

Occasional Paper

The Canadian *Income Tax Act* and the Concepts of Charitable Purposes and Activities

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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.



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The Canadian *Income Tax Act* and the Concepts of Charitable Purposes and Activities

1. Introduction

In the dying months of the last federal government, much was being reported in the media about Canadian charities audited by the Canada Revenue Agency, because of their perceived involvement in political activities. Some held these audits as an example of intolerance and persecution of opponents by the government of the day. Others claimed that the Agency was simply acting fairly and enforcing the rules. But underlying the entire debate was an abiding concern within the charitable sector that the current rules found in the *Income Tax Act* restricting charities' political activities were outdated, intimidating, open to arbitrary application, and difficult to understand.¹

Other concerns, though less prevalent in the mainstream media, were being expressed in the charitable sector about the Agency requiring that a registered charity maintain quasi-absolute "direction and control" over its resources, in order to comply with the Act's apparent requirement that a charity devote all its resources "... to charitable activities carried on by the organization itself."² A 2015 article in *The Philanthropist*, stated "There is a widening gap between what CRA requires and what charities need to operate effectively and appropriately. (...) This goes beyond safeguarding public money. It is a philosophy that many Canadian charities operating internationally view as undesirable, impractical, and unrealistic."³

Similar concerns centered on the kinds of business and investment activities in which charities can be involved, or around the onerous annual bookkeeping and reporting requirements imposed by the Agency.

¹ See Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*, Final Report, February 1999, at pp. 71, 91; Adam Aptowitzer, *Bringing the Provinces Back In – Creating a Federated Canadian Charities Council*, C.D. Howe Institute Commentary, November 2009, at pp. 5-6; Voluntary Sector Initiative, *Regulation of Advocacy in the Voluntary Sector – Current Challenges and Some Responses*, Voluntary Sector Initiative Secretariat, 2002, 40 pp., in particular at p. 34; Ottawa Citizen, *Op-Ed: Charities have a place in the public conversation*, March 26, 2015.

² See in particular, *Canadian Committee for the Tel Aviv Foundation v. Her Majesty the Queen*, 2002 F.C.A. 72; *Bayit Lepletot v. M.N.R.*, 2006 F.C.A. 128; *Public Television Association of Quebec v. Canada (National Revenue)*, 2015 F.C.A. 170. In all cases, the court merely accepted the "direction and control" issue at face value without analyzing the potential complexity of the Agency's policy. The policy was originally intended to create a suitable audit trail in the context of a legitimate agency agreement, in order to prevent Canadian charities from merely acting as conduits for foreign organizations, but it became more stringent in the wake of the 2001 World Trade Center terrorist attack and the 2006 Inquiry into the Air India bombing, out of concern that funds might be eventually find their way into questionable uses.

³ Until recently, the restriction on charities to act directly or to give funds only to "qualified donees" was merely an inference on which Agency policy was based. See paragraph 19, *Canadian Magen David Adom v. Canada (Minister of National Revenue)*, 2002 F.C.A. 323. Now, with recent amendments to the Act, it is the only way in which charities can operate. Malcolm Burrows, "New Series: Canadian Charities Working Internationally", in *The Philanthropist*, March 22, 2015. See in the same series, John Lorinc, "The Problems with Direction and Control", in *The Philanthropist*, April 6, 2015; and Juniper Glass, "Do Canada's internationally focused charities operate in an enabling environment?" in *The Philanthropist*, April 20, 2015.

It would be tempting to suggest that government policy-making and monitoring practices in the above areas could be appealed to the courts. In the case of registered charities, the *Income Tax Act* provides that appeals on registration matters go to the Federal Court of Appeal.⁴ However this too poses a significant obstacle to charities that would wish to challenge the Agency. In three relatively recent cases, *Human Life International in Canada v. M.N.R.*,⁵ *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*,⁶ and *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*,⁷ the courts recognized their responsibility for making the common-law definition of charity evolve to meet contemporary social needs and values. But almost in the same breath, they refused to intervene because ruling on such matters would encroach on the will of Parliament as expressed in the *Income Tax Act*.⁸ In effect, and because the charitable sector in Canada is substantially defined by access to income-tax privileges, the result of the Act's statutory intrusion into the common law of charity is to entrench the current state of the sector and its capacity to address social problems in a kind of desiccating conservatism. Add to this the prohibitive costs of any appeal – particularly by incipient charities – as well as the Agency's capacity to select which cases go to court, the fact that the onus of proof on appeal rests with the charity, the Agency's practice of raising as many incriminatory issues as possible in appeal cases, and the courts' understandable tendency to prefer ruling on matters within settled law rather than venturing into uncharted legal waters, and it is not surprising that, under the current system, requests by charities to the courts for judicial guidance are doomed to failure.

The contention of this paper is that the real source of all these problems lies with a set of provisions in the *Income Tax Act* and in particular, with the undue emphasis on activities found in the definition of a "charitable organization" in subsection 149.1(1) of the Act. The paper's objective is to highlight the current irregularities in legislation and policies relating to this provision, the relationship – or lack of it – between this provision and the common law, and the benefits of a focused legislative reform.

The further contention of this paper is that the common law can provide all the reassurance the Agency needs in a registration context, without having to deal with legal provisions that are at best meaningless and at worst, contradictory and confusing. At the very least, the process for assessing a putative charity for Canadian income-tax purposes needs to be adjusted and focused primarily if not exclusively on purposes, to avoid undue complexity, contradiction with the common law and lack of certainty. It is not that activities are no longer pertinent in the registration process – it is that their use needs to be placed in context, and that the reference to activities in the statute is unnecessary, unless it is replaced by suitable wording that contrasts relief programs and other expenditures. In any event, the definition of a charitable organization in the *Income Tax Act* should be re-worded, along with other references to "activities", to provide underlying statutory consistency and to allow the common law of charity to operate properly.

⁴ *Income Tax Act*, 1985 R.S.C. c. 1 (5th supp.), s. 168 and 172(3).

⁵ (1998) 3 F.C. 202.

⁶ (1999) 1 S.C.R. 10.

⁷ (2007) 3 S.C.R. 217.

⁸ Contrast this judicial reluctance for instance, with the ruling of the High Court of Australia in *Aid/Watch Incorporated v. Commissioner of Taxation*, 2010 H.C.A. 42. See in particular paragraphs 25 and 26, as well as a reference to the *Aid/Watch* case, in *News to You Canada v. Canada (National Revenue)*, 2011 F.C.A. 192 at paragraph 29.

2. The provision and its irregularities

An analysis of the provision and how it has affected current policy and thinking within the Agency needs to start with a bit of history.⁹

Originally, the definition of a charitable organization for Canadian income tax purposes was part of a cluster of definitions, each designating a sub-set of charities for tax purposes: charitable organizations, (charitable) non-profit corporations, and charitable trusts. Definitions for each of these were found in section 62 of the *Income Tax Act*, as it then was. Material parts of the wording have been underlined in excerpts of the relevant provisions below.

