The Function (or Malfunction) of Equity in the Charity Law of Canada's Federal Courts

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This essay explores what, if anything, it means for the Federal Court of Appeal to be a "court of equity" in the exercise of its jurisdiction over matters related to charitable registration under the Income Tax Act. The equitable jurisdiction over charities encompasses a number of curative principles, which the Court of Chancery traditionally invoked to save indefinite or otherwise defective charitable gifts. The author identifies some of these equitable principles and contemplates how their invocation might have altered the course of certain unsuccessful charitable registration appeals. She then considers the principal arguments for and against the Federal Court of Appeal applying these equitable principles when adjudicating matters related to registered charity status.

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I. Introduction

The doctrines and remedies that make up the common law charities tradition belong to the realm of equity. Inherited from the ecclesiastical courts, they were, by the fifteenth century, being applied by the Lord Chancellor of England, who granted to charitable gifts the same privileges that canon law had anciently awarded to legacies *ad pias causas*.[1] Throughout the sixteenth, seventeenth, and eighteenth centuries, the English Court of Chancery developed the law of charities, determining the boundaries of the legal concept of charity, confirming its privileges, and expanding the tools for its enforcement. By the early nineteenth century, when the English law of equity was being introduced into the colonies of British North America[2], there was in place an extensive set of equitable doctrines relating to charitable trusts, charitable corporations and charitable gifts.

Today, in Canada, it is arguable that the most significant heir of this equitable jurisdiction is the appellate court of "law, equity, and

1. Gareth H Jones, *History of the Law of Charity, 1532-1827* (London: Cambridge University Press, 1969) at 4-9.
2. JE Cote, 'The Reception of English Law' (1977) 15 Alberta Law Review 29 at 57-59.

admiralty" created by the *Federal Courts Act*[3] ("*FCA*"). Pursuant to section 172(3) of the *Income Tax Act*[4] ("*ITA*"), a decision of the Minister of National Revenue to exclude an organization from registered charity status is appealed directly to the Federal Court of Appeal. The Federal Court of Appeal is therefore the first line judicial arbiter of whether an applicant is "constituted and operated exclusively for charitable purposes" (*constituée ou administrée exclusivement à des fins de bienfaisance*), or is an "organization…which devotes all of its resources to charitable activities" (*œuvre…dont la totalité des ressources est consacrée à des activités de bienfaisance*) so as to qualify it for charitable registration.[5] Due to the constraints on appealing civil matters to the Supreme Court of Canada, the Federal Court of Appeal also generally has the last word on whether a purpose or activity is "charitable". For almost twenty years, that last word has consistently been "no".[6]

It is the Canadian judiciary's longstanding approach to the interpretation of the registered charity provisions that links the Federal Court of Appeal to the charity law tradition of the Chancery Courts. The *ITA* does not define the word "charitable" (*de bienfaisance*). In this situation, the Federal Court of Appeal has always relied on the common law to give meaning to the statutory term. The Supreme Court of Canada confirmed the propriety of this approach in *Vancouver Society of*

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3. RSC 1970, c 10 [*FCA*].
4. RSC 1985, c 1 (5th Supp) [*ITA*].
5. *Ibid* s 149.1(1), "charitable foundation" (*fondation de bienfaisance*); "charitable organisation" (*oeuvre de bienfaisance*). The Department of Finance has faced considerable pressure to introduce amendments that would allow charity registration and revocation appeals to be taken to the Tax Court of Canada. So far, however, the only response has been the extension of the internal objection review process of the Minister of National Revenue: see William Innes & Patrick J Boyle, *Charities, Non-Profits and Philanthropy Under the Income Tax Act* (Toronto: CCH Canadian, 2006) at 13.
6. The last time a charity successfully appealed a charitable registration decision was in 1996: see *Vancouver Regional FreeNet Assn v Minister of National Revenue*, [1996] 3 FC 880 (CA) [*Vancouver Regional FreeNet*]. Since 1999, there have been at least 17 unsuccessful appeals by charities to the Federal Court of Appeal.

