputes and issues that have found their way into past judicial proceedings, as well as the procedural avenue by which the various issues proceed. Against this background, I will address the two primary means by which a public interest organization can participate in such litigation: interventions and public interest litigation. I will also comment on the ability of such an organization to participate in reference questions on charity law issues to the Tax Court of Canada and seek declaratory judgments in provincial superior courts.

3. Intervention: Joining pre-existing litigation

One approach by which a public interest organization may be able to participate in charity-related litigation would involve applying for leave to intervene in proceedings in which charity law issues are being addressed. This is the primary avenue by which such an organization can involve itself in

⁵³ *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Ont. Gen. Div.).

⁵⁴ Details regarding this class action can be found at <http://elderadvocates.ca/lawsuit-elder-advocates-et-al-vs-crown/>

pre-existing litigation (the way in which an organization may be able to *initiate* such proceedings is discussed below).

The rules of procedure across Canada generally provide for the granting of intervener status to a person who is not directly implicated by the facts under dispute, but who has some interest in the proceedings or the subject matter at issue and can add either factual evidence or legal argument that would not otherwise be put before the court. This can include organizations representing a broad constituency that would be generally affected by the decision.

To the extent that a public interest organization can meet the test for intervener status, it may be in a position to participate in ongoing charity law cases through this mechanism.

(a) General legal test for intervener status

There is no single foundational case addressing the test for intervener status. The rules of procedure applicable to the court in question will dictate the particular analytical structure applied in any application for leave to intervene. Having said this, there is sufficient commonality between the various statutes and case law that some general conclusions can be offered regarding when leave to intervene will be granted. Generally speaking, a court will only exercise its discretion to grant leave to intervene when the following basic criteria are met:

- the proposed intervener must have an interest in the outcome of the litigation sufficient to justify intervention;⁵⁵
- the proposed intervener must be able to offer additional evidence or legal argument that would assist the court over and above the submissions of the parties to the proceeding;⁵⁶ and
- the addition of the intervener must not prejudice the interests of the parties.

(i) *Added party versus friend of the court intervention*

At the outset, it is important to distinguish between two basic types of intervention. The first is intervention as an added party to the litigation. This generally carries with it, subject to the discretion of the court, all the rights of a party, including the right to introduce evidence and cross-examine witnesses. The second form of intervention is as a “friend of the court” (or *amicus curiae*). This form of intervention generally carries with it a more limited right to make written and/or oral submissions in the proceeding. Rules of civil procedure in some jurisdictions expressly distinguish between these forms of intervention.⁵⁷

Generally speaking, intervention as a friend of the court is appropriate where the intervener seeks to advance legal rather than factual submissions. Friends of the court are generally required to take the factual record as they find it, “to ensure economy and fairness to the parties and to prevent an intervener from changing the focus, scope or nature of the proceedings by changing the record.”⁵⁸ Because friends of the court will generally play a more limited role and have more

⁵⁵ *E.g. Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 257.

⁵⁶ *E.g., C.U.P.E. v. Canadian Airlines International Ltd.*, [2010] 1 F.C.R. 226; *Canada (A.G.) v. P.I.P.S.C.*, 2010 FCA 217.

⁵⁷ *E.g.*, Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg 194, Rule 13.

⁵⁸ *R. v. M. (A.)*, [2005] O.J. No. 4017 at para. 4.

limited rights as participants in litigation, the threshold for intervention as a friend of the court is lower than for intervention as an added party. In some circumstances, however, friends of the court have been permitted to make limited factual submissions without being added as parties to the litigation.⁵⁹

Intervention as an added party is generally appropriate where the intervener seeks to make factual submissions.⁶⁰ Courts will tend to scrutinize more carefully in such circumstances whether the addition of new parties making new factual submissions will unduly delay the proceedings or prejudice the parties.⁶¹ In exercising its discretion to permit added parties, courts may circumscribe the new evidence that will be permitted to be introduced. There may also be cost consequences to being added as a party to litigation that should be considered.⁶²

(ii) *Need for interest in the outcome of the litigation*

An applicant for intervener status must satisfy the court that it has a sufficient interest in the outcome of the litigation to justify its participation in the proceeding. Some civil procedure statutes set out factors that will satisfy the “interest” component of the test.⁶³ For example, Rule 13.01 of the Ontario Rules of Civil Procedure states that a non-party may move for leave to intervene as an added party if the person claims one of the following:

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

Other rules of civil procedure state simply that the party seeking to intervene must have “an interest” in the proceeding.⁶⁴ Some rules, notably the Federal Court Rules,⁶⁵ do not explicitly state any requirement to demonstrate an interest in the proceedings, though this requirement has been affirmed consistently by the Federal Court on applications for leave to intervene. Despite the differences in the wordings of the various rules, the factors that will satisfy this requirement are fairly common across the different jurisdictions in Canada.

This leads naturally to the question of what is an “interest” in the proceedings that will justify intervention. The interests that will satisfy this requirement can generally be divided into *private interest* and *public interest*. Private interests are those of the persons directly affected by the proceedings and would include circumstances where the proposed intervener’s proprietary or legal rights are directly affected or a representative action in which the intervener is a member of

⁵⁹ *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada (Attorney General)*, 2011 FC 158.

⁶⁰ *Ontario (Human Rights Commission) v. Christian Horizons*, 2008 CarswellOnt 7924 at para.15.

⁶¹ *Ibid.* at para. 18.

⁶² For example, the intervener may be required to agree not to seek costs of the proceedings: (*Human Rights Commission) v. Christian Horizons*, 2008 CarswellOnt 7924 at para. 30).

⁶³ For example, Ontario Rules of Civil Procedure, Rule 13.01; Saskatchewan Rules of Court, Rule 39.

⁶⁴ Rules of the Supreme Court of Canada, SOR/2002-156, Rule 55; Court of Appeal Rules, B.C. Reg. 297/2001, Rule 36(1).

⁶⁵ Federal Court Rules, SOR/98-106, Rule109; also, Alberta Rules of Court, AR 124/2010, Rule 2.10.

the represented class. Courts have also recognized that a commercial interest in the outcome of a proceeding may be sufficient to meet this part of the test. Where a private interest in litigation can be demonstrated, this will generally justify adding the interested party as a party to the litigation on the basis that all parties directly affected by a proceeding should have the right to be heard. Public interest, by contrast, is the interest held by strangers in having a particular point of view expressed on an issue of wide importance or in making the court aware of the impact or implications of the decision on a particular constituency.

While it is possible that a public interest organization may be able to demonstrate a direct or commercial interest in some limited circumstances, this paper will focus on the ability of such an organization to intervene on the basis of its public interest in the subject matter in charity law cases.

A good example of the analysis applied to applications for public interest intervention is set out in the Federal Court of Appeal decision in *Amnesty International Canada v. Canada (Minister of National Defence)*.⁶⁶ The substantive case involved issues related to human rights law. The proposed intervener, University of Toronto, Faculty of Law – International Human Rights Clinic, specialized in international human rights. The Court ultimately denied the application for leave to intervene, and in so doing articulated a key element to the requirement that an intervener must have an interest in the outcome of the litigation.

The Court was addressing an application for leave to intervene made under section 109 of the *Federal Court Rules*. Section 109 provides a general discretion to the court allowing it to grant leave to any person to intervene in a proceeding. The Court summarized the factors that it would consider in the context of a leave application as follows, which derived from an earlier decision of the Federal Court:⁶⁷

The essential question is whether the Applicant can demonstrate that its participation in the appeal will assist in the determination of a factual or legal issue related to the outcome of the appeal. In making its decision, the Court considers a number of factors, including:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?

⁶⁶ 2008 FCA 257.

⁶⁷ *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (F.C.T.D.).

6. Can the Court hear and decide the cause on its merits without the proposed intervener?⁶⁸

The Court acknowledged that the proposed intervener had expertise in human rights law and might therefore be in a position to offer useful submissions. However, it denied the application for leave to intervene on the basis that the proposed intervener lacked a sufficient interest in the proceeding.

The Court noted that the applicant was, essentially, a law firm, but was not bringing the application on behalf of any particular client or organization. The Court then stated:

An interest in the outcome of litigation has also been said to be insufficient to justify intervention where that interest is "jurisprudential in nature" as that phrase was used by Noël J.A. in *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (Fed. C.A.). The "jurisprudential" interest of the Applicant in the appeal is illustrated by the contents of paragraph 25 of the affidavit of Renu Mandhane, which states:

25. The IHRC has a particular and pressing interest in this Appeal because of the IHRC's interest in ensuring that the Canadian government complies with its obligation under international human rights law and that Charter jurisprudence develops in a manner that maximizes respect for international human rights. The IHRC has a particular and pressing interest in ensuring that government authorities do not lose sight of their obligations in respect of such rights once they step outside of their borders, but rather that international human rights are truly given international scope.

In conclusion, I analogize the interest of the Applicant in the appeal to that of the interest of a boutique income tax law firm, specializing in international income tax cases, in a tax appeal dealing with an international income tax issue that is being argued by a different law firm. Clearly, the income tax boutique will be interested in the outcome of the appeal as that outcome may affect its chosen area of international income tax law. Moreover, because of its specialized experience in that area of law, no doubt the income tax boutique would be able to bring useful and potentially unique submissions to the hearing of the appeal. However, in my view, the interest of the income tax boutique law firm is insufficient to warrant its intervention in the appeal.

Thus, a mere interest in "advancing the jurisprudence" or in "developing the law" has been held to be insufficient to demonstrate the necessary interest in the proceedings to justify intervention. Numerous other decisions of various courts have affirmed this general principle.⁶⁹ This sometimes occurs where a proposed intervener has pending claims of a similar nature and wishes to

⁶⁸ *Ibid.* at para. 2. This general test derives from *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.) and has been cited by several courts (e.g., *Apotex Inc. v. Eli Lilly Canada Inc.* (2001), 11 C.P.R. (4th) 486 (F.C.A.)).

⁶⁹ E.g., *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119; *Pfizer Ltd. v. Ratiopharm Inc.*, 2009 FCA 339; *Anderson v. Canada (Customs & Revenue Agency)*, 2003 FCA 352; *Tioxide Canada Inc. v. R.* (1994), 174 N.R. 212 (F.C.A.); *R. v. Eurocopter Canada Ltd.* (2004), 71 O.R. (3d) 27 (S.C.J.); *R. v. Trang*, 2002 ABQB 185.

intervene in hopes of setting precedents that would affect future litigation.⁷⁰ Courts have referred to this as a mere “jurisprudential” interest in the case and have held that it is not a sufficient interest to justify intervention.