Prior to the major revision of the *Income Tax Act* in 1970,¹⁰ paragraph 62(1)(e) of the Act, as it then was, defined a “charitable organization” as an organization

...whether or not incorporated, all the resources of which were devoted to charitable activities carried on by the organization itself and no part of the income of which was payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder thereof.

Paragraph 62(1)(f) of the Act defined a (charitable)¹¹ “non-profit corporation” as

...a corporation that was constituted exclusively for charitable purposes, no part of whose income was payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder thereof, that has not since June 1, 1950, acquired control of any other corporation, and that, during the period,

- (i) did not carry on any business,
- (ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salary, rents and other current operating expenses, and
- (iii) except in the case of a corporation that was, before the 1st day of January, 1940, constituted exclusively for charitable purposes, expended amounts each of which is
 - A. an expenditure on charitable activities carried on by the organization itself,
 - B. a gift to an organization in Canada, the income of which for the period is exempt from tax under the present Part by virtue of paragraph (e),

⁹ The text of this section is taken almost *verbatim* from a prior article by C. Juneau, posted on the Pemsell Case Foundation website. See *Charitable Activities under the Income Tax Act – A Historical Perspective*: <http://www.pemselfoundation.org/sites/default/files/Juneau%20Paper%20July%2016%202015.pdf> .

¹⁰ 1952 R.S.C. c. 48, amended by 1970-71-72 S.C. c. 63.

¹¹ In contradistinction to paragraph 62(1)(i) which defined a “regular” non-profit organization as “a club, society or association organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder thereof.”

- C. a gift to a corporation resident in Canada the income of which for the period is exempt from tax under this Part by virtue of this paragraph,
or
- D. a gift to Her Majesty in right of Canada or a province or to a Canadian municipality, and

the aggregate of which is not less than 90 per cent of the corporation's income for the period.

Paragraph 62(1)(g) of the Act defined a "charitable trust" as

...a trust all the property of which is held absolutely in trust for charitable purposes, that has not, since June 1, 1950, acquired control of any corporation, and that, during the period,

- (i) did not carry on any business,
- (ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salary, rents and other current operating expenses, and
- (iii) expended amounts each of which is
 - A. an expenditure in respect of charitable activities
 - B. a gift to an organization in Canada the income of which for the period is exempt from tax under this Part by paragraph (e), or
 - C. a gift to a corporation resident in Canada the income of which for the period is exempt from tax by virtue of paragraph (f) and

the aggregate of which is not less than 90 per cent of the income of the trust for the period.

It is immediately apparent from the overall structure of these three definitions that the expressions "charitable activities carried on by the organization itself", combined with the companion expression "gifts to an organization...", are intended to distinguish how charitable funds are to be applied by each type of charity. Paragraph (f) refers also to "...charitable activities carried on by the organization itself", and paragraph (g) refers to "an expenditure in respect of charitable activities".¹²

In contrast to charitable organizations, charitable non-profit corporations and charitable trusts could use their funds on their own relief programs or they could also transfer funds to charitable organizations. In addition, charitable trusts could transfer funds to charitable non-profit corporations, but could not in turn receive funds from these same corporations. The reverse however was prohibited for charitable organizations: the wording of paragraph 62(1)(e), "carried on by the organization itself", read together with the wording in (f) and (g) that allowed corporations and trusts to give to charitable organizations was intended to prevent charitable

¹² With regard to (g), see the subsequent change in wording, below, which made the wording more consistent with that of paragraphs (e) and (f).

organizations from funding charitable non-profits and charitable trusts, and presumably from circulating funds endlessly or sheltering them without actually using them for charitable relief.

The 1966 *Report of the Royal Commission on Taxation* dealt primarily with the taxation or tax exemption of charities, and not so much with the rules regulating charities under the *Income Tax Act*. But tellingly, it summarized the applicable legislation, as it then was, in the following words:

The present general exemption from income tax for charitable organizations is contained in paragraphs (e), (f) and (g) of section 62(1) of the Act. Paragraph (e) exempts charitable organizations, whether or not incorporated, all the resources of which are devoted to charitable activities carried on by the organization itself; paragraphs (f) and (g) respectively, exempt charitable corporations and charitable trusts, each of which must meet certain stipulated requirements, and which may act as conduits for distributing funds to charitable organizations.¹³

(emphasis added)

The major revision of the *Income Tax Act* in the early 1970s¹⁴ brought no significant change to these provisions. However, the Act was again amended¹⁵ in 1974, and the relevant provisions migrated to subsection 149(1).¹⁶

At that time, subsection 149(1) read:

- (1) No tax is payable under this Part upon the taxable income of a person for a period when the person was...
- (f) a charitable organization whether or not incorporated, all the resources of which were devoted to charitable activities carried on by the organization itself and no part of the income of which was payable to, or otherwise available for the personal benefit of any proprietor, member or shareholder thereof.
 - (g) a corporation that was constituted exclusively for charitable purposes, no part of whose income was payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder thereof, that has not since June 1, 1950, acquired control of any other corporation, and that, during the period,
 - (i) did not carry on any business,
 - (ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salary, rents and other current operating expenses, and
 - (iii) except in the case of a corporation that was, before 1940, constituted exclusively for charitable purposes, expended amounts each of which is

¹³ *Report of the Royal Commission on Taxation*, 1967, Queen's Printer, volume 4, pp. 128 and ff., at p. 131.

¹⁴ 1970-71-72, S.C., c. 63.

¹⁵ 1974-75, S.C., c. 26, s. 103(1) and (2).

¹⁶ Migration to the current section 149.1 (as opposed to s. 149) was enacted a few years later. See footnote 19.

- A. an expenditure on charitable activities carried on by the corporation itself, or
- B. a gift to any donee described in paragraphs 110(1)(a) and (b), and

the aggregate of which is not less than 90 per cent of the corporation's income for the period.

(h) a trust all the property of which is held absolutely in trust for charitable purposes, that has not, since June 1, 1950, acquired control of any corporation, and that, during the period,

- (i) did not carry on any business,
- (ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salary, rents and other current operating expenses, and
- (iii) expended amounts, each of which is

- A. an expenditure on charitable activities carried on by the trust itself, or
- B. a gift to any donee described in paragraph 110(1)(a) or (b), and

the aggregate of which is not less than 90 per cent of the income of the trust for the period.

Note the slight change to s. 149(1)(h)(iii)A, which brought it more in line with the wording in the other provisions. These amendments essentially replicated the former provisions while adding some new donees of charitable assets, namely Canadian municipalities and others. Note also that charitable organizations still could not transfer funds to other charities or other donees described in paragraphs 110(1)(a) and (b).