Immigrant and Visible Minority Women v Minister of National Revenue[7] ("*Vancouver Society*"), stating that the *ITA*:

> … appears clearly to envisage a resort to the common law for a definition of 'charity' in its legal sense as well as for the principles that should guide us in applying that definition …[8]

and that:

> … whether a purpose would or may operate for the public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity.[9]

In the years before and since the *Vancouver Society* decision, there has been extensive debate on the merits of resorting to the common law definition of charity for purposes of interpreting federal tax legislation. However, considerably less thought has been given to the principles that should guide the Federal Court in applying that definition, or to the nature of the equitable jurisdiction that a court must exercise in the context of the registered charity regime.

This essay explores what, if anything, it means for the Federal Court of Appeal to be a "court of equity" in the exercise of its jurisdiction over matters related to registered charity status under the *ITA*. Its premise is that the equitable jurisdiction over charities encompasses a number of curative principles which traditionally functioned to effectuate indefinite or otherwise defective gifts and which might usefully be invoked in an appropriate case to lift the law of (registered) charities out of its present state of inertia. The essay begins by describing the equitable jurisdiction that is conferred on the Federal Court of Appeal by the terms of the *FCA* (Part II). It then identifies several key principles of the equitable jurisdiction over charities, and explores what impact those principles might have had on recent charitable registration appeals, had they been invoked (Part III). Finally, having established how equitable principles have traditionally influenced judicial decision-making regarding the charitable nature of purposes and activities, the essay turns to examine the chief arguments for and against their application by the Federal

7. [1999] 1 SCR 10 [*Vancouver Society*].
8. *Ibid* at para 28.
9. *Ibid* at para 175.

Court of Appeal (Part IV).

II. The Equitable Jurisdiction of the Federal Court of Appeal

The Federal Court of Appeal is the successor of the Appeal Division of the Federal Court of Canada, which was created in 1971 to be the successor to the Exchequer Court of Canada. Like our other federal courts, it is a court created by the Parliament of Canada under the authority of section 101 of the *Constitution Act, 1867*.[10] The jurisdiction of the Federal Court of Appeal is often described as "exceptional".[11] In contrast to the provincial superior courts, which have a general and inherent jurisdiction, it has no jurisdiction except that conferred by statute.[12] In a famous series of cases dating from 1976, the Supreme Court of Canada also limited the exercise of Canadian federal court jurisdiction to *substantive* federal law, holding that there must be an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction".[13] However, the general trend that has characterized recent federal court jurisprudence is the adoption of an increasingly expansive approach to federal court jurisdiction.[14] It is uncontroversial that the federal courts may decide incidental questions of provincial law

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10. (UK) 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5.
11. Brian J Saunders, Justice Donald J Rennie & Graham Garton QC, *Federal Courts Practice 2015* (Toronto: Carswell, 2014) at 1-2.
12. *Ordon Estate v Grail*, [1998] 3 SCR 437. For a more detailed discussion, see *ibid* at 1-5.
13. *ITO-Int Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766, also citing *Quebec North Shore Paper Co v Canadian Pacific Ltd*, [1977] 2 SCR 1054 and *McNamara Construction (Western) Ltd v The Queen*, [1977] 2 SCR 654.
14. See *e.g. Minister of National Revenue v RBC Life Insurance Co,* 2013 FCA 50, (the federal courts enjoy "plenary powers" analogous to the inherent powers of the provincial superior courts); *Canadian Transit Co v Windsor (City),* 2015 FCA 88 [*Canadian Transit*] (the federal courts have the jurisdiction to consider the constitutional doctrines of paramountcy and inter-jurisdictional immunity where they otherwise have jurisdiction).

in adjudicating income tax appeals.[15]

Section 3 of the *FCA* constitutes the Federal Court of Appeal as a court of "law, equity, and admiralty in and for Canada". Equity, it has been held, refers to those principles of law that were administered before 1873 by the Courts of Equity (and mainly the Court of Chancery), rather than any general notion of what is just or fair.[16] Thus, like the Federal Court, and notwithstanding that it is a creature of statute, the Federal Court of Appeal has the power to apply the doctrines of the Court of Chancery where the subject-matter of the dispute is otherwise within its jurisdiction and where equitable principles are applicable to the issue.[17] In *Algonquin Mercantile Corp v Dart Industries Canada Ltd*, the Federal Court Trial Division described this equitable jurisdiction in the following terms:

> [o]nce it has jurisdiction and subject only to any specific statutory provision to the contrary, the Federal Court of Canada may, in determining the issues before it, exercise all of the powers and enforce all of the remedies available to both courts of law and courts of equity. In other words, to dispose of any case before it, it may exercise the same powers and apply the same laws and principles as the Superior Court of the province where the cause of action lies.[18]

In *Apotex Inc v Abbott Laboratories Ltd*,[19] the Ontario Superior Court confirmed that it shared this expansive view of the Federal Court's jurisdiction, rejecting the argument that it could award equitable relief to a party in a patent-based action in circumstances where the Federal Court had denied other patentees exactly the same remedy. [20]

There is a relatively small body of case law shedding light on when the Federal Courts will, and when they will not, apply the rules of equity

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15. *Canadian Transit, supra* note 14 at para 38.
16. *Maplesden v Minister of National Revenue*, [1998] 2 CTC 162 (FCA) at para 27 [*Maplesden*].
17. *Teledyne Industries Inc v Lido Industrial Products Ltd* (1982), 68 CPR (2d) 204 (FC (TD)) at 227 [*Teledyne*]; *Garford Pty v Dywidag Systems International Canada Ltd,* 2010 FC 997 (TD)[*Garford*]. The Exchequer Court of Canada also had an equitable jurisdiction.
18. [1987] 2 FC 373 (TD) [*Algonquin*] at para 78.
19. 2013 ONSC 356.
20. *Ibid* at para 81 [*Apotex*].

to a matter brought before them.[21] In perhaps the earliest case on point, *Teledyne Industries Inc v Lido Industrial Products Ltd*[22] ("*Teledyne*"), the Federal Court considered a claim that it should award prejudgment interest on equitable principles in an accounting of profits for patent infringement under the federal *Patent Act*.[23] Section 40 of the *FCA*, which governed the claim, provided: "[u]nless otherwise ordered by the Court, a judgment … bears interest from the time of giving the judgment". The Federal Court held that this section neither granted nor limited any authority that the court might otherwise possess regarding pre-judgment interest and awarded the equitable relief claimed. According to Justice Addy, the fact that the fundamental right being protected was a statutory right did not remove or vary the "normal requirement" to apply "all relevant equitable principles in determining the nature and the extent of the relief to which the aggrieved party was entitled".[24]

Since *Teledyne*, the equitable jurisdiction of the Federal Courts has manifested (or not manifested) itself in a variety of different ways. The Federal Court of Appeal has invoked its equitable jurisdiction to enforce a party's undertaking to pay damages[25] and to grant a bill of discovery against the Minister of National Revenue in a patent dispute between two corporate parties.[26] In other cases, it has refused to exercise its equitable jurisdiction to hear claims based on unjust enrichment[27] or to vacate a tax assessment on equitable grounds.[28] If there is a common theme in these decisions, it is the court's central concern to determine the

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21. I speak here of the Federal Court and the Federal Court of Appeal. There are, of course, other "small f" federal courts, the extent of whose "equitable jurisdiction" would require separate analysis: see *e.g. Pliskow v Canada*, 2013 TCC 283.
22. *Teledyne, supra* note 17.
23. RSC 1985, c P-4.
24. *Teledyne*, *supra* note 17 at 230.
25. *Algonquin*, *supra* note 18. See also *Beloit Canada Ltée c Valmet-Dominion Inc,* [1997] 3 FC 497 (CA).
26. *Glaxo Wellcome v Canada (Minister of National Revenue)*, [1998] 4 FC 439 (CA) [*Glaxo Wellcome*].
27. *Bédard v Kellogg*, 2007 FC 516 (TD). See also *Garford, supra* note 17.
28. *Maplesden*, *supra* note 16.

interplay between the rules of equity being invoked and the legislative provisions at issue.[29] The Federal Court of Appeal has indicated that it will not shrink from applying an equitable principle simply because of its novelty in Canadian jurisprudence. [30] In cases where statutory and equitable tools overlap, however, the Court is tasked with determining "whether the legislation displaces or precludes resort to the common law or whether, conversely, the common law applies in addition to or in spite of the law set out in the legislation".[31] The legislature is generally presumed not to depart from prevailing law, unless it clearly expresses its intention to do so. However, this general presumption may be rebutted if it is clear the legislature intended to modify equitable rights by enacting a "comprehensive regulation of the matter at issue".[32] "Careful attention" must therefore be paid to the particular law under which jurisdiction is claimed.[33]