In order to satisfy a court that a proposed public interest intervention is warranted, it has generally been necessary to establish that the issues being considered are of broad importance to a wide constituency and that the proposed intervener is a suitable representative of that constituency. The larger the affected group, the more likely that intervention will be permitted. In many cases, this will mean showing that the applicant formally represents the interests of a group of organizations or individuals that would be affected by the decision in question, as in the case of trade or industry association.⁷¹ It has sometimes been sufficient to establish that the applicant is a member of the affected constituency, without necessarily having a formal role representing their interests; individual taxpayers, for example, have been granted status to intervene in matters affecting tax obligations. Generally, however, representation of an affected constituency is an important factor in obtaining leave to intervene.

A recent decision of the Federal Court of Appeal, *Canada (Attorney General) v. Pictou Landing Band Council*⁷² has suggested that the requirement to demonstrate an “interest” in the litigation should be relaxed from its framing in the six-part test cited above. The six-part test in *Rothmans* suggested that a “direct interest” in the litigation is required. David Stratas J.A. considered this and stated that while a “direct interest” is necessary for added-party status, intervener status can be granted on the basis of a lower threshold. As framed by David Stratas J.A., the question of the applicant’s interest in the litigation should be framed as follows:

Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?⁷³

Whether this re-framing of the test will change the analysis above with respect to organizations with mere “jurisprudential interest” is unclear. However, the language used suggests that the focus should be placed on the applicant’s knowledge, skills, and resources, which would seem to make interventions by organizations with an interest in the development of the law more feasible, provided that they can demonstrate sufficient expertise and resources to be effective as interveners. It is notable in particular that while Amnesty International was denied leave to intervene by the Federal Court in the 2008 decision cited above, Amnesty International was granted leave to intervene in *Pictou Landing Band Council*, which dealt with a case involving whether the federal government was obligated to provide funding in support of an expense request from a First Nations Band.

⁷⁰ *C.U.P.E. v. Canadian Airlines International Ltd.*, [2010] 1 F.C.R. 226 at para. 11; *R. v. Boulton*, [1976] 1 F.C. 252 (Fed. C.A.); *Tioxide Canada Inc. v. R.* (1994), 174 N.R. 212 (Fed. C.A.).

⁷¹ *Maurice v. Canada (Minister of Indian Affairs & Northern Development)*, 2000 CarswellNat 233 (F.C.T.D.).

⁷² 2014 FCA 21.

⁷³ *Ibid.* at para. 11.

(iii) Must assist the court

It is also necessary that an intervener be in a position to assist the court with some factual or legal issue that is not otherwise being addressed adequately by the parties to the litigation. Numerous decisions have confirmed that an intervener must do more than simply reiterate the position of one of the litigants in the intervener's own words.⁷⁴ Interveners are also not generally permitted to raise new issues.⁷⁵ Interveners are required to bring a "relevant and useful point of view that the initial parties cannot or will not present."⁷⁶

In this, it is important that a proposed intervener either be representative of a constituency affected by the decision in question so as to establish that it offers a unique point of view that may be insufficiently represented or have a special expertise in the subject matter at hand. Note that the decision of the Federal Court of Appeal in *Amnesty International Canada* accepted that a group of lawyers and law students specializing in international law had expertise and might assist the court in the determination of a human rights issue. While this group did not satisfy the court that it had a sufficient interest in the proceedings to justify intervention, it does indicate that legal expertise may be sufficient to satisfy the requirement that the intervener be in a position to assist the court.

In some cases, it may be necessary to establish that a proposed intervener's position is different from either of the parties. In other words, it must show not only that it will advance different arguments or add new factual submissions but also that the substantive position that it takes is distinct from the position the parties to the litigation.

Where a proposed intervener can demonstrate that it has extensive history and experience intervening in past litigation involving matters related to its constituency or mandate, this will weigh in favour of permitting intervention.⁷⁷ This will help to satisfy the court that the intervener understands the limits that apply to interventions and will work constructively to aid the proceedings.

(iv) Must not prejudice the parties

The Rules of Civil Procedure in certain jurisdictions specifically include a requirement that the court consider whether a proposed intervention would prejudice one of the parties to the litigation.⁷⁸ Courts will consider in particular whether the addition of interveners would unduly delay or complicate the proceedings.

Both of these factors are discretionary and will depend on the circumstances. Each case will involve a weighing of factors favouring intervention against the delay or disruption it might cause. In general, interventions to introduce factual submissions will be more disruptive and time-consuming than purely legal submissions. Courts will give weight to whether new submissions will change the scope of the proceedings or require new factual submissions or arguments by the

⁷⁴ *Ferroequos Railway Co. v. C.N.R.*, 2003 FCA 408; *Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267.

⁷⁵ *Maurice v. Canada*, *supra* note 71.

⁷⁶ *Abbott v. R.*, [2000] 3 F.C. 482 (Fed. T.D.), cited in *Ferroequos*, *supra* note 74. In *Pictou Landing Band Council*, *supra* note 72, David Stratas J.A. stated that the key question is whether "the proposed intervener [will] advance different and valuable insights and perspectives that will actually further the Court's determination of the matter" (para. 11).

⁷⁷ *Ontario (Human Rights Commission) v. Christian Horizons*, 2008 CarswellOnt 7924 at paras. 3, 23.

⁷⁸ Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 13.01(2).

parties.⁷⁹ The length of time remaining before the hearing will also be relevant, as the parties may have to prepare responses to the arguments or evidence advanced by the interveners. Courts have noted that only in exceptional circumstances will interventions be permitted close to the hearing date of an appeal where the parties have already delivered their *facta* and would have little time to prepare for and respond to new arguments.⁸⁰

Measured against this will be the extent of the public interest implicated by the case. In this, courts have regard to how broad a section of the public would be impacted by the decision and whether the case involves constitutional questions or purely private interests. The novelty of the issues under consideration will also likely be relevant.

In *Pictou Landing Band Council*, David Stratias J.A. approached this issue from the specific perspective of Rule 3 in the Federal Court Rules. He framed the appropriate question as follows:

Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

(v) Standard applied

It should be noted that the standard that must be met in order to justify intervention varies depending on the "public interest" dimension of the case.

Several courts have noted, for example, that cases exist on a spectrum, with constitutional cases existing at one end and purely private litigation at the other. A more relaxed standard will be applied to applications for leave to intervene where there are constitutional issues under consideration. For example, in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*,⁸¹ Dubin C.J.O. of the Ontario Court of Appeal stated as follows:

In constitutional cases, including cases under the *Charter of Rights and Freedoms*, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.⁸²

Similar statements have been made by judges of various courts in Canada.⁸³ Courts are also generally more willing to permit interventions by friends of the court rather than added parties.⁸⁴

⁷⁹ *Tadros v. Peel Regional Police Service*, 2008 ONCA 775 at para. 8; *Adler v. Ontario* (1992), 8 O.R. (3d) 200 at para. 35.

⁸⁰ *Oakwell Engineering Ltd. v. EnerNorth Industries Inc.*, [2006] O.J. No. 1942 (Ont. C.A.), at para. 13, cited in *Tadros v. Peel Regional Police Service*, 2008 ONCA 775 at para. 9. It should be noted that the Federal Court of Appeal has approved an application for intervener status with only two weeks remaining before the hearing: *Horn v. Canada*, 2006 FCA 1216. The Court in that case circumscribed the submissions that would be permitted by the intervener.

⁸¹ (1990), 74 O.R. (2d) 164.

⁸² *Ibid.* at 167.

⁸³ *E.g.*, *Adler v. Ontario* (1992), *supra* note 53, at para 4.

⁸⁴ *Ibid.* at 40.

In *Pictou Landing Band Council*, David Stratas J.A. stated that the public importance of the matter should be considered as a question of whether the interest of justice would be served by the proposed intervention. He stated the question as follows:

Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?⁸⁵

(b) Intervention in charity law cases

(i) Tax disputes

Intervener status has been granted in a few cases addressing charity law issues under the *Income Tax Act*. While the decisions to grant intervener status in the cases below have not been reported, a summary of these cases provides some insight into when and under what circumstances courts have tended to allow interventions in tax cases involving charity law issues. Charity law cases in which interveners have been permitted to make submissions include the following:

- *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)* (2007, SCC)⁸⁶. This case considered, among other things, whether the promotion of amateur sport qualified as a charitable purpose. The Canadian Centre for Philanthropy was granted intervener status in the hearing and argued that the appropriate approach to determining eligibility for charitable status was to use the common law method that had been historically applied and which was endorsed by the Supreme Court of Canada in *Vancouver Society*. The intervener argued that the test applied by the Court of Appeal, which considered the various statutory categories available under the *Income Tax Act*, was incorrect. No position was taken by the intervener on whether or not the applicant organization ought or ought not to qualify for registration as a charity under the ITA.
- *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue* (1999, SCC).⁸⁷ This case addressed the scope of education as a charitable purpose and commented generally on the legal definition of charity. The Canadian Centre for Philanthropy, the Minority Advocacy and Rights Council, the Canadian Ethnocultural Council, and the Centre for Research Action on Race Relations were all granted leave to intervene. The Canadian Centre for Philanthropy assisted the court in advising of case law, holding that assisting the settlement of migrants, immigrants, and refugees, and their integration into national life, is a charitable purpose already recognized under the fourth head of the *Pemsel* classification. The other interveners argued that denying charitable status to an organization that served minority women

⁸⁵ *Pictou Landing Band Council*, *supra* note 72, at para. 11.

⁸⁶ 2007 SCC 42.

⁸⁷ [1999] 1 S.C.R. 10.

violated section 15 of the *Charter* (right to equality) by reducing the organization's ability to raise revenue and thereby to carry out the full range of activities that would otherwise be available to it.⁸⁸

- *Woolner v. R.*⁸⁹ (1999, FCA). This case addressed whether donations to the Mennonite church, a portion of which was designated to provide bursaries to students of a Mennonite school, qualified as charitable donations. The Ontario Alliance of Christian Schools Societies was granted status as intervener.
- *Zylstra v. MNR*,⁹⁰ (1997, FCA). This case addressed the availability of the clergy residence deduction under paragraph 8(1)(c) to the president of a bible college and theological seminary. The Canadian Council of Christian Charities, the Evangelical Fellowship of Canada, and The Interdenominational Foreign Mission Association of Canada were added as interveners. The interveners submitted a memorandum of fact and law addressing various concerns that were said to arise from the reasoning of the trial judge in the case (who had denied the clergy residence deduction).