The 1975 Discussion Paper, *The Tax Treatment of Charities*, released by the Department of Finance¹⁷ was also of the view that the wording of the definition of a charitable organization in paragraph 149(1) (f) was intended to distinguish these organizations from other kinds of charities and determine how charitable funds should be expended. In paragraph 8 of the Paper, it stated the situation at the time thus:

More than 90 per cent of the registered charities are in fact organizations under paragraph 149(1)(f) of the *Income Tax Act*. These organizations may take varying legal form. They must devote all their resources to charitable activities they themselves carry on. The transfer of money by one of those organizations to another charity is not considered a charitable activity for the purposes of the *Income Tax Act*.

At paragraph 9, it went on to state:

¹⁷ Department of Finance, June 23, 1975.

As practice has developed in Canada over the years, most charitable corporations and charitable trusts are fund raisers, transferring the money raised or earned to other charities. Most direct charitable activity is carried on by charitable organizations.

And at paragraph 11, the authors of the Paper repeated:

At present, charitable organizations are not allowed to distribute funds to other registered charities because this would detract from their role in carrying on direct charitable activities.

(emphasis added)

The 1975 Discussion Paper went on to recommend that charitable organizations be allowed to distribute up to 50 percent of their annual income to other registered charities and qualified donees, and accordingly, after a subsequent Budget Paper, *Charities under the Income Tax Act*,¹⁸ the above definitions were repealed,¹⁹ with the exception of the definition of a charitable organization which, importantly for this discussion, remained essentially the same. The former definitions of a charitable non-profit corporation and a charitable trust however were replaced with a single definition – that of a “charitable foundation”:²⁰

“Charitable foundation” means a corporation or trust constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof and that is not a charitable organization.

That definition of a charitable foundation remains unchanged to this day. At the same time, the Act was amended to allow all charities registered under the *Income Tax Act* – foundations and organizations alike – to transfer funds to what would later become “qualified donees”. The latter included notably all other registered charities.

What this brief history tends to show is that originally the wording of the definition of a charitable organization in the *Income Tax Act* was in no way intended as a substantive test for registration purposes by requiring the supervisory body to determine whether an organization’s activities were charitable in their own right. Instead, it appears the whole structure was intended as a complete system, preventing the channeling of funds from often loosely-constituted organizations to charitable corporations or trusts, and ensuring instead that they flowed toward relief programs. Charitable organizations were conceived essentially as the “do-ers”, the prime deliverers of relief programs.

However, at present, some in the Agency would argue that the wording of this provision – requiring charitable organizations to devote all their resources “...to charitable activities carried on by the organization itself” – operates as a justification for using *both* a “purposes test” and an independent “activities test” when determining whether a charity is eligible for registration. At the very least, the Agency expressly asserts this as a matter of course in its standardized letters. As well, its policies relating to charities frequently characterize activities as charitable or not,

¹⁸ Department of Finance, *Budget Paper D – Charities Under the Income Tax Act*, May 25, 1976.

¹⁹ 1976-77, S.C., c. 4, s. 59(1). It was at that time that the regime for registered charities, including new rules notably on a “disbursement quota”, “related business”, and the acquisition and control of corporations, was moved to a newly created section – s. 149.1 – by s. 60(1), 1976-77, c. 4 s. 60(1).

²⁰ Paragraph 149.1(1)(e).

completely removed from any purpose that is being achieved, or they tend to conflate purposes and activities.²¹ In other cases, in a valiant attempt at nailing down all possible activities of a potential charity, the policies simply result in a minutia of detail, and a confusing, protean and ever-expanding list of ways in which activities can be characterized as charitable or not. This inordinate focus produces abstruse outcomes, as in the case of *Canadian Magen David Adom*, where the purchase of a telecommunications system was considered charitable for an ambulance service, but funding for a personnel identification system (for security and record-keeping purposes) was not.²²

On the contrary, the common law as traditionally applied to charities requires only a “purposes test”, except in those specific circumstances which we will further explain below. In this respect, an organization, trust or non-profit corporation can only be considered a charity if the primary purposes for which it is constituted are exclusively charitable as determined by case law.

If the literal reading of the definition of a charitable organization in the *Income Tax Act* is correct, and one can characterize an organization’s activities on their own as “charitable” without any reference to the purposes they are intended to achieve, then that definition enters into conflict not only with the reality of charities operations, but with other sub-sections of 149.1 as well.

If that is indeed the case, how does one conciliate the definition of a charitable organization with the distinction – specified in the Act – between charitable activities and a charity’s other activities as found in the definition of a disbursement quota for instance, or in the provisions elsewhere in subsection 149.1 dealing with non-qualified investments, in the implicit recognition that charities could be involved in political activities to a limited extent, or in the specified alternative between charitable activities and gifts to qualified donees?

On a practical level, most, if not all, charities have activities that could not be characterized on their own as charitable – fund-raising activities for instance, administrative activities, the activity of recruiting and training volunteers, or renting or buying delivery trucks.²³ To follow the logic of a literal interpretation, those organizations would not qualify for registration under the Act. And if the latter activities are charitable in their own right, as being connected to an ultimate charitable purpose (a position that is in fact supported by common law), then a focus on the characterization of activities as charitable in isolation is at best a generator of unnecessary complexity, and at worst, fundamentally wrong.

Given that the “own activities” test was originally present in all three defined sub-groups of registered charities, arguably it might be that Parliament *did* indeed intend to impose an

²¹ For instance, as an example of significant, at least co equal, and arguably undue focus on activities, the *Agency’s Guidance on Arts Activities and Charitable Registration* (CG-018) apart from the obvious conflict of its title with the purposive approach of the common law, uses the word “activities” 60 times, and “purposes” 82 times. Its *Guidance on Community Economic Development Activities and Charitable Registration* (CG-014) references “activities” 89 times, contrasted with 65 times for “purposes”. The *Guidance on the Promotion of Animal Welfare* (CG-011) mentions “activities” 52 times, and 71 times for “purposes”. The *Guidance on Upholding Human Rights and Charitable Registration* (CG-001) mentions “activities” 100 times, compared with 123 times for “purposes”. The *Guidance on Charitable Purposes and Activities that Benefit Youth* (CG-020) mentions “activities” 72 times, but “purposes” only 58 times. The *Guidance on Fundraising by Registered Charities* (CG-013) mentions “activities” 223 times, but “purposes” only 91 times.

²² See *Canadian Magen David Adom v. M.N.R.*, 2002 F.C.A 323, as discussed by R. Hayhoe in http://www.millerthomson.com/assets/files/article_attachments/a_RBH_Magen.pdf.