The Federal Courts' understanding of when a statutory regime precludes the exercise of their equitable jurisdiction can be illustrated by contrasting two decisions that came to opposite conclusions on the use of equitable tools. In *Garford Pty Ltd v Dywidag Systems International Canada Ltd*[34] ("*Garford*"), a plaintiff sought leave to amend a statement of claim based on section 36 of the federal *Competition Act*,[35] in order to raise ancillary claims sounding in unjust enrichment.[36] Section 36 provided that any person who had suffered loss due to breaches of the *Competition Act* was entitled to sue for "an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding [the cost of any investigation and the proceedings]". Finding that section 36 provided a civil remedy that

29. *Glaxo Wellcome*, *supra* note 26.
30. *Ibid* at para 33.
31. *Ibid* at para 36 citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d (Toronto: Butterworths, 1994) at 298.
32. *Glaxo Wellcome, supra* note 26 at para 36.
33. *Garford*, *supra* note 17 at para 9.
34. *Ibid*.
35. RSC 1985, c C-34.
36. *Garford*, *supra* note 17 at para 3.

limited plaintiffs to the recovery of actual loss or damage, the Federal Court refused to grant the proposed amendment. The court reasoned that either the plaintiff was putting forth a new cause of action, in which case the matter was within provincial jurisdiction, or it was seeking a new remedy, in which case that remedy was outside the terms of section 36.[37] Section 3 of the *FCA* did not assist the plaintiff as that section did not give the Court a "general jurisdiction" to consider equitable claims and remedies in a civil case based on a statutory cause of action.[38]

Garford may be contrasted with *Glaxo Wellcome v Canada (Minister of National Revenue)*[39] ("*Glaxo Wellcome*"), a 1998 decision of the Federal Court of Appeal. In *Glaxo Wellcome*, the appellant sought to obtain from the Minister of National Revenue the names of unlicensed importers of a patented drug that the appellant believed was violating its patent rights. The federal *Customs Act*,[40] which governed the appellant's request, contained three relevant provisions:

- Section 107, which prohibited the Minister from disclosing information collected under the Act "except as authorized under section 108";
- Subsection 108(1), which permitted the Minister to disclose information gathered pursuant to the Act to the Department of National Revenue or "any person" authorized by the Minister;
- Subsection 108(2), which authorized a court of record to order a customs officer to disclose information gathered pursuant to the Act.

When the Minister refused to release the names of the importers to the appellant under subsection 108(1), the appellant petitioned the Federal Court to grant it an equitable remedy "of ancient origin", which would permit the court to order discovery of persons against whom the appellant

37. *Ibid* at para 12.
38. *Ibid* at para 8.
39. *Glaxo Wellcome*, *supra* note 26.
40. RSC 1985, c 1 (2d Supp).

had no cause of action.[41] On appeal, the Federal Court of Appeal agreed to exercise its equitable jurisdiction to provide the remedy sought. The Court reasoned that although Parliament had specifically designated the Minister as the decision-making authority regarding which persons should have access to information collected under the Act, the inclusion of section 108(2) indicated that Parliament did not intend to make the Minister the "sole arbiter of disclosure".[42] The *Customs Act*, in other words, was not "an exhaustive statutory code" which directly or by necessary implication prohibited the courts from incorporating equitable principles or remedies.[43] Based on this reading of the *Act*, the Court exercised its jurisdiction to order an equitable bill of discovery, effectively requiring the Minister to disclose the names of the importers of the patented drug.

It is arguable that, at least in some earlier cases, the Federal Courts exhibited a particular reluctance to exercise their equitable jurisdiction in matters related to tax. In *Maplesden v Minister of National Revenue*[44] ("*Maplesden*"), for example, a taxpayer asked the (then) Federal Court Trial Division to vacate a tax assessment on equitable grounds, arguing that it was Revenue Canada's own erroneous actions that had caused the tax liability to arise. The Court held that it had no authority to grant the relief sought, distinguishing *Teledyne* on the basis of the statutory grant of authority conferred on the Court in that case, and noting that "tax laws were never part" of the regime administered by the English Court of Chancery.[45] One year later,[46] the same court relied on *Maplesden* in refusing to use its equitable jurisdiction to grant restitution to taxpayers in the face of limitations imposed by the *Excise Tax Act*.[47] However, in *Neles Controls Ltd v Canada*,[48] the Federal Court of Appeal brought its position on the exercise of equitable jurisdiction in tax matters in line