The Federal Court of Appeal rejected an application for intervener status in a GST case involving Camp Mini-Yo-We, which considered a decision of the Tax Court of Canada on whether the Camp was entitled to a general GST exemption in respect of its camp fees.⁹¹ The Canadian Council of Christian Charities, as well as the Christian Sunday School Mission, sought status as interveners to make legal submissions to the effect that the Tax Court judge had failed to abide by principles of *stare decisis* and judicial comity. Noel J.A. for the Federal Court of Appeal denied intervener status on the basis that the proposed intervention would not assist the court, as the appellants in the case had already raised, in their factum, the issue on which the proposed intervention was based.

(ii) Provincial charity and trust law cases

In 2010, in *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*,⁹² the Ontario Superior Court of Justice addressed various alleged breaches of trust by the directors of the Toronto Humane Society (“THS”). In the course of the proceedings, the Court considered a motion by a member of the THS seeking leave to intervene as a party to the proceeding.⁹³ The proposed intervener had been a member of the THS for some time and had previously run unsuccessfully for the Board of Directors. She was also a member of a group called the Association for the Reform of the Toronto Humane Society (“ART”), which had been in existence since late 2007 and was made up of approximately 15 members and volunteers of the THS. The purpose of the ART was stated as follows:

to provide a credible association for the gathering and dissemination of facts and background on the current Board and management of [THS] relative to animal care, treatment of staff and volunteers, fiscal accountability and governance matters, and to create public awareness of these issues in an

⁸⁸ *Ibid.* at para. 207.

⁸⁹ [2000] 1 C.T.C. 35.

⁹⁰ [1997] 2 C.T.C. 203.

⁹¹ *Camp Mini-Yo-We v. R.*, 2006 FCA 102.

⁹² 2010 ONSC 824.

⁹³ The applicant relied on Rule 13.01 of the Ontario Rules of Civil Procedure.

effort to bring about reform and renewal of the THS for the benefit of the animals and our community.⁹⁴

The applicant sought to intervene on the basis that the ART had identified several concerns related to the ongoing governance of the THS, including (i) inadequate answers by THS directors to questions from members; (ii) the lack of a nominating committee for members of the Board; (iii) a "closed shop" environment amongst current Board members; (iv) the lack of information about how to run for the Board; and (v) a lack of clarity in the membership list about which persons are voting members. ART members were also concerned about the on-going allegations against THS regarding inadequate animal care, as well as about the manner in which charitable donations are spent.

The proposed intervener sought to be included as a full party, with the right to file evidence, cross-examine witnesses, and make submissions at the hearing.

The Court considered the general test for intervener status under Rule 13 of the Ontario Rules of Civil Procedure, which provides as follows:

13.01(1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) interest in the subject matter of the proceeding;
 - (b) that the person may be adversely affected by a judgment in the proceeding;
or
 - (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
- (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

The Court noted that where an application is in a *Charter* case, usually at least one of three criteria must be met by the intervener: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or, it is a well-recognized group with a special expertise and a broadly identifiable membership base.⁹⁵ By contrast, the court noted that Ontario courts have interpreted Rule 13 more narrowly in conventional, non-constitutional litigation between private litigants.

⁹⁴ *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824 at para. 2.

⁹⁵ *Ibid.* at para. 8. The Court cited *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 (Ont. C.A.) for this proposition.

The Court held that the proposed intervener had an interest in the proposed litigation as a member of the THS, as the proceedings had called into question the adequacy of the THS' care given to animals under its control as well as the Society's use of its charitable funds. It held, however, that she did not appear to be adversely affected by the judgment in the proceedings and that there were no common questions of law or fact as between the issues raised by the intervener and those raised in the notice of application.

The Court stated as follows:

Turning to the consideration of the discretionary factors under Rule 13.01(2), this case stands closer to the private litigation end of the continuum than the public interest end. True, a public dimension exists in this proceeding since THS is a charity and, as such, THS and its directors owe certain duties to the public, especially those who contribute to its operations. However, this proceeding originated with specific allegations made by the OSPCA, a body charged by statute to supervise and enforce standards of animal care in this province, about the care given by THS to animals in its charge.

The applicants have alleged certain breaches of the trust created for the charitable purposes of the THS: Charities Accounting Act, s. 10(1). Those allegations have engaged the supervisory jurisdiction of this court over charities. THS is responding to those allegations. I do not think it would be fair to the respondents to permit an intervener to expand the scope of allegations in this proceeding, which is what I perceive would be the effect of granting leave to Ms. MacKinnon to intervene with the full rights of a party. As I stated during the hearing, this proceeding is not a public inquiry into the affairs of the THS; it is an adjudication of specific allegations made by the applicants against the respondent.

The Court permitted the member of the THS to intervene in the matter but limited her status to that of a friend of the Court, with the right to make legal submissions in a factum and the right to make oral submissions of up to 30 minutes.

It is noteworthy that the involvement of the Attorney General (or the Public Guardian & Trustee, in Ontario) is not uncommon in *cy pres* cases and is sometimes described as an "intervention".⁹⁶ However, there are no examples of public interest interventions by third parties in the *cy pres* context.

(c) Application to public interest organization

The above summary provides an overview of the issues that would be faced by a public interest organization in obtaining leave to intervene in ongoing charity cases. The nature of the organization in question would determine which aspects of the test for intervener status would present challenges.

⁹⁶ *E.g.*, *Re Killam Estate* (1999), 185 N.S.R. (2d) 201 (S.C.); *Corbin Estate v. Corbin Estate* (1992), 1992 CarswellOnt 2288 (Ont. Gen. Div.). See also, *Re Leonard Foundation Trust* (1990), 74 O.R. (2d) 481 (C.A.), which involved three parties described as "interveners," though none appear to constitute public interest interveners. The case involved an application for a *cy pres* order varying certain racist provisions of an old scholarship trust provided for in a Will. The court allowed "interventions" by the Royal Ontario Museum, which had been named as a beneficiary under the Will, by a representative of the class of eligible beneficiaries (*i.e.*, for the scholarships) under the Will, and by the Public Guardian and Trustee.

For umbrella organizations with large memberships that represent the sector, obtaining intervener status will generally be easier than for a smaller public interest organization that has expertise in charities matters but that may have difficulty in establishing that it represents a broad constituency affected by the decision in question.

Either type of organization would potentially be able to satisfy the other two elements of the test for intervention: namely, the ability to assist the court and the absence of prejudice to the parties. With respect to the requirement to demonstrate that the organization's intervention would assist the court, the following factors would assist the organization in demonstrating this:

- it has substantial specialized expertise in substantive charity law issues and/or the practical impact of legal developments on the operations of registered charities, including legal expertise; and
- the organization can cite the participation of its principals in interventions in other charity law cases. This will be particularly relevant for new organizations, which will (at least initially) have no track record as an intervener. Its principals will be able to establish that they understand the rules and limitations that apply and that they will work constructively to assist the court.

With respect to the requirement to show that intervention will not prejudice the parties, this is highly case-specific but should be possible, particularly where the litigation involves constitutional issues or issues of broad public concern and where the organization will limit itself to legal submissions. The cases cited above under the *Income Tax Act* show that many charity law issues under the *Income Tax Act* have been found to entail a sufficient public concern to justify intervention.

This leaves the requirement that the organization must demonstrate an interest in the proceedings. On this issue, smaller educational organizations that do not have broad memberships will not be able to claim that they represent a broad membership of charities in Canada. Where the organization is itself a charity, it may therefore apply for intervener status as a representative member of the impacted constituency. However, this argument is generally weaker than if the organization formally represented the interests of a broad range of charities or stakeholders in the voluntary sector. Organizations that can demonstrate that they represent a substantial constituency affected by the case at hand have an advantage in demonstrating an interest justifying intervention.

A further hurdle will be faced by organizations that are constituted for the purpose of advancing the public's understanding of charity law and relevant jurisprudence. This raises the risk that a court may interpret the organization's interest as being merely jurisprudential in nature. To be sure, the comments from David Stratas J.A. in *Pictou Landing Band Council* appear to move the test for intervener status in the Federal Court in a direction that makes it easier for public interest organizations to intervene, but the extent of this trend will not be known until there is more jurisprudence applying that decision.

One way by which a smaller educational organization can to avoid this issue would be for the organization to work with and support the intervention of umbrella groups that represent the sector. Such groups, because they formally represent a large membership in the charity sector, would be able to demonstrate a clear interest in the litigation. Thus, they would likely be entitled to intervene. The smaller organization would thus be able to work in partnership with such organizations to ensure that all relevant submissions are made, and to lend its expertise.

If it is not possible to intervene jointly with a sectoral organization, smaller organizations should nonetheless endeavour to obtain support from such organizations. Courts have noted favourably in several cases that an applicant for leave to intervene has obtained support from other sectoral organizations.

Organizations should also obtain consent of the parties, if possible, prior to filing an application for leave to intervene. While it may not always be possible to obtain consent from the parties, and particularly from both parties, the organization should endeavour to obtain their consent, or at least their lack of objection, to an application for leave to intervene. Where consent of the parties has been obtained, courts are more likely to grant leave to intervene.

4. Public Interest Litigation

As discussed above, interventions are the primary route by which a public interest organization may be able to participate in pre-existing litigation. There are also avenues by which a public interest litigant can initiate legal proceedings to address legal issues affecting the public.

One possible avenue by which charity issues might be brought before a court is public interest litigation. Courts have established that, in certain circumstances, it is appropriate to permit members of the public to challenge either legislation or administrative action of the government even though the litigant may not be directly subject to action under the relevant statute. For some matters, and in particular matters involving challenges to the constitutionality of legislation or administrative action relating to charities, public interest litigation may be an option.