²³ Along the same lines, see Maurice Cullity, *The Myth of Charitable Activities*, (1990-91) 10 Estates and Trusts Journal, pp. 7 – 29, at p. 13.

additional requirement to the purposive approach of the common law – namely, that all charities be directly involved in program delivery in a way that guaranteed a charity’s liability for a misapplication of funds. But if that is the case, the requirement belongs in an operational test, and it does not belong in a definition to determine eligibility for registration. And this still does not explain why the definition of a “charitable organization” focuses only on activities while remaining silent on purposes. It does not explain the differential treatment afforded to the notion of activities in the definition of a “charitable organization”, and the references to charitable activities and other kinds of activities assigned elsewhere in section 149.1. Nor does it explain the disappearance of the notion of “own activities” from the definition of a “charitable foundation”, or the blurring of the distinctions we are witnessing currently between the operations of charitable organizations and charitable foundations: both kinds of charities can be involved in program relief and transfer funds to “qualified donees” (the tipping point being 50% of a charity’s income for the year).²⁴ In fact, it appears that both kinds of charities can now be revoked – as a result of other subsections of 149.1 – for failing to devote a specified amount to “charitable activities carried on by it, and by way of gifts by it to qualified donees”.²⁵

All of the above might be an entirely academic exercise, were it not for the fact that the Agency routinely distinguishes between “charitable” activities and “non-charitable” ones, thereby forcing charities to engage in intellectual contortions to account for program spending; or that the Agency uses the “own activities” wording to fetter its own discretion²⁶ and impose monitoring and control practices that – given that charities are notionally equitable uses and have no corporeal existence – are difficult to reconcile with the common-law concepts of agency and contract; or that the provisions taken as a whole mitigate against incremental development of the meaning of charity in Canadian jurisprudence.

3. Judicial comment on “activities” in relation to s. 149.1 of the Act

The judiciary have often struggled to make sense of the apparent contradictions in section 149.1 of the Act, perhaps out of a failure to sufficiently address the historical evolution of the provisions.

In one of the first appeals to the Federal Court of Appeal on a charity registration matter – *Re Scarborough Legal Services and the Queen*, Marceau J. commented:

It will have been noted that the exact meaning of the phrase “all the resources of which are devoted to charitable activities” in the definition of para. 149.1(1)(b) is nowhere given and the manner in which an application for registration will have to be presented to and disposed of by the Minister is not expressly determined. Such legislative laconism was bound to raise problems as it was obviously leaving many questions unanswered. Surprisingly, it does not appear that this court has yet been called upon to take position on any of these questions, despite the fact that, as we have been told, more than forty-five hundred applications for registration are made each year, and close to 20% of them are

²⁴ *Income Tax Act*, subsection 149.1(6).

²⁵ *Ibid*, subsections 149.1 (2), (3), and (4).

²⁶ See *Gordon v. Canada (Attorney General)*, 2016 FC 643.

refused. This case, so far as I know, is the first one to come before this court requiring the disposition of some of the most basic of those unanswered questions.²⁷

(emphasis added)

Further on, Marceau noted the difference between the common law and the statutory requirement focusing on “activities” for charitable organizations as opposed to charitable “purposes” for foundations. But he shrugged the matter off as being somewhat irrelevant²⁸ – a position he was to revise in the subsequent case of *Toronto Volgograd*, below.

In *Toronto Volgograd Committee v. M.N.R.*, the appellant charity argued that the Minister erred in law by focusing on purposes rather than activities, as specifically required by the *Income Tax Act*. Stone J. noted the discrepancy between the definition of a charitable organization in the Act, and the purposive approach of the common law, but conveniently avoided addressing the matter:

Fortunately I am relieved of expressing a final view on the question because of counsel’s concession during argument that we should, indeed, look at both purposes and activities in deciding whether the appellant is entitled to registration as a “charitable organization”.²⁹

In the same case, Marceau J., concurring in the result, again focused, as in *Scarborough Legal Services*, on the difference between the wording applied by the Act to a charitable foundation, which focused on “purposes”, and that applied to charitable organizations, which focused on “activities”. His analysis of the provisions only went back to 1976, but he added:

And indeed, in each and every subsequent provision establishing the rules governing each type of charity, when dealing with a charitable foundation, the Act speaks of purposes; and when dealing with a charitable organization, it speaks of activities (see for example, subsections 149.1(2), (3), (6.1), (6.2)). That this difference is fundamental in the legislative scheme is not to be doubted.³⁰

(emphasis added)

Marceau’s rationale is that foundations were intended as repositories of funds, while charitable organizations were involved in program delivery. But this overlooks the fact that many charities registered as foundations are involved in direct relief programs, and it also overlooks the fact that charitable organizations can also raise funds, and fund other “qualified donees” – which brings us back to some of the very questions raised by the current paper.

Subsequently, in *Everywoman’s Health Centre Society v. M.N.R.*, Décaré J. writing for the Court stated:

The *Income Tax Act*, at paragraph 149.1(1)(b) refers to “charitable activities”. The *Statute of Elizabeth* which is at the source of all those cases that have developed the concept of charity trusts, referred to “charitable purposes”. However, in the case at bar, I do not see any reason not to apply to the “activities” of an organization, the principles established

²⁷ *Re Scarborough Legal Services and the Queen*, 17 D.L.R. (4d) 308, at p. 320.

²⁸ *Ibid.* p. 325.

²⁹ 88 D.T.C. 6192, at p. 6195-6196.

³⁰ At p. 6200.

with respect to the “purposes” of an organization unless, of course, the context prevents us from so doing.

Ultimately, the Supreme Court of Canada addressed the matter in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* – a case dealing with an application for registration by an organization that provided educational forums, classes, workshops and seminars to immigrant women to help them find employment.³¹ At paragraph 149, Iacobucci J., writing for the majority, stated:

Although the *Pemsel* approach has been applied countless times by Canadian courts, both prior and subsequent to *Guaranty Trust*, its application to the myriad of modern organizations vying to be identified as charitable has often proved a daunting task. There have been repeated calls for the expansion or replacement of the test to reflect more completely the standards and values of modern Canadian society. As Strayer J.A. recently observed in *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202 (C.A.), at para. 8, the definition of charity “remains ... an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts”.

(emphasis added)

Further on, at paragraphs 152-154, he focused more precisely on the income-tax notion of a charitable organization and its emphasis on “activities”.

While the definition of “charitable” is one major problem with the standard in s. 149.1(1), it is not the only one. Another is its focus on “charitable activities” rather than purposes. The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature.

Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms “purposes” and “activities” almost interchangeably. Such inadvertent confusion inevitably trickles down to the taxpayer organization, which is left to wonder how best to represent its intentions to Revenue Canada in order to qualify for registration. In fact, as may become clear shortly, the Society may have suffered exactly this difficulty in drafting its purposes clause.

The final consideration raised by s. 149.1 is that of exclusive charity. Under subs. (1), the definition of “charitable foundation” includes the requirement that it “is constituted and operated exclusively for charitable purposes” and “charitable organization” means, *inter alia*, an organization “all the resources of which are devoted to charitable activities carried on by the organization itself”. The ITA, therefore, clearly requires that all of the purposes and activities of the foundation or organization be charitable. In light of the preceding discussion regarding the construal of charitable activities, exclusively charitable activities would be those that directly further charitable purposes and not other, non-charitable, purposes.