41. *Glaxo Wellcome*, *supra* note 26 at para 20.
42. *Ibid* at para 42.
43. *Ibid*.
44. *Maplesden*, *supra* note 16.
45. *Ibid* at paras 27-28.
46. *Federated Co-operatives Ltd v Canada* (1999), 165 FTR 135.
47. RSC 1985, c E-15.
48. 2002 FCA 107.

with *Glaxo Wellcome*, holding that the determining factor in a claim for equitable relief of a tax overpayment was whether it was "precluded by a comprehensive statutory scheme".[49] Even in the tax context, the Court suggested, an exercise of its equitable jurisdiction could be warranted "in situations where the legislation is silent, where it cannot apply, or where a gap in relief is apparent".[50]

III. The Role of Equitable Principles in the Common Law of Charities

If we turn from the general nature of the Federal Courts' equitable jurisdiction to the specific nature of the jurisdiction that Chancery traditionally exercised over charities, we see that the latter jurisdiction had a few central features. On the one hand, equity subjected charitable trusts and corporations to a standard of control and scrutiny even more rigorous than that applied to private trusts.[51] On the other hand, equity treated charities as entitled to "extraordinary favor".[52] Charities were largely exempt from the rule against perpetuities, for example, and the Chancellor would not allow a statute of limitations to bar an action to enforce a charitable use.[53] In recognition of the public interest in charity property, the Court of Chancery also developed a number of curative principles that oriented the court towards the effectuation of charitable gifts. The following section identifies some of these curative principles, explains how they functioned, and points to various places in Canada's

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49. *Ibid* at para 15.
50. *Ibid*.
51. Hubert Picarda, *The Law and Practice Relating to Charities*, 4d (West Sussex: Bloomsbury, 2010) at 528 [Picarda], citing *A-G v Gleg* (1738), Amb 584 (Ch (Eng)); *A-G v The Governors of Sherborne Grammar School* (1854), 18 Beav 256 (Ch (Eng)). See also *A-G v Governors of Harrow School* (1754), 28 ER 351 (Ch), and *Re Devlin's Estate* (1889), 23 LR Ir 516 (Ch)(where the Chancery Court required a charity trustee to swear an affidavit stating how he would exercise his discretion before charity funds were paid out of court).
52. *Jackson v Phillips* (1867), 96 Mass (14 Allen) 539 (USSC) at 550 [*Jackson*].
53. Jones, *supra* note 1 at 18.

registered charity jurisprudence where their exercise might have altered the course of a charitable registration appeal.

A. Benignant Construction

A first equitable principle that distinguishes the law of charities from the broader law of trusts is that a court may give a benignant construction to a document in order to carry into effect a donor's charitable intent. "In regard to the construction of charitable gifts … the rule of widest application is that the court leans in favour of charity".[54] Where a gift is capable of two constructions, one of which would make it void and the other effectual, the latter construction is to be preferred.[55] There are limits to the principle of benignant construction: the court, it is sometimes said, must not "strain a will" to gain money for a charity.[56] Where the terms of a gift permit the trustees to apply the trust fund to charity *or* some other non-charitable purpose, the gift may be found too uncertain to be valid. Even in such circumstances, however, courts of equity have sometimes saved an unfortunately worded gift, construing the word 'or' conjunctively on the basis of either the *ejusdem generis* principle, benignant construction, or the testator's charitable intent.[57]

The Canadian courts have occasionally applied the principle of benignant construction to save a charitable gift. A leading authority is *Jones v T. Eaton Co*[58] ("*Jones*"), a case which concerned the validity of a bequest to the Eaton Company's executive officers "to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their

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54. Jean Warburton et al, *Tudor on Charities* 9d (London: Sweet & Maxwell, 2003) at 175 [Warburton].
55. *Inland Revenue Commissioners v McMullen*, [1979] 1 All ER 588 (CA (Civ)) citing *Houston v Burns*, [1918] AC 337 (HL) at 341-42 and *Re Bain, Public Trustee v Ross*, [1930] 1 Ch 224 (CA (Eng)) at 230. See also *Bruce v Presbytery of Deer* (1867), LR 1 SC 96 (HL) at 97.
56. Warburton, *supra* note 54 at 176, citing *Dolan v Macdermot* (1868), LR 3 Ch 676 (Eng) at 678.
57. Picarda, *supra* note 51 at 330-31.
58. [1973] SCR 635.