(a) Legal test for public interest standing in constitutional context

The legal test for public interest standing has developed in a series of decisions of the Supreme Court of Canada, beginning in 1974 and most recently in 2012. The most recent major decision on the subject, *Downtown Eastside Sex Workers United against Violence Society v. Canada (Attorney General)*,⁹⁷ significantly reconsidered a major aspect of the traditional test for public interest standing. I will first review the foundational cases that developed the traditional test for public interest standing in Canada before addressing how the more recent decision has modified this test.

The test for public interest standing originally developed in three Supreme Court of Canada cases. The first, *Thorson v. Attorney General of Canada*,⁹⁸ involved a constitutional challenge to the federal *Official Languages Act* (“OLA”). The appellant brought an application against the Attorney General of Canada for a declaration that the *Official Languages Act* was *ultra vires* the Parliament of Canada. The appellant sued as a taxpayer on behalf of all taxpayers in Canada. The appellant objected to the use of the funds from the Consolidated Revenue Fund of the federal government to implement the OLA. The lower courts had held that an individual lacked standing to challenge the constitutional validity of an Act of Parliament unless he or she is specially affected or exceptionally prejudiced by it; the mere fact that the appellant paid taxes that were used in the implementation of the OLA was insufficient.

⁹⁷ 2012 SCC 45.

⁹⁸ [1975] 1 S.C.R. 138.

The Supreme Court of Canada overturned the lower court decision and granted standing to the appellant. It held that the main issue was the nature of the legislation and whether it affected all members of the public equally, or whether a particular subset of the public would be specially affected by it. The Court stated as follows:

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like Smith, is too remotely effected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.⁹⁹
[emphasis added]

The Court held that because the statute in question was declaratory, not regulatory, there was no particular group directly affected by it that could bring the case before the court.

The case of *Nova Scotia Board of Censors v. McNeil*¹⁰⁰ involved a challenge by a member of the public to the constitutionality of certain provisions of the *Theatres and Amusements Act* of Nova Scotia. The appellant objected to the broad powers granted to the Nova Scotia Board of Censors under the Act to censor the showing of films. The appellant sought a declaration in the Nova Scotia Supreme Court that certain sections of the *Theatres and Amusements Act* were *ultra vires* the provincial legislature. The decision addressed the preliminary issue of the appellant's standing to bring the challenge.

It is important to note the steps taken by the appellant in *McNeil* before seeking a declaration in court. The petitioner had sought to appeal to the Lieutenant-Governor in Council pursuant to a provision in the impugned statute but was not recognized as having any right of appeal. He also requested that the provincial Attorney General refer the constitutionality of the Act to the Appeal Division of the court but did not receive a response from the Attorney General. The Attorney General took the position that it viewed the statute as *intra vires* and that there appeared to be no right in the petitioner to attack its validity. The petitioner brought an application for declaration that the law was invalid only after these steps had been taken. The plaintiff in the *Thorson* case, above, it should be noted, had also taken the similar step of seeking to have the Attorney General refer the question to the Court.¹⁰¹

⁹⁹ *Ibid.* at para. 37.

¹⁰⁰ [1976] 2 S.C.R. 265.

¹⁰¹ See section below addressing "Relator Actions."

The Court noted that the petitioner, by these steps, took “all reasonable steps that he could reasonably be required to take to make the question of his standing ripe for consideration.”¹⁰²

The Court then went on to consider the plaintiff’s standing. It noted that the Act in question, unlike the *Thorson* case, was regulatory and not declaratory. There was therefore a specific class of persons directly regulated by the statute. The Court, however, stated as follows:

I think it important to distinguish what I would term the administrative law features of so-called regulatory legislation and the constitutionality of such legislation. Its pith and substance, in the latter aspect, may very well disclose a purpose which would be served by its administrative features but would not be limited by them. Thus, the fact that certain persons or classes of persons, or certain activities in which persons engage, may be subjected to compulsory regulation on pain of a penalty or other sanction does not always mean that the pith and substance of the legislation is to be determined only in that context, so as to make those regulated the only persons with a real stake in the validity of the legislation.¹⁰³

The Court then went on to state that the *Theatres and Amusements Act* provided a perfect example of this. The statute provided for a licensing regime applicable to any theatre owner and required that the owner comply with the censorship decisions of the Nova Scotia Board of Censors. Such theatre owners were the persons directly affected by the regulatory regime in the statute. However, the court also noted that the general public were also affected by the statute and might have a valid desire to challenge the prohibitory aspects of the Act. The Court stated:

The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing.¹⁰⁴

The Court held that the petitioner had standing to seek a declaration of invalidity.

The third foundational case is *Borowski v. Canada (Minister of Justice)*,¹⁰⁵ decided in 1981. In *Borowski*, the plaintiff had commenced an action challenging the therapeutic abortion provisions in the *Criminal Code*. The plaintiff sought a declaration that the provisions violated the Canadian Bill of Rights, a declaration that all federal provisions authorizing the spending of money on therapeutic abortion were *ultra vires*, and an injunction preventing the Minister of Finance from expending money on therapeutic abortions.

The majority of the Court reviewed the prior decisions in *Thorson* and *McNeil*, then noted that the provisions at issue in this case were not declaratory, as in *Thorson*, nor regulatory, as in *McNeil*,

¹⁰² *MacNeil*, *supra* note 100. at 268.

¹⁰³ *Ibid.* at 269.

¹⁰⁴ *Ibid.* at 271.

¹⁰⁵ [1981] 2 S.C.R. 575.

but were rather *exculpatory*. It provided an exemption from the criminal liability that then existed generally for doctors who performed abortions. Thus, it was unlikely than anyone directly affected by it would have reason to challenge it. The majority determined that the plaintiff did have standing, stating (with reference to the *Thorson* and *McNeil* decisions):

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court. In my opinion, the respondent has met this test, and should be permitted to proceed with his action.¹⁰⁶

These three foundational cases thus established a basic three-part test for public interest standing to make a constitutional challenge. In order to be granted public interest standing, a litigant must demonstrate the following:

1. There must be a serious justiciable issue as to the validity of the law in question;
2. The litigant must be directly affected by it or have a genuine interest as a citizen in the validity of the legislation; and
3. There must be no other reasonable and effective manner in which the issue may be brought before the court.

Subsequent decisions affirmed this basic test,¹⁰⁷ and public interest organizations have been found to have standing to seek a declaration of constitutional invalidity in the specific context of the *Income Tax Act*.¹⁰⁸

In 2012, the Supreme Court of Canada considered anew the availability of public interest standing in *Downtown Eastside Sex Workers United against Violence Society v. Canada (Attorney General)*.¹⁰⁹ In *Downtown Eastside*, the Court considered an application by a society supporting women in the sex trade (the “Society”) that sought a declaration that various provisions of the *Criminal Code* related to prostitution violated the *Charter of Rights and Freedoms*. For the Court, Cromwell J. noted the three-part test that had developed in the trilogy of foundational cases and commented on the traditional concerns that led to restrictions on the availability of public interest standing. He identified three main concerns that had led to the development of the traditional test for standing:

- Scarce resources and busybodies – Cromwell J. noted the oft-cited concern about screening out “mere busybodies” so as to avoid a multiplicity of actions and to ensure that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. However, he stated that the concern about mere

¹⁰⁶ *Ibid.* at para. 56.

¹⁰⁷ For example, *PHS Community Services Society v. Canada (Attorney General)*, [2010] 2 W.W.R. 575 (B.C.C.A.) at para. 179; *Canadian Association of the Deaf v. R.*, 2006 FC 971 at para. 51.

¹⁰⁸ *O.P.S.E.U. v. National Citizens Coalition Inc.* (1990), 74 O.R. (2d) 260 (O.C.A.).

¹⁰⁹ 2012 SCC 45.

busybodies can be overstated, as relatively few people in fact bring cases in which they have no interest.¹¹⁰

- Ensuring contending points of view – Cromwell J. noted that courts benefit from having contending points of view offered by the persons most directly affected by the issue.¹¹¹
- Proper judicial role – Cromwell J. acknowledged the importance of ensuring that courts respect their proper role in the constitutional relationship with the legislation and deal only with justiciable issues (*i.e.*, issues that are appropriate for judicial determination).¹¹²

Cromwell J. then cited three issues that must be borne in mind when weighing and applying the factors set out in the three-part test for public interest standing. These are:

- *The principle of legality* – Cromwell J. stated that “The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action.”¹¹³ The Court emphasized on the basis of prior case law that legislation and government action should not be immunized from having their constitutionality challenged.
- *Discretion* – Cromwell J. noted that the question of standing has always been resolved through the exercise of judicial discretion. Accordingly, “it follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.”¹¹⁴
- *Purposive and flexible approach* – Cromwell J. emphasized that the three-part test must be applied “flexibly and purposively”.¹¹⁵ He noted that a plaintiff with standing as of right will generally be preferred.

Having set out this analytical framework, the Court went on to review the three-part test developed in the trilogy. It held that the Society should be granted public interest standing to bring the application. In so doing, the Court commented on each element of the three-part test.

(i) Serious justiciable issue to be tried

This element of the test is generally met easily. It has been held to require only that the claim raise an issue of law that is not frivolous or too hypothetical to justify being heard by the court.

The Supreme Court in *Downtown Eastside* noted that this factor relates to two of the concerns underlying the traditional restrictions on standing: concern about the proper role of the courts

¹¹⁰ *Ibid.* at paras. 26-28.

¹¹¹ *Ibid.* at para. 29.

¹¹² *Ibid.* at para. 30.

¹¹³ *Ibid.* at paras. 31-34.

¹¹⁴ *Ibid.* at paras. 36.

¹¹⁵ *Ibid.* at para. 37.

and the allocation of scarce resources.¹¹⁶ Courts must ensure that they deal only with questions that are justiciable and appropriate for judicial determination¹¹⁷ and must deny standing to plaintiffs bringing claims that fail to raise a serious or substantial issue.

(ii) *Genuine Interest*

The proposed litigant challenging a law must demonstrate a genuine interest in the validity of the legislation. The trio of cases noted above took a relatively broad view of when an applicant will be found to have a genuine interest in the litigation. In *Thorson*, the litigant was an individual taxpayer and was permitted to bring a public interest case on behalf of all taxpayers. Similarly, in *McNeil*, a member of the public in Nova Scotia was permitted to challenge the validity of legislation as a general member of the province-wide community affected by the *Theatres and Amusements Act*.