³¹ (1999) 1 S.C.R. 10

(emphasis added)

Vancouver essentially states the applicable common-law rule: activities are charitable to the extent they aim at achieving a charitable purpose. This includes relief programs (what the Agency tries to label as “charitable activities” in a restricted sense), but also fund-raising activities, administrative activities, and political activities.³²

In summary, what we have seen from past judicial pronouncements is a vacillation from a literal reading of the Act, to an interpretation based on assumptions, and then to a statutory scheme that is – if the Supreme Court of Canada is to be believed – at odds with the common law.

The situation has been exacerbated by an accretion of income-tax amendments to section 149.1 made over the course of years without much thought as to an underlying need for consistency, either within the Act or between the Act and the common law. In the case of political activities for instance, a re-write of the definition of a “charitable organization” would have solved matters by simply referring the issue of political activities and purposes back to the common law, and it would have allowed registered charities to engage in such activities as long as they were ancillary and incidental to primary charitable purposes. Prior to the 1985 amendments, under a literal reading of the definition of a “charitable organization”, as it then was and as it still basically is, the Act’s focus on “exclusively charitable activities” meant that any amount of political activity by an applicant was viewed as unacceptable, and charities would regularly be denied registration on that ground.³³ Rather than correcting the original provision, in 1985, the rule on “political activities” was introduced and it set a rigid income-tax template on what would otherwise have been a more flexible common-law rule that would have allowed charities to engage in political activity to a reasonable extent.³⁴

The introduction of the political-activity amendment only compounded the problem as it brought with it a multitude of slippery slopes and overlaps: for instance, when does an organization’s “charitable activity” become “political”? Do we start counting the “politically tendentious” words in a speech? Does the identity or position of the person speaking matter? When does an organization’s underlying ideology become political? How do we monetize political activities for tax purposes? What is the meaning of “substantially all” and why does the Agency insist on interpreting it as 90% of resources when the courts clearly say it isn’t?³⁵ Is commenting on, or conducting research on areas of government policy political? Is attempting to sway public

³² But how do we conciliate this interpretation for instance, with the text of s. 149.1(6.2) which distinguishes between charitable activities and political activities?

³³ See for instance, *Re Scarborough Legal Services and the Queen*, 17 D.L.R. (4d) 308, at p. 321, as one case where such a denial occurred. See, in particular, the reasons of Marceau, J., notably at pp. 321, and 323 and ff.

³⁴ 33-34-35 Eliz. II, 1986, c. 6, paragraph 85(2). See *N.D.G. Neighbourhood Association c. Revenu Canada, Département de la Taxation*, 1988 F.C.A. docket A-468-86, May 16, 1988, at p.11. Why the legislator did not see fit to address a charitable organization’s other arguably non-charitable activities – such as administration or fund-raising – or why the Agency continued to register organizations with such non-charitable activities remains a mystery.

³⁵ See a summary of the Canadian debate on this issue in A. Grant, *Political Activities and the Meaning of “Substantially All” – An Analysis for Registered Charities*, <http://www.pemselfoundation.org/wp-content/uploads/2016/05/Political-Activities-and-the-Meaning-of-Substantially-All.pdf>.

opinion on issues such as drug use or drinking and driving charitable or political?³⁶ Why are those causes arguably acceptable, but others not?

As a result of the above analysis of the definition of a charitable organization, the canons of interpretation would suggest that to satisfy the requirements for registered charity status, the expression “all the resources of which are devoted to charitable activities carried on by the organization itself” should be interpreted in context, in particular as it relates to its genesis and its original meaning. (Note that no different meaning was ascribed to it when the notion of “charitable foundation” was introduced.) Moreover the expression should be interpreted in a way which produces a logical result, rather than in ways that produce conflicting ones. And finally the expression ought to be assigned the same meaning throughout section 149.1. The only way a consistent meaning can be ascribed to the expression “all the resources of which are devoted to charitable activities carried on by the organization itself” is as an operational description of the organization’s work, not as an independent and substantive qualifying test for the purpose of registration.

Nevertheless while we might interpret the above expression essentially as designating “relief programs”, strictly speaking the legislation says otherwise, and if it is to contain a uniform underlying theme as well as a more solid connection to common law, it is clear that the only positive way forward is through legislative amendment. In order to operate effectively, the definition of a “charitable organization” and indeed the entire provision need to acknowledge the purposive approach of the common law. The conflicts between “purposes” and “activities”, or between the diverging concepts of “charitable activity” within section 149.1 itself, or between the provisions of section 149.1 and the common law, are the core conundrum.

4. A defense on the use of an activities test in the registration context

Any legal discussion on the use – or overuse – of activities to tease out an organization’s purposes needs to be injected with a dose of practicality. With the exception of large and substantially-funded charities that have allied professionals at their beck and call, the vast majority of charities are the result of a grass-roots movement. The volunteers that staff them may be passionate, they may know their cause intimately, but they likely know relatively little about the technical definition of charity, or often, about the law of organizations – because that is not what has driven them to freely contribute their time and energy.

As a result, the sector and its regulators are often confronted with two issues: one of them is mission drift: the tendency of an organization’s efforts to expand beyond its purposes as originally stated – a problem that becomes more likely if regulators were to focus exclusively on purposes without asking how those purposes are to be attained; the second likely issue is that an organization registered under charitable, but general purposes, without an informative account of its actual programs, would be more likely to engage inadvertently in pursuits that are simply not charitable.

An example of mission drift is the case of an organization that provides non-profit housing to low income families, but that gradually becomes substantially involved in providing for-profit housing

³⁶ On the latter issue, see *Human Life International in Canada v. M.N.R.*, 1998 3 F.C.R. 202, at paragraph 12; *Positive Action Against Pornography v. M.N.R.*, (1988) 2 F.C. 340, at p. 352.

to middle-income tenants. Still another example is an organization that focuses on selling donated, recycled or end-run building materials at reduced prices to help build and provide housing to the poor, but that eventually provides low-cost building materials to the general public.

Also, if it is not expected to provide information on its programs, an organization might for instance apply to be registered as a charity because its purposes simply state that it plans to put on artistic concerts on the public square. The organization might present to the public, works of artistic value such as concerts of classical music. But it might just as well stage productions of popular music that primarily entertain, but have little enduring artistic merit. Since the Agency cannot possibly audit every charity annually to ensure that it stays within the realm of acceptable purposes, it tries to resolve as many of these issues as possible at the point of registration. At that point, case law suggests that the Agency should assess the activities in light of the purposes they are structured to achieve rather than at face value. Still, unless such problems are suitably addressed, government and society in general would end up tax-subsidizing organizations of questionable merit, however that might be defined. And in this context, there are many concepts that tend to be overworked by applicants that seek to be registered as charities – for instance, those of “education”, “promoting healthy activity”, and “art”, which have all been used at one time or another, to justify political purposes, the promotion of a particular sport, or mere entertainment.