absolute discretion may decide".[59] Before the Supreme Court of Canada, the argument focused on whether the word "or" must be interpreted disjunctively or conjunctively, and whether the word "deserving" was too vague to communicate a charitable intent. The Court found it unnecessary to deal with the first argument, but upheld the validity of the trust on the basis that the testator was expressing a charitable intent when he used the word "deserving".[60] Citing English authority for the principle that charitable bequests must receive a benignant construction, the Court held that in the context of the bequest, the word "deserving" must be understood to refer to a person "who although not actually poverty-stricken was nevertheless in a state of financial depression".[61] On the strength of this construction, a unanimous Court concluded that the disputed bequest was a valid charitable trust.

If the Supreme Court of Canada has invoked the principle of benignant construction in construing the terms of an allegedly charitable bequest, it has been more equivocal on the role of the equitable principle in construing allegedly charitable objects for purposes of the registered charity regime. This is the conclusion that must be drawn from *Vancouver Society*, where the Court was called upon to determine whether the purposes and activities of the Vancouver Society of Immigrant and Visible Minority Women were charitable so as to qualify the organization for charitable registration under the *ITA*. The objects of the Society included, *inter alia*:

> (a) to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment ...; and
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> (e) to provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.[62]

The Supreme Court of Canada held that object (a) was charitable, a

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59. *Ibid* at 637.
60. *Ibid* at 642.
61. *Ibid* at 646.
62. *Vancouver Society*, *supra* note 7 at paras 129-35.

conclusion that was only made possible by the Court's bold expansion of the educational head of charity to include more informal training initiatives aimed at teaching necessary and practical life skills.[63] However, the appellant's case fell on object (e), with a majority of the Court concluding that the inclusion of the words "or conducive" placed the Society as a whole "outside the scope of legal charity".[64]

Vancouver Society provides a dramatic illustration of the potential for the rules of equity to influence the outcome of charitable registration appeals. The Supreme Court of Canada's majority and dissenting judgments ran, together, for over 200 paragraphs, addressing a number of difficult and substantive questions regarding the scope of the registered charities regime. Nevertheless, the issue on which the majority and dissenting judges ultimately split was the proper construction of the Society's final object. Justice Gonthier, while not explicitly invoking the principle of benignant construction, appeared to rely on it in spirit. Writing in dissent, he found that the "obvious intent" of the drafter of object (e) was to provide a mechanism by which the Society's main (and charitable) purpose could be achieved.[65] Moreover, Gonthier J stated, based on the Court's decision in *Jones,* it would be erroneous to simply assume that the term "or" should be interpreted disjunctively in construing an allegedly charitable object.[66] Finally, Gonthier J noted that in an earlier case, the Supreme Court of Canada had affirmed the validity of an association constituted to do things "incidental or conducive" to the attainment of its charitable objects.[67] The conclusion that begged to be drawn was that the language raised no concerns.[68]

The majority judges evaluated the Society's final object through a far less benignant lens. Writing for the majority, Justice Iacobucci opined that while doing things "incidental" to the attainment of charitable purposes could safely be treated as a means of fulfillment of those

63. *Ibid* at paras 166-74.
64. *Ibid* at para 116.
65. *Ibid* at para 118.
66. *Ibid* at para 119.
67. *Ibid* at para 120.
68. *Ibid* at paras 117-21.

purposes, the term "conducive" implied only that the action *contributed* to that result.[69] Based on this reading of object (e), and bolstered by his view that the Society had previously carried out non-charitable activities that would be covered by the word "conducive", Iacobucci J concluded that the Society could not be classified as a charitable organization.[70] It was an odd end to the *Vancouver Society* story, particularly as no party had raised an objection to object (e) in either written or oral argument.[71] As the decision stands, however, the majority's actual construction of object (e) sits in tension with its earlier endorsement of relying on equitable principles to determine charitable status under the *ITA*. This tension goes some way in explaining why the Federal Court of Appeal has not mentioned