In *Downtown Eastside*, the Court framed this factor as a question of whether the plaintiff has a “real stake in the proceedings or is engaged with the issues that arise.”¹¹⁸ Cromwell J. cited three previous cases on public interest standing as exemplifying this trend:

In *Finlay*, for example, although the plaintiff did not in the Court’s view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski’s engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a “genuine interest”, as it enjoyed “the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants” (p. 254). In examining the plaintiff’s reputation, continuing interest, and link with the claim, the Court thus assessed its “engagement”, so as to ensure an economical use of scarce judicial resources (see K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at ¶5.120).

While public interest litigation has been commenced by representative organizations representing a broad constituency, the requirement to demonstrate that the applicant formally represents a broad constituency appears to be less crucial in this context as compared to applications for leave to intervene.¹¹⁹ It has often been found sufficient for the purposes of demonstrating a genuine interest that a proposed public interest litigant is a member of an affected group.

This suggests that a public interest organization that is a registered charity may be found to have a genuine interest in challenging legislation that affects charities generally.

¹¹⁶ *Ibid.* at para. 39.

¹¹⁷ *Ibid.* at para. 40. The Court noted that Le Dain J., in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that “where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government.”

¹¹⁸ *Ibid.* at para. 43.

¹¹⁹ *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236.

(iii) *Reasonable and effective means of bringing the matter before the court*

This element of the test for public interest standing is important, as it goes to the heart of why courts will permit public interest litigation. Historically, this element of the test was generally framed as a strict requirement. As stated by the Supreme Court of Canada in *Canadian Council of Churches v. R.*:

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.¹²⁰

In *Canadian Council of Churches*, the Supreme Court of Canada considered an application by the Canadian Council of Churches, a corporation representing of the interests of a broad group of member churches, challenging certain aspects of the refugee determination process under the *Immigration Act*. The Council, which did work in the area of protection and resettlement of refugees, alleged that certain provisions in the *Immigration Act* violated the *Charter*.

The Court agreed that there was a serious issue to be tried and that the applicant had a genuine interest. However, it denied standing on the basis that there were other reasonable means by which the constitutional challenge might be brought before the court. Cory J. stated:

The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the Charter. ... MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear, concrete factual background upon which the decision of the court could be based.

...

From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the court. On this ground the applicant council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears.¹²¹

¹²⁰ *Ibid.* at para. 36.

¹²¹ *Ibid* at paras. 40, 42.

In *Downtown Eastside*, the Supreme Court of Canada modified this factor. The Court noted that while this element of the test has often been expressed as a strict requirement, courts have not always applied it rigidly in practice.¹²² Cromwell J. stated:

It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court’s decisions in this area.¹²³

Cromwell J. stated that this factor must be applied purposively and not mechanically as a technical requirement, and that the courts must take a flexible approach when applying the “reasonable and effective means” factor. Cromwell J. provided several examples of the kinds of interrelated factors that should be considered when assessing this factor:¹²⁴

- the capacity of the plaintiff to bring forward the claim, taking into account the plaintiff’s resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;
- whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action;
- whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination – Cromwell J. stated that courts should take a practical and pragmatic approach, considering the existence of other potential plaintiffs and the practical likelihood of their bringing the matter to court, as well as whether the applicant for public interest standing brings a unique interest or perspective; and
- the potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account.

By reframing of the third element of the test from “no other effective means” to a “reasonable and effective means” of bringing the matter before the court, and by emphasizing the flexible and purposive approach that should be taken, *Downtown Eastside* would seem to increase the ability of public interest organization to gain public interest standing. Decisions on public interest standing since *Downtown Eastside* confirm that the third factor in the test is now more easily met.¹²⁵

¹²² *Downtown Eastside*, *supra* note 109, at para. 44.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at para. 51.

¹²⁵ For example, in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 43, the Supreme Court of Canada confirmed that since *Downtown Eastside*, the presence of other possible claimants does not necessarily preclude public interest standing. See also *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2012 BCCA 422, in which the BC Court of Appeal considered the decision of a lower court judge to deny public interest standing that was made on the basis of the pre-*Downtown Eastside* test, and noted that if the judge had applied the flexible and purposive test called for in *Downtown Eastside*, the judge would have found the test to have been met (para. 37). For an example of a case in which an application for public interest standing has been found to fail the test in *Downtown Eastside*, see *Forest Ethics Advocacy*

To be sure, this element of the test could still raise a difficulty to the extent that the issue raised could be addressed in private litigation and where private litigation does occur frequently. In the context of charity law matters, a court might deny standing to bring a public interest challenge to the constitutionality of a particular legislative provision on the basis that a similar challenge could be brought by a charity faced with sanctions under the particular provision. In arguing in favour of standing, it would be relevant how frequently the issue in question is before the courts in private litigation and hence whether there is a reasonable possibility of the issue being challenged through private litigation. The unique perspective or experience of the organization seeking standing should also be emphasized.

(b) Public interest litigation in non-constitutional context

Public interest litigation has most often been used in the context of constitutional challenges to the validity of existing laws, either under the *Charter* or on the basis of the division of powers in the *Constitution Act*. Not all of the issues that a public interest organization may wish to put before a court, however, will be constitutional in nature. In many cases, the organization will seek only to clarify the interpretation of a statute or the common law on an issue that relates to charities.

Shortly following the Supreme Court of Canada's decision in *Borowski*, the Supreme Court of Canada held that public interest litigation may be used to challenge the administrative actions of government where they exceed their statutory authority. In *Finlay v. Canada (Minister of Finance)*,¹²⁶ the Supreme Court of Canada held that a resident of Manitoba could bring a public interest action against the federal Minister of Finance seeking a declaratory judgment that certain payments by the Government of Canada to the province under the Canada Assistance Plan were not made in accordance with the relevant statutory authority.

The Court stated as follows, applying the criteria from *Borowski* to the question of whether a public interest litigant could bring an action challenging whether a government agency had acted within its governmental authority:

The issue, then, as I see it, is whether the principle reflected in *Thorson, MacNeil* and *Borowski* should be extended by this Court to such cases. This question raises again the policy considerations and underlying judicial attitudes to public interest standing, and in particular, whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this Court in *Thorson, MacNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority. In my view an affirmative answer should be given to this question.

The Court therefore upheld the claimant's public interest standing and permitted his action to go forward. The *Finlay* case has been cited for the proposition that courts may permit public interest standing in non-constitutional cases that allege a violation of statutory authority for administrative action.

Association v. National Energy Board, 2014 FCA 245 at paras. 29-36. The court held that the applicant lacked a direct interest in the outcome of the proceedings and was a "classic 'busybody'" (para. 33).

¹²⁶ *Supra* note 117.

Courts have emphasized, however, that public interest standing will not be available for actions seeking declarations in isolation as to the interpretation of a statute. This has been upheld more than once in the context of taxing statutes. In *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*,¹²⁷ the petitioner, a tobacco products manufacturer, sought a declaration with respect to the interpretation of the definition of “cigarette” under the *Excise Tax Act*, which was relevant to determining the amount of excise duty payable on the sale and importation of cigarettes. It disagreed with the interpretation adopted by CRA in respect of this definition. The Court denied standing to the applicant, stating as follows:

The decisions of the Supreme Court of Canada in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, and *MacNeil v. Nova Scotia (Board of Censors)* (1975), 5 N.R. 43, were urged upon us as indicating a relaxation of the requirement of *locus standi*. A careful reading of these decisions shows, in my respectful opinion, that the principal consideration governing them is the importance in a federal state of opportunity to challenge the constitutional validity of statutes. No such consideration is applicable here. It was suggested that there is a comparable consideration of public policy in broad access to challenge the validity of administrative action, and this view finds some support in the recognition of a judicial discretion to permit a stranger to bring certiorari or prohibition in certain cases. The present case is not one that raises any question of the limits of statutory authority. The most that is raised is a question of administrative interpretation that the authorities are obliged to make in their application of the governing statute.
[Emphasis added]

This position has been upheld in the specific context of the charity provisions in the *Income Tax Act*. In one case,¹²⁸ a charity facing revocation sought a judicial declaration with respect to the treatment of certain costs and expenses that it would face in responding to a Notice of Intent to Revoke. The Court noted that the charity was requesting that the court provide the equivalent of an advance income tax ruling. The Court affirmed earlier case law holding that one cannot bring an action in isolation seeking a declaration on a mere interpretation of the Act.¹²⁹

Courts have, however, permitted public interest litigants to bring actions, including for declarations as to the interpretation of an Act, in certain non-constitutional circumstances where the interpretation of the Act is relevant in determining whether the government agency acted beyond its authority. In one such case, *Harris v. R.*,¹³⁰ the Federal Court of Appeal considered an application by a taxpayer alleging that CRA had breached its fiduciary duties in the administration of the statute. Essentially, the plaintiff argued that CRA had acted out of an ulterior motive by providing favouritism to a particular taxpayer – a family trust – when CRA issued an advance income tax ruling that was favourable to that trust. The CRA had previously published a ruling taking a contrary (less favourable) interpretation of the Act, but had provided the trust with a copy of another ruling, not made public, that took a favourable view of the relevant provisions.

¹²⁷ [1976] 2 F.C. 500 (F.C.A.).

¹²⁸ *Universal Aide Society v. Minister of National Revenue*, 2009 FCA 107.

¹²⁹ *Ibid.* at para. 22.

¹³⁰ *Harris v. R.*, [2000] 4 F.C. 37 (F.C.A.).

The plaintiff sought a declaration as to the correct interpretation of the relevant provisions in the Act¹³¹ as well as a declaration that CRA had breached its fiduciary duty by showing favouritism to particular taxpayers. The petitioner sought to obtain a declaration that CRA was obliged to use its powers to collect any taxes owing from those who had benefitted from the previous rulings.

The Court held that the plaintiff had raised a justiciable issue in claiming that the Minister of National Revenue acted illegally or improperly or for ulterior motives, namely favouritism and preferential treatment by way of a covert deal when he interpreted the provisions of the Act in favour of a specific trust. This raised a question of a potential violation of the Act that a Court may assess by reference to the Minister's duty to follow the Act "absolutely." The court also held that there was a serious issue to be tried.

The court was also satisfied that the plaintiff had a genuine interest in the issue. The plaintiff was a member of a group called "CHOICES" – A Coalition for Social Justice". According to the Statement of Claim in the case, the Coalition carried out "research, advocacy and social action on a wide variety of public policy issues at all levels of government." The Statement of Claim stated that a fundamental concern of the group had been the fair distribution of taxation burden and the proper enforcement of taxing statutes.