The above examples also illustrate the logical fallacy that an organization is either “charitable” or “not charitable”. There is no clear dividing line in practice, and a lot is left to judgment, accommodation, and common sense – something which recent CRA policies have apparently sought to skirt in the pursuit of some elusive clarity, through an overabundance of detail and a focus on the minutiae of the day-to-day. Unfortunately, such an approach often deprives charities of necessary flexibility, it raises more questions than provides answers, and its intricacy and perceived rigidity compel charities to be overcautious. In addition, charity trustees are subject to a fiduciary duty and are constrained in the exercise of their discretion through that duty. Within that duty, they have wide scope to determine what constitutes prudent/appropriate conduct. This analysis suggests that it is preferable for them to be held accountable through trust (or parallel corporate fiduciary) obligations, not through ITA regulatory measures. The *Income Tax Act* should recognize the need for charities’ flexibility, adaptability and trustees’ discretion.

An emphasis on activities is never justifiable in all cases. Certainly, it is wrong to characterize an activity as “charitable” or not, in isolation of the purposes it strives to attain.³⁷ There are cases where an examination of activities can be extremely useful, and these are supported extensively by judicial precedent. But an over-emphasis on activities at the legislative level and in CRA administrative policies can result in decisions cloaked in arbitrary, and that are wrong at common law. One example of the CRA’s favourite hobby horses here is “the mere distribution of

³⁷ “In these contexts and others, it has been stated and implied, from time to time, that the activities of a charitable body are restricted by law to those that can be characterized as charitable. It is that general proposition that I wish to challenge, for I believe it is, on the most favourable interpretation, highly misleading, and on the worst, meaningless. It can lead to mistakes not only when questions arise under the laws of any of the common law provinces but also when the interpretation and application of the provisions of the Income Tax Act that apply to registered charities are at issue.” Maurice Cullity, *The Myth of Charitable Activities*, (1990-91) 10 *Estates and Trusts Journal*, p.7. One recent decision of the Federal Court of Appeal, *Credit Counselling Services of Atlantic Canada Inc. v. Canada (National Revenue)*, persisted in focusing on activities to a significant extent, but did recognize that such activities needed to be characterized in light of the purposes they were intended to achieve, as well as the targeted beneficiaries. See 2016 FCA 193, at paragraphs 14 and 17.

information”. CRA examiners, supported by policies that focus extensively on activities, will often jump on cases where a body distributes information on its programs, or on those of like-minded organizations, in order to label the activity as a coequal but non-charitable purpose in the absence of any quantifiable information or appreciation of the larger context, and thereby refuse to register it.

5. The use of activities in a common-law context at the point of registration

There is some doubt as to whether the Agency’s focus on activities taken in isolation, comes from s. 149.1 of the Act. But if it doesn’t come from there, it certainly doesn’t come from common law.³⁸ And if indeed the CRA’s focus on activities is based on the common law, there is no need for a conflicting reference to activities in the statute. Moreover, in a field where jurisprudence often uses activities to ascertain an organization’s purposes, the notion of “activities” should not be used in a different statutory sense so as to confuse matters even more or create contradictions.

The common law is clear in stating that an activity cannot be characterized as charitable or not, without reference to the purpose it is designed to attain. Activities cannot be independently characterized as “charitable”. However, while jurisprudence refuses to assign a charitable nature to activities in isolation, it does recognize the use of activities in certain specific contexts.³⁹ This article does not propose an extensive review of the jurisprudence – this has already been done elsewhere.⁴⁰ What it hopes to do is to provide some sense of how the common law also addresses the CRA’s need for a reasonable amount of information when registering charities for the purposes of the *Income Tax Act*.

The orthodox position of the common law is that activities are not relevant in recognizing a body as charitable. As long as the purposes of a given body fall within the ambit of charity, it is a valid charitable trust. And trustees enjoy relative discretion within those purposes as to how they are to be attained. Where there is a precedent that a purpose is charitable, there can be no question, at least in the absence of significant social change, of proposed or actual activities displacing the

³⁸ *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, (1999) 1 S.C.R. 10, at paragraph 144: “The common-law definition of “charity” developed in the context of trust law, where a charitable purpose trust is an exception to the general rule that a purpose trust is invalid. Therefore the trust law question focuses on charitable purposes and not charitable activities.” See also, S. Barker, *The myth of “charitable activities”*, New Zealand Law Journal, September 2014, p. 304.

³⁹ *Vancouver Society of Immigrant and Visible Minority Women*, (1999) 1 S.C.R. 10, at paragraph 194, Iacobucci, J., writing for the majority, refers to *Guaranty Trust v. M.N.R.*, [1967] S.C.R. 133:

“In *Guaranty Trust*, at p. 144, this Court expressed the view that the question of whether an organization was constituted exclusively for charitable purposes cannot be determined solely by reference to the objects and purposes for which it was originally established. It is also necessary to consider the nature of the activities presently carried on by the organization as a potential indicator of whether it has since adopted other purposes. In other words, as Lord Denning put it in *Institution of Mechanical Engineers v. Cane*, (1961) A.C. 696 (H.L.), at p. 723, the real question is “for what purposes is the society at present instituted?”

⁴⁰ Maurice Cullity, *The Myth of Charitable Activities*, in (1990-91) 10 Estates and Trusts Journal, pp. 7-29; S. Barker, *The myth of “charitable activities”*, New Zealand Law Journal, September 2014, pp. 304-308; J. Garton, *Charitable Purposes and Activities*, in (2014) 67 Current Legal Problems, 373-407.

fact that, strictly speaking as a matter of law, the organization in question is established for a charitable purpose; to suggest otherwise is to misunderstand the nature of the legal definition of charity at common law.⁴¹

However, it is one thing to claim that a body is a charity in the absence of information as to how those purposes are to be attained, and quite another to deal with practical issues as outlined under the previous heading, or to argue that any information submitted is not relevant when determining charitable status or other constraints of the law, such as the requirement for public benefit.⁴²

The first question that must arise in comparing the information that has been provided in the context of an application for registration, with an organization's stated purposes is whether the activities of that organization are reasonably connected to its purposes. With the exception of specific statutory requirements (for instance, determining whether an organization is involved in a "related business"), the true objective of a review of activities is to determine whether an organization's existing or ascribed purposes are charitable – it is not to impugn the charitable character of an organization based on the sole existence of those activities.⁴³

Except in the case of statutory requirements (for instance, the income-tax rules concerning a "related business"), the only question, in the case of activities of charitable corporations with the powers of a natural person, should be whether the acts of the body and those of its directors acting on behalf of the corporation are reasonable and prudent methods of advancing its objects.⁴⁴ The fact that the authorized activities of an organization constituted for charitable purposes can be characterized in some contexts as trading, business, or commercial in nature, is not necessarily inconsistent with charitable status.⁴⁵ Neither is charitable status jeopardized if the charity incidentally provides private benefits to certain individuals⁴⁶ or provides professionals with tools and information needed in their trade.⁴⁷

⁴¹ J. Garton, *Charitable Purposes and Activities*, in (2014) 67 *Current Legal Problems*, 373-407, at pp. 376-77, 394.

⁴² See *National Anti-Vivisection Society v. I.R.C.*, 1948 A.C. 31.

⁴³ For the use of activities and ancillary objects to ascertain the charitable nature of the primary object, see for instance *Keren Keyemeth Le Jisroel*, (1932) All E. R. 971, at p. 977:

“There are a great number of objects in this memorandum. They are all expressed as ancillary to the main object, and I well appreciate the argument that says that once you find the main object charitable, you cannot destroy the charitable character of the main object because the ancillary powers, which are incidental to it, are some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate in reaching a conclusion on that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable”. (emphasis added)

⁴⁴ Maurice Cullity, *The Myth of Charitable Activities*, in (1990-91) 10 *Estates and Trusts Journal*, pp. 7-29, at p. 24.

⁴⁵ *Ibid.* p. 14, 15.

⁴⁶ *Commissioners of Inland Revenue v. Oldham Training and Education Council*, (1998) 69 T.C. 231, at pp. 250-251:

“The question raised is whether the remaining objects viewed in this context can and should be construed as subject to the implicit limitation “so far as charitable”. There is, of course, no such express limitation. In my judgment, no such limitation can be implied or is compatible with the range of benefits and of the eligible recipients of such benefits which it is the object of Oldham TEC to provide.”

⁴⁷ *Incorporated Council of Law Reporting for England and Wales v. A.G.*, (1972) 1 Ch. 73, at p. 86 (B) and (C), and 87 (E).

In this exercise, there is a presumption under charity law in the absence of information to the contrary, that trustees intend to, and will act solely, in a lawful and proper manner appropriate to the trustees of a charity.⁴⁸ It should be borne in mind that the body and its directors have likely better and more intimate knowledge than officials of the Canada Revenue Agency of the circumstances they are called to address, and that they do have discretion as to how they might apply charitable assets within the law. Any challenge to this ought to carry with it a degree of conviction clearly establishing that there is no reasonable and logical connection between the activities in question, an organization’s charitable beneficiaries, and an organization’s stated purpose.

Here are some examples where a review of activities – supported by judicial precedent – is necessary or at the very least useful at the point of registration, notably:

- Vague purposes, where a purpose is alleged to be charitable, but is stated in such general terms that there is some doubt as to whether it falls within the ambit of charity.⁴⁹
- New purposes, where a potential charity has a purpose which is novel and not covered by precedent.⁵⁰
- Public benefit, to ensure that a charitable trust does not provide more than incidental benefit to private individuals.⁵¹
- Political purposes, to ascertain whether political activities are incidental or whether they constitute an end in themselves.
- Related business, a statutory requirement.
- Mission drift, in the context of an audit, to determine whether an organization has been conducting itself in a manner consistent with the purposes for which it was registered.⁵²
- Inaccurate information, where the stated purposes say one thing, but the activities point to a different purpose or suggest the organization is a sham – such as an organization

⁴⁸ *McGovern v. A.G.*, (1982) 2 W.L.R. 222, at p. 245.

⁴⁹ See as an example, *Re Louisa Kenney, Clode v. Andrews* (1907) All E.R. Ext. 1122 (Ch.), where a trust for “missionary objects” previously held to be too vague, was eventually considered by the court when Warrington J. considered it appropriate to take into account the charitable nature of previous missionary work. One charity law requirement that is presumed to be met in the absence of information to the contrary is that if a purpose can be interpreted in two different ways – one charitable, and the other, not – the one to prefer is the former: *Southwood v. A.G.*, 2000 WTLR 1199, at paragraph 20; citing *McGovern v. A.G.*, (1982) Ch. 321, at p. 353.

⁵⁰ One such example eventually resulted in the case, *Vancouver Regional Freenet Association v. M.N.R.*, (1996) 3 F.C. 880.

⁵¹ Note that charities operating under purposes that have already been recognized as charitable are implicitly operating for public benefit, and the sole question is to determine whether they are operating for the enjoyment by a sufficient section of the community: J. Garton, *Charitable Purposes and Activities*, in (2014) 67 Current Legal Problems, 373-407, at p. 400. *National Anti-Vivisection Society v. I.R.C.*, 1948 A.C. 31, at pp. 42 and 65. The question of public benefit is formed through evidence before the Court. In *Oppenheim v. Tobacco Securities Trust* for instance, the Court recognized that the purpose of the trust, being for the advancement of education, was charitable but that the trust could not be recognized as a charity because it was in fact restricted to a private class of beneficiaries (1951) A.C. 297, at pp. 309 and 313.

⁵² See *Vancouver Society of Immigrant and Visible Minority Women*, (1999) 1 S.C.R. 10, at paragraph 194.

ostensibly established for the relief of poverty overseas but which in reality is set up to finance acts of terrorism.⁵³

Finally, on a concrete level, the process of examining activities in order to uncover a potential unstated purpose also instills proper governance practices in incipient charities.

6. Collateral purposes

Any governmental policy concern around unacceptable activities can be resolved by addressing a charity's potential collateral purposes. The obvious question in the above context is, when does an activity or set of activities become so important as to be a purpose or indeed a primary purpose of an organization?

A crucial distinction is between ends and means: there has to be a link to a charitable purpose. Thus, if activities or benefits are incidental to and consequent upon the way in which a charitable purpose of the body in question is carried on, they do not represent a collateral or independent purpose, and the organization is charitable. The question in such cases should be whether the activities are a reasonable and prudent way of contributing to the attainment of an organization's purposes. "Only confusion will be engendered if the question is not framed in that manner and, instead, the inquiry is directed at the charitable or non-charitable nature of particular activities".⁵⁴

In many cases, the private benefits accruing as a consequence of advancing the main purpose could equally well be classified as a necessary part of the means of achieving the main purpose. In the last resort, it is a matter of degree⁵⁵: the relative amounts spent overall, as compared to those spent on a given aspect of an organization's operations; the number and presence of other activities; the relative number of people affected, beneficiaries or otherwise; the outward prominence of a given activity; contextual prominence; inter-dependence between a set of activities or a purpose and the primary purpose of the organization; or the amount of on-going attention given to a particular issue.