The Court also acknowledged that there was no other means of bringing the matter before the court, as those who were directly affected by CRA's actions had *benefited* and would therefore not bring a challenge to this action. The Court noted that the Coalition had requested that the Attorney General initiate action or a Court referral, without receiving a response.

Accordingly, the Court affirmed the granting of public interest standing. Significantly, though, the Federal Court of Appeal stated as follows:

I wish to emphasize the narrow cause of action for which public interest standing has been granted. Mr. Harris does not merely seek to obtain the interpretation of a particular provision of the Act, akin to requesting a court to provide a legal opinion. A mere *bona fide* change of position on interpretation of a statute, without more, would be insufficient to constitute a cause of action and would have been insufficient to persuade this Court to exercise its discretion to recognize public interest standing. Nevertheless, in considering Mr. Harris' cause of action for which public interest standing has been granted, the trial judge may incidentally find it necessary to consider whether, on a proper construction of the Act, "taxable Canadian property" may be held by a resident of Canada.¹³²

Thus, the Court was careful to make clear that it would not have permitted the action to go forward were it limited to a request for a declaration as to the interpretation of a particular provision in the Act. However, because the determination of the question of maladministration of the Act turned in part on the interpretation of the relevant provisions, the court might find it necessary to consider the substantive issues of interpretation at issue in the case. The court noted

¹³¹ The substantive issue related to the definition of "taxable Canadian property" under the *ITA*, and whether such property could be held by a resident of Canada. The determination of this issue had implications where ownership of such property was transferred from Canada to the U.S. CRA had issued rulings to the effect that certain property held by family trusts in Canada constituted "taxable Canadian property" and that such a transfer of ownership of this property from Canada to the US would not attract Canadian tax.

¹³² *Harris*, *supra* note 130, at para. 66.

several other decisions granting public interest standing to challenge administrative action of a government agency.¹³³

(c) Application to public interest organizations

Public interest organizations that are registered as charities may succeed in gaining public interest standing to seek a declaratory judgment that either a statutory provision or administrative act of government violates either the *Charter* or the separation of powers in the Canadian *Constitution Act*. The requirement to demonstrate that the organization represents a broad constituency is less of an obstacle in the context of public interest litigation as compared with applications for leave to intervene. Where a statutory provision or administrative practice affecting charities generally is alleged to be unconstitutional, public interest organizations that are themselves charities may well be in a position to bring an action as a charity on behalf of the charitable sector seeking to overturn the law.

To the extent that a public interest organization is not directly subject to administrative action on the issue in question, there may be a challenge in establishing that public interest litigation is a reasonable and effective means of bringing the issue before the courts. It might be suggested, for example, in the context of a challenge to CRA's application of its fundraising policy or the application of the rules regarding "ineligible individuals", that a better way to address the constitutionality of these issues is to wait for a charity to be subject to sanctions under these rules and bring the challenge in that context. In these circumstances, it would likely be important for the organization to be able to demonstrate an absence or at least paucity of relevant jurisprudence on the issue, thus establishing that the issue is unlikely to be addressed by a court except through public interest litigation. The recent decision in *Downtown Eastside* should make it easier for public interest organizations to meet this aspect of the test for public interest standing.

The availability of public interest standing would be more limited outside the constitutional context. Courts have made clear that public interest standing will not generally be granted in isolation to challenge an interpretation of a statute by a government authority. In order to challenge the administration of a law on a non-constitutional basis, it would likely be necessary to demonstrate that the governmental agency in question was acting outside its legislative authority. If, for example, CRA administratively shows bias against a particular category of registered charity – environmental charities, for example – this might form the basis of a public interest case challenging this practice. Absent an allegation of maladministration of the relevant law, however, public interest standing may be difficult to obtain.

It is clear that litigants bringing constitutional challenges – both *Charter* challenges and disputes regarding the division of powers – stand the best chance of obtaining standing as public interest litigants. Thus, public interest organizations should likely focus on public interest litigation in the constitutional context. Such organizations may be in a better position to address non-

¹³³ *Ibid.* at para. 64, citing *Greater Victoria Concerned Citizens Assn. v. British Columbia (Provincial Capital Commission)*(1990), 46 Admin. L.R. 74 (B.C.S.C.) (citizens group successfully obtained standing to seek to obtain a declaration that an agreement to lease certain heritage property as a tourist attraction was beyond the Provincial Capital Commission's jurisdiction); *Union of Northern Workers v. Northwest Territories (Minister of Mining Safety)* (1991), 49 Admin. L.R. 280 (N.W.T.S.C.) (union granted public interest standing to seek to compel a government Minister to hold occupational health and safety board meetings); *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (F.C.T.D.) (environmental protection organization promoting granted standing to seek to compel government to subject the sale of nuclear reactors to a full environmental assessment as required under the *Canadian Environmental Assessment Act* (Canada)).

constitutional issues through interventions in pre-existing litigation, rather than by instituting new public interest proceedings.

(d) Procedure and venue

Procedurally, a public interest organization seeking an order that a particular statute or administrative action is unconstitutional, or a decision as to a point of statutory interpretation, would typically file an application for declaratory relief. It is important to note, particularly when dealing with federal statutes like the *Income Tax Act*, that declaratory relief may be available from both the federal court and in provincial superior courts.

Provincial superior courts have a general jurisdiction to issue declaratory relief. The power to issue declarations of legal rights, whether or not consequential relief is claimed, is conferred on the superior courts by their enabling statutes¹³⁴ and/or is set out in regulatory rules of court.¹³⁵ The superior courts also have inherent jurisdiction and are generally given the powers exercised by the courts of common law and equity in England, which includes the power to issue declaratory judgments.¹³⁶ Provincial rules of civil procedure generally permit plaintiffs seeking declaratory relief to apply for such relief by application.

The power of the provincial superior courts to issue declaratory relief is broader than that of the Federal Court. The Federal Court is not a superior court with inherent jurisdiction and is limited to the powers and jurisdiction conferred under the *Federal Courts Act*.¹³⁷ Paragraph 18(1)(a) of the *Federal Courts Act* provides that the Federal Court has exclusive original jurisdiction “to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal”.¹³⁸ To the extent that a public interest organization seeks a declaration against a federal agency like CRA, the federal court is an appropriate venue to seek relief.¹³⁹ Federal courts have the power to issue declarations of the constitutional invalidity of federal statutes.¹⁴⁰

Provincial superior courts also have jurisdiction to issue declarations with respect to the constitutionality of the *Income Tax Act* or other federal statutes, including through public interest litigation. Several of the foundational cases on public interest standing originated as applications in provincial superior courts for declarations of the constitutional invalidity of provisions in federal

¹³⁴ *Judicature Act*, R.S.A. 2000, c. J-2, s. 11; *Queen’s Bench Act*, R.S.S. 1978, c. Q-1, s. 17; *The Court of Queen’s Bench Act*, C.C.S.M. c. C280, s. 34; *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 97; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 22(1); *Judicature Act*, R.S.P.E.I. 1988, c. J.2.1, s. 40.

¹³⁵ In British Columbia, Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 2-1(2)(c); in Manitoba, Court of Queen’s Bench Rules, Manitoba Reg. 553/88, Rule 14.05(2)(c)(iv); in Ontario, Rules of Civil Procedure, Rule 14.05(3)(d); in New Brunswick, Rules of Court, NB Reg. 82-73, Rule 16.04(e); in PEI, Rules of Civil Procedure, Rule 14.05(3)(d); in Northwest Territories, Rules of the Supreme Court of the Northwest Territories, NWT Reg. R-010-96, Rule 22(d).

¹³⁶ *E.g.*, *Courts of Justice Act (Ontario)*, *supra* note 134, s. 11(2).

¹³⁷ R.S.C. 1985, c. F-7.

¹³⁸ This power is made subject to s. 28 of the *Federal Courts Act*, which confers exclusive original jurisdiction for some matters on the Federal Court of Appeal.

¹³⁹ See for example, *Harris v. R.* [2000] 4 F.C. 37 (C.A.).

¹⁴⁰ *E.g.*, *Canadian Council of Churches*, *supra* note 119, began as an action in the Federal Court seeking a declaration that certain amendments to the federal *Immigration Act* were constitutionally invalid.

statutes.¹⁴¹ Subsequent cases have confirmed this jurisdiction, including in the context of declarations regarding the *Income Tax Act*.¹⁴² Courts have also held that the jurisdiction of provincial superior courts to issue a declaration as to the constitutionality of a federal statute exists notwithstanding that the *Federal Courts Act* may confer jurisdiction on the federal court to hear the matter.¹⁴³

Provincial superior courts also have the jurisdiction to issue declarations as to the interpretation of a statute, subject to the issues of standing discussed above which determine whether a public interest litigant can seek judicial interpretation of a statute in the absence of a private right that depends on this interpretation. The rules of procedure in several provinces and one territory include provisions that explicitly provide that litigants may file an application seeking the determination of rights that depend on the interpretation of a statute.¹⁴⁴ In Ontario, Rule 14.05(3) of the Rules of Civil Procedure provides as follows:

14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

...

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

...

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

¹⁴¹ *Thorson*, *supra* note 98, began as an application in the Ontario High Court of Justice; *Borowski*, *supra*, began as an application for a declaration from the Saskatchewan Court of Queen's Bench.

¹⁴² In *O.P.S.E.U. v. National Citizens Coalition Inc.*, (1990), 74 O.R. (2d) 260 (C.A.), the Ontario Court of Appeal considered a motion to strike out an action by a trade union seeking a declaration that the *Income Tax Act* violated sections 15(1), 2(b), 2(c) and 2(d) of the *Charter* to the extent that it gave favourable tax treatment to businesses that made donations to certain non-profit organizations that was not available to employee donors to a trade union. The court struck out the action as having no chance of success on the merits, but noted that the appellants clearly had standing to challenge the constitutionality of the *Income Tax Act* in the provincial court (para. 20). Also, in *In Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, the Supreme Court of Canada upheld the jurisdiction of a provincial superior court to issue a declaration as to the constitutional validity of a provision of the *Income Tax Act*.