In the Canadian context, the case of the *Toronto Humane Society*⁵⁶ suggests a proportionality test:

It is not disputed that the short-term goal of CAPS (amendment of the *Animals for Research Act*) is one which could reasonably be said to be conducive to the primary purposes of the Society. The Public Trustee does not go the length of contending that *any* involvement in, or support of, CAPS by the Society would be objectionable. The submission of the Public Trustee is that such involvement and support have reached a stage where it is a primary activity of the Society and that this is objectionable in a charitable institution.(...) However

⁵³ See an example of this kind of approach in *Southwood v. A.G.*, 2000 WTLR 1199, where a trust clearly stated to be for the advancement of education in the subject of militarism and disarmament was held void on the basis that the activities carried on under it—the running of academic conferences superficially similar to those considered acceptable in *Re Koeppler's Will Trust* (1986 Ch. 423) — revealed that its true purpose was not to advance education but to promote a particular political ideology.

⁵⁴ Maurice Cullity, *The Myth of Charitable Activities*, (1990-91) 10 *Estates and Trusts Journal*, 7 – 29, at pp. 13, 24.

⁵⁵ H. Picarda, *The Law and Practice Relating to Charities*, 2d, London, Butterworths, 1995, at p. 209 and 216-217; S. Barker, *The myth of "charitable activities"*, *New Zealand Law Journal*, September 2014, pp. 304-308.

⁵⁶ *Re Public Trustee and Toronto Humane Society*, (1987) 60 O.R. (2d) 236.

unsatisfactory and imprecise it may be, I think the question must be decided on general principles and on a case-by-case basis. Regard should be had to all the activities of the Society and a decision reached as to the proportion of such efforts which is being absorbed by CAPS. Consideration should be given not only to expenditure of money, but to use of premises, personnel and other resources.” (at pp. 254-255)

Unfortunately, there is no bright line dividing activities from purposes. When an organization’s purposes describe the specific activity to be carried on – for instance, providing credit counselling to poor people – then, the activity effectively becomes the purpose. Similarly, when an organization focuses only on a single endeavor, that endeavor can be construed as its overall purpose notwithstanding formal purposes stated in its constituting documents.⁵⁷

If in fact, the activity or set of activities are so important that they become a “purpose” of the organization, they can still be subservient to a primary charitable purpose. If on the contrary they stand as a purpose on their own, they can be either non-charitable or charitable in their own right. Indeed, the problem arises where there is a collateral purpose – that is, one that functions independently of an organization’s other charitable purposes and programs, and that may be outside the ambit of charity.

In the case of an organization with more than one purpose, if the question is to determine which purposes are primary and which are subservient, activities as well as logical relationships may be taken into account to determine which purposes are the dominant ones and which, if any, are subsidiary to these or are collateral but non-charitable purposes. This is particularly significant given that a charity may legitimately have non-charitable objects (including political objects) where these are subsidiary to a dominant charitable purpose. Non-charitable purposes are acceptable if they are incidental – that is, if they are a means to the fulfilment of a primary charitable purpose. In *Guaranty Trust v. M.N.R.*,⁵⁸ Ritchie J., writing for the majority of the Court, quoted Denning, L.J. in *British Launderers Research Association v. Hending Rating Authority*, at p. 487, in his description of a collateral, non-charitable purpose:

It is not sufficient that the society should be instituted “mainly” or “primarily” or “chiefly” for the purpose of science, literature or the fine arts. It must be instituted “exclusively” for those purposes. The only qualification – which, indeed, is not a qualification at all – is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive the society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral, that is, cease to be a means to an end but become an end in themselves; that is, become additional purposes of the society, then whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption.

(emphasis added)

⁵⁷ *National Anti-Vivisection Society v. Inland Revenue Commissioners*, 1948 A.C. 31.

⁵⁸ 1967 S.C.R. 133, at p. 143.

He added, the mere enumeration of a purpose in a constituting document of an organization does not transform it into an end in itself. Rather, taken in context, it may be only a “means to the fulfilment” by which the organization’s primary purposes are to be achieved.⁵⁹

7. Potential Benefits of an Amendment

The presence of an express reference to “charitable activities carried on by the organization itself” in the *Income Tax Act* raises many questions, some of them dealing with contradictions within the statute or between the statute and the common law, others dealing with the absence of a purposive approach when dealing with “charitable organizations”, and others still, with an inordinate and ill-advised focus on “activities” in administrative policies, or with the artificial distinction between “charitable organizations” and “charitable foundations”.

We have to wonder what is the public-policy benefit of such a reference in a field that is already regulated by common law. The rigor that the Department of Finance and the Canada Revenue Agency may have been hoping to achieve with the notion of “activities” is unnecessary. It merely increases complexity, highlights contradictions, and augments the regulatory burden.

There are here, presumably two distinct policy issues that must be addressed: encouraging and freeing charities so they can function effectively within society; and regulating and monitoring tax abuse. The two aren’t necessarily incompatible, but they should not function as a hindrance on each other. Re-shaping the rules around the definition of a registered charity in *the Income Tax Act*, and more particularly the rules around “charitable activities carried on by the organization itself” would...

- provide underlying consistency within the Act and eliminate any contradictions;
- bring the Act into closer harmony with the common law, and hence with areas that are, constitutionally, largely attributed to the provinces;
- allow the CRA to formulate policy that is simpler and less confusing;
- eliminate the confusion resulting from the direction-and-control issue at the policy level which currently work against charities’ ground-level operations and which fetters the Agency’s own decision-making, and restore common-law notions of agency and contract;
- provide an opportunity to regulate those areas of foreign involvement by charities that are of concern to terrorist financing;
- allow for the repeal of the provisions on political activities, and replace them with the more flexible common-law rules;
- reduce advocacy chill, by providing a buffer zone buttressed by common law rules on political activity;
- allow charities to participate more effectively in the democratic process, and create a more informed citizenry, and thereby improve the functioning of democratic institutions;

⁵⁹ Cited with approval by Iacobucci, J., in *Vancouver Society of Immigrant and Visible Minority Women*, (1999) 1 S.C.R. 10, at paragraph 109.

- by eliminating the overly rigid and complex income-tax template on political activities, compel the Agency to deal with egregious cases only, rather than dealing with minor issues;
- provide an opportunity to re-frame partisan political activity in ways that are clearer and not open to abuse;
- provide an opportunity to re-orient current and arguably irrelevant distinctions between charitable organizations and charitable foundations in the statute, and focus regulatory attention instead on tax-at-risk; and
- by reducing statutory intrusion into areas that are properly the realm of common law, free the courts to make the definition of charity evolve on matters relating to the promotion of industry, the environment, fitness, political activity, social financing, and charities' foreign activities, to name a few.

The alternatives – leaving matters unchanged, or addressing the definition of charity head-on for the purpose of the statute, or tackling the political activities piece directly – may be politically and realistically unpalatable, and will only perpetuate a regime that is overly complex and daunting for both the regulator and charities.



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