¹⁴³ In *Tzeachten First Nation v. Canada (Attorney General)*, 2007 BCCA 133, the BC Court of Appeal stated, at para. 40:

In my opinion, the principle that emerges from *Jabour*, *L'Anglais* and *Lavers* is that whenever the validity of a federal statute is challenged either as *ultra vires* the power of Parliament (*Jabour*) or as inconsistent with the provisions of the *Charter of Rights and Freedoms*, (*Lavers*) or whenever the applicability of a federal statute is challenged as trenching on provincial jurisdiction (*L'Anglais*), a provincial superior court always has jurisdiction to hear and decide the case. The reason is that if the Court did not have jurisdiction, the provincial superior court might be required to apply and enforce a federal statute that was invalid as beyond the powers of Parliament to enact, or invalid in a particular application as beyond Parliament's legislative competence. Such a result would be inconsistent with Canada's constitutional structure and the role of provincial superior courts within that structure.

¹⁴⁴ See footnote 135, above.

Thus, to the extent that a charity-related issue depends, or can be characterized as depending on, the determination of rights that depend on the interpretation of a statute, rule 14.05(3) would permit the filing of an application to determine this question.¹⁴⁵ This would include the interpretation of a federal statute, such as the *Income Tax Act*.¹⁴⁶

There appears to be at least one case in Ontario which a charity has brought an application for declaratory judgment on the interpretation of the *Income Tax Act*. In 2000, in response to what was then a recent shift in CRA's administrative position that Canadian charitable foundations were limited to disbursing funds to qualified donees, The Wolfe and Millie Goodman Foundation brought an application in the Ontario Superior Court of Justice for a declaration confirming that Canadian foundations could make grants to foreign charities and thereby satisfy the requirement to use all resources for a charitable purpose.¹⁴⁷ The case was ultimately settled, and Minutes of Settlement were entered into on August 17, 2000, in which CRA acknowledged that the Foundation would be permitted to disburse not more than 10% of its resources on grants to foreign charities that were not qualified donees.¹⁴⁸ The substantive resolution in the settlement has, of course, since been superseded by statutory developments prohibiting all grants to non-qualified donees by registered charities (which the settlement expressly contemplated would occur), but the case does provide an example of an application for declaratory relief in a provincial superior court of justice on a matter of charity law interpretation under the *Income Tax Act*.

Courts in Ontario have recently permitted public interest litigation brought under Rule 14.05(3)(d) seeking a declaration as to the interpretation of a statute.¹⁴⁹ In another case from 1974, *Vladicka v. Calgary School District No. 19*,¹⁵⁰ a property taxpayer brought an application before the Alberta Supreme Court seeking a declaration as to whether a local school board was entitled to set the level of honoraria received by the school board trustees. The application was brought under the equivalent to the Ontario rule 14.05(3)(d) in the then-current Alberta Rules of Court 1968.¹⁵¹ The Court noted the then-recent jurisprudence of the Supreme Court of Canada in *Thorson* and granted standing to the plaintiff despite the plaintiff not having brought the suit as a relator action (discussed below).

Thus, public interest organizations seeking to bring public interest litigation seeking declaration as to a matter of charity law under a federal statute should remember that the jurisdiction to hear such a case is not limited to the federal court but also includes the provincial superior courts.

¹⁴⁵ Rule 14.05 has been used, for example, to seek declaratory relief with respect to whether an applicant falls within a particular statutory definition for the purposes of provincial taxation legislation: *Proctor & Gamble Inc. v. Ontario (Minister of Finance)*, 2010 ONCA 149. In this case, the applicant, Proctor & Gamble, sought a declaration under Rule 14.05(3)(d) that it did not fall within the definition of "purchaser" under the *Retail Sales Act* (Ontario).

¹⁴⁶ The definition of "statute" in the Ontario Rules of Civil Procedure "includes a statute passed by the Parliament of Canada": Rule 1.03(1) "statute".

¹⁴⁷ As cited in Robert Hayhoe, "A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities" 49 *Canadian Tax Journal* 320 at 331-332.

¹⁴⁸ Minutes of Settlement filed on August 17, 2000 in *The Wolfe and Millie Goodman Foundation v. The Queen*, Ontario Superior Court of Justice, Court file no. 08-06199, cited in Hayhoe, *supra* note 147.

¹⁴⁹ *Schaeffer v. Wood*, 2011 ONCA 716.

¹⁵⁰ (1974), 45 D.L.R. (3d) 442 (Alta. S.C.).

¹⁵¹ Alberta Rules of Court, Alta. Reg. 390/1968, Rule 410.

5. References to Tax Court of Canada

The *Income Tax Act* provides for a further means by which certain charity law issues may be addressed in the Tax Court of Canada.

(a) Reference under section 173

Subsection 173(1) of the *Income Tax Act* provides:

Where the Minister and a taxpayer agree in writing that a question of law, fact, or mixed law and fact arising under this Act, in respect of any assessment, proposed assessment, determination or proposed determination, should be determined by the Tax Court of Canada, that question shall be determined by the Tax Court of Canada.

This section permits the filing of reference questions before the Tax Court of Canada, provided that both Minister of National Revenue and the taxpayer agree. These questions can be a question of law, fact, or mixed fact and law. The question must relate to an assessment, proposed assessment, determination, or proposed determination under the *ITA*.

This latter limitation is significant for the purposes of determining the extent to which charity law issues can be brought before the Tax Court of Canada by way of section 173 references. Section 173 provides that the reference question must be “in respect of” an “assessment, proposed assessment, determination, or proposed determination.” Thus, the section does not provide unlimited ability to refer questions to the Tax Court of Canada.

It appears that this section is used relatively infrequently.¹⁵² It has been used to refer to the Tax Court of Canada various questions, all arising in the context of an assessment or proposed assessment of a taxpayer. Questions referred to the Tax Court have related, for example, to the application of limitation periods in respect of assessment,¹⁵³ characterization of payments,¹⁵⁴ and the entitlement to deductions under the Act.¹⁵⁵

It should be noted that, while section 173 does not require an actual assessment to have been issued, the section does appear to contemplate that the reference question will be brought by the Minister and the taxpayer facing the assessment or determination. There do not appear to be any cases in which a taxpayer has brought a reference question in respect of general or hypothetical question of interpretation under the Act not related to a specific assessment. Thus, in order to participate in a reference question under section 173, it would seem necessary to be either directly implicated by the proposed assessment or determination (or work on behalf an organization that is so implicated) or intervene in the context of a reference question.

To the extent that a charity law matter is raised in the context of an assessment or proposed assessment, section 173 would provide a means of bring related questions of law before the Tax

¹⁵² Colin Campbell, *Administration of Income Tax 2012* (Toronto: Thomson Reuters, 2012) at section 14.1.1. Mr. Campbell suggests that CRA did not intend for the 173 procedure to be widely used.

¹⁵³ *E.g.*, 236130 *British Columbia Ltd. v. Her Majesty the Queen*, 2005 TCC 770.

¹⁵⁴ *E.g.*, *Syspro Software Ltd. v. R.*, 2003 TCC 498.

¹⁵⁵ *Imperial Oil Ltd. v. R.*, 2004 FCA 361, on appeal from a reference question to the TCC under section 173.

Court of Canada. It is clear therefore that reference questions in respect of the following matters could be advanced via section 173:

- Questions arising on the assessment or reassessment of donors in respect of charitable donations claimed and whether the donor is entitled to a credit or deduction. This could include a consideration of the following issues:
 - the meaning of “gift”;
 - the application of various anti-avoidance rules relating to charitable donations and the issuing of donation receipts.
- Questions arising from the application of intermediate sanctions under Part V, which are assessed under subsection 189(7) to the extent that they include monetary penalties.
- Questions arising from application of Part V revocation tax, which are also assessed under subsection 189(7). Under section 188 of the Act, a charity that has been de-registered is liable to pay a tax equivalent to the value of its assets as of the date the charity received a notice of intent to revoke its registration. The tax is due on the date that is one year from the date the charity received the notice of intent.

Thus, a reference question can be addressed to the Tax Court to address essentially any of the “donor side” issues that arise in the context of charitable giving, given that they typically arise in the context of an assessment or reassessment of a donor in respect of a donation credit or deduction claimed.

More difficult, however, would be the “charity side” issues – *i.e.*, the issues related to maintaining charitable registration, including interpretation of the four heads of charity, the rules regarding business activities or political activities, etc. Since these issues are typically reviewed in the context of a judicial review of the decision of the Minister to deny or revoke registration, and do not involve an assessment, there is some question as to how a reference question under section 173 could be brought in respect of these issues.

One possibility is that decisions by the Minister to deny or revoke charitable registration might constitute “determinations” in respect of which reference questions can be brought. This does not appear to be supported by the Act, however. The word “determination” is not defined in the Act and does not appear in any of the provisions related to the revocation of charitable registration. The term is used in certain specific provisions in the Act related to the determination by the Minister of specific deductions and losses,¹⁵⁶ or in the context of the application of the general anti-avoidance rule.¹⁵⁷ However, none of these provisions appear relevant to charity law issues or, in particular, to the revocation of a charity’s charitable registration. As such, it is unclear that a decision to revoke charitable registration constitutes a “determination” that would bring it within the ambit of section 173.

It is possible that matters addressed in the context of Part V assessments, including both intermediate sanctions and the revocation tax, might allow for reference questions addressing a fair range of charity compliance issues. The intermediate sanctions in the Act provide for monetary penalties in respect of the following compliance issues:

¹⁵⁶ *ITA*, ss. 152(1.01) – (1.7), (3.2) – (3.3).

¹⁵⁷ *ITA*, ss. 152(1.11).

- carrying on unrelated business activities;¹⁵⁸
- acquiring control of a corporation by a charitable foundation;¹⁵⁹
- penalties under the excess corporate holdings regime;¹⁶⁰
- conferring an undue benefit;¹⁶¹
- failure to file annual returns;¹⁶²
- issuing of false or incorrect receipts;¹⁶³
- transactions to delay expenditures on charitable activities;¹⁶⁴ and
- failure to expend amounts gifted to non-arm's length charities.¹⁶⁵

Presumably, a reference question in respect of an assessment of any of these penalties could address the substantive underlying issue – for example, the meaning of “related business” or the interpretation of the provisions of the excess corporate holdings regime. In the context of a proposed assessment under any of these provisions, a reference question could be brought in respect of any of the above issues.

In the context of the assessment of the revocation tax, arguably an even wider set of questions could be referred to the Tax Court of Canada. To the extent that the substantive basis for revocation is open to challenge, this could potentially be addressed in a reference question.

It appears doubtful, however, that a reference question in respect of an assessment for the revocation tax would be permitted to address the substantive basis for revocation. Subsection 189(9) confirms that the objection and appeal process in respect of a decision to revoke charitable registration is distinct from an appeal from the *assessment* of the revocation tax and cannot be appealed to the Tax Court of Canada. This suggests that a reference question in respect of an assessment of the revocation tax would be limited to interpreting the technical provisions related to the timing and calculation of the revocation tax and would not review the substantive basis for revocation.

There is no case law on the scope of section 173 to deal with charitable issues, as no reference questions have been brought in respect of these issues. It is worth noting that the phrase “in respect of” has been interpreted very broadly under the Act.¹⁶⁶ It might therefore be argued that the substantive basis for revocation is “in respect of” the assessment of the tax. However,

¹⁵⁸ *ITA*, ss. 188.1(1) and (2).

¹⁵⁹ *ITA*, ss. 188.1(3).

¹⁶⁰ *ITA*, ss. 188.1(3.1) – (3.5).

¹⁶¹ *ITA*, ss. 188.1(4) and (5).

¹⁶² *ITA*, ss. 188.1(6).

¹⁶³ *ITA*, ss. 188.1(7) – (9).

¹⁶⁴ *ITA*, ss. 188.1(11).

¹⁶⁵ *ITA*, ss. 188.1(12).

¹⁶⁶ See *Norwegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39 (para. 30): “The phrase ‘in respect of’ is probably the widest of any expression intended to convey some connection between two related subject matters.”

subsection 189(9) suggests that a court may not accept this argument. It would be necessary to test this proposition in court to obtain a definitive answer.

(b) Reference under section 174

The Act provides in section 174 for the reference of common questions of fact or law to the Tax Court of Canada. Subsection 174(1) provides as follows:

Where the Minister is of the opinion that a question of law or fact or mixed fact and law arising out of one and the same transaction or occurrence or a series of transactions or occurrences is common to assessments or proposed assessments in respect of two or more taxpayers, the Minister may apply to the Tax Court of Canada for a determination of that question.

This provision functions similarly to section 173, subject to a few significant differences. References under section 174 can only be initiated by the Minister. There must also be a transaction or occurrence (or a series thereof) that gives rise to a common question that relates to assessments or proposed assessments of two or more taxpayers. Significantly, like section 173, section 174 provides that the reference question must be common to an assessment or proposed assessment.

Section 174(2) provides that, in order to initiate a section 174 reference question, the Minister must file an application setting out:

- the question in respect of which the Minister requests a determination;
- the names of the taxpayers that the Minister seeks to have bound by the determination; and
- the facts and reasons on which the Minister relies and on which the Minister based or intends to base assessments of tax payable by each of the taxpayers named in the application.

The Minister must also serve a copy of the application on each taxpayer named in the application, and on any other persons who, in the opinion of the Tax Court of Canada, are likely to be affected by the determination in question.

This provision has been used more frequently than section 173. Like section 173, however, it does not appear to have been used to bring reference questions that relate to charity law issues.

Because section 174 imposes a requirement that any reference questions must relate to an assessment or proposed assessment, the analysis above in the context of section 173 would seem to apply under section 174 to limit the charity law issues that can be addressed under this section. While it would certainly be possible to address a range of issues in the context of donor assessments, as well as in the context of assessment of charities against which intermediate sanctions have been imposed, it would be necessary to relate the question to an assessment of tax. This would limit the use of reference questions under section 174 to address questions related generally to revocation of registration.

(c) Application to public interest organizations

It is clear that a range of charity law issues arise in the context of assessments under the *Income Tax Act*. To the extent that the Minister is willing to submit reference questions to the Tax Court of Canada that relate to these matters, it will provide another avenue by which charity law issues

can be put before the courts. The organization's participation would presumably need to be arranged with the party in respect of whom the assessment is proposed, or it would be necessary to seek leave to intervene in the reference question.

6. Relator Actions

Common law jurisdictions have recognized the ability of private citizens to bring "relator actions" on behalf of the Attorney General in respect of a matter of public interest. A relator action is an action in which the Attorney General agrees to allow a private citizen to bring litigation seeking injunctive or declaratory relief in the name of the Attorney General on a matter of public interest. In this way, a citizen can gain standing where that citizen would otherwise lack standing due the absence of personal legal rights being implicated.

This form of action derives from the Attorney General's standing to institute litigation seeking injunctive or declaratory relief to protect the public interest. The Attorney General can conduct such proceedings directly or can authorize proceedings to be carried on by another person on behalf of the Attorney General. As such, individuals who believe that a law is being broken that impacts the public good but who do not have direct personal rights at stake can petition the Attorney General to allow them to institute proceedings under the Attorney General's name.

Relator actions appear to have been brought relatively infrequently in Canada. They have been brought on occasion seeking injunctive relief to compel compliance with applicable legislation. Relator actions have been brought:

- in relation to citizens seeking to compel the mayor and council of the City of Regina to put to a citizen vote a proposed by-law for the expenditure of funds for a new City Hall, as required by the *Urban Municipality Act* (Sask);¹⁶⁷
- in relation to the Corporation of Land Surveyors of the Province (BC), the professional body charged with licensing and regulating land surveyors in BC, seeking an interlocutory injunction preventing a company from holding itself out as a BC Land Surveyor;¹⁶⁸
- in relation to various municipalities that owned an airport seeking an injunction to compel the dismantling of a tower that had been built by local homeowners to interfere with the airport operations;¹⁶⁹
- in relation to local residents seeking an injunction to restrain the activities of an airport as a public nuisance;¹⁷⁰ and
- in relation to a private citizen seeking an injunction to prevent several municipalities from submitting certain referendum questions to the electorate.¹⁷¹

¹⁶⁷ *Cholod et al. v. Baker et al.*, [1976] 2 S.C.R. 484.

¹⁶⁸ *British Columbia (Attorney General) v. Infomap Services Inc.*, 1987 CarswellBC 1295 (BCSC).

¹⁶⁹ *Manitoba (Attorney General) v. Campbell* (1983), 24 Man. R. (2d) 70 (Man. Q.B.).

¹⁷⁰ *Manitoba (Attorney General) v. Adventure Flight Centres Ltd.* (1983), 22 Man. R. (2d) 142 (Man. Q.B.).

¹⁷¹ *Ontario (Attorney General) v. Penetanguishene (Town)*, 30 O.R. (2d) 748 (H.C.J.).

Prior to the development of public interest standing, relator actions were the only means by which a person could bring litigation in the public interest. Private plaintiffs were historically denied standing to bring public interest litigation to address a public wrong unless they could show that some private right had been interfered with, or that the plaintiff had suffered some special damage peculiar to himself or herself.¹⁷² In the absence of these factors, an action to address a public wrong could only be brought by the Attorney General or through a relator action.¹⁷³ The Attorney General has full discretion whether to allow a private citizen to use his or her name, and the decision of the Attorney General is not reviewable. Thus, if the Attorney General did not consent, this could prevent the plaintiff from having any basis for bringing litigation in the public interest.¹⁷⁴

As discussed above, however, more recent jurisprudence in Canada has recognized the right of citizens to bring public interest litigation in the absence of consent from the Attorney General seeking declarations as to the constitutionality of statutes or, in some cases, injunctive relief against government actors failing to act within their jurisdiction.

In *Thorson v. Attorney General of Canada*,¹⁷⁵ for example, which was discussed above in the context of public interest standing, Laskin J. noted that the applicant for standing had previously sought unsuccessfully to have the Attorney General Institute proceedings to test the constitutional validity of the *Official Languages Act*. Laskin J. commented that some U.K. case law suggested that a request to the Attorney General to institute proceedings or agree to a relator action is a condition of a private person's right to initiate public interest proceedings on his own.¹⁷⁶ However, Laskin J. distinguished the Canadian system, in which the Attorney General is tasked with enforcing legislation enacted by Parliament, and the unitary system in Great Britain where there is no unconstitutional legislation and the Attorney General is the guardian of the public interest. As such, he stated that seeking the involvement of the Attorney General was not a prerequisite to bringing a public interest action challenging the validity of a statute.

In this way, the law of public interest standing has developed as a supplement to the Attorney General's jurisdiction to initiate litigation in the public interest. The foundational cases noted the prior limitations on public interest standing but developed the test discussed above as a stand-alone basis upon which a member of the public can bring litigation in the public interest.

Applying this to a public interest organization seeking to address matters of charity law, relator actions may be of limited use in Canada. Where an organization seeks a declaration as to the constitutionality of a charity law statute or wishes to challenge public administrative action, it would be possible to seek the attorney general's consent to bring a relator action prior to seeking to commence an action on its own. While the case law suggests that consent to such action may be difficult to obtain, such a request may still be helpful in supporting a subsequent application for public interest standing. As noted, courts considering applications for public interest standing often note that the plaintiff may have sought to have the attorney general commence an action

¹⁷² *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 at 114.

¹⁷³ E.g., *Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.).

¹⁷⁴ This occurred, for example, in *Gouriet*, *ibid*.

¹⁷⁵ *Supra*, note 98.

¹⁷⁶ *Ibid*, at 146, citing *Attorney General v. Independent Broadcasting Authority, ex parte McWhirter*, [1973] 1 All E.R.689.

or permit the plaintiff to bring a relator action. Courts have viewed this favourably when considering whether to grant standing to bring public interest litigation.

7. Conclusion

This paper has attempted to canvass the ways in which a public interest organization can involve itself in litigation related to charity law issues so as to contribute to the courts' and the public's understanding of the law. Between the approaches discussed above, there are relatively few instances of litigation addressing charity law issues in which a public interest organization cannot potentially involve itself. Particularly if the public interest organization can work along with sectoral organizations representing a broad constituency of charities, it will likely be possible to intervene in most matters with broad implications for the sector. This, it may be hoped, will help bring greater clarity to the law and support the development of a larger and more coherent body of charity law jurisprudence in Canada.



The Pemsel Case

FOUNDATION

Suite 1150, 10060 Jasper Avenue,
Edmonton, Alberta, T5J 3R8

www.pemselfoundation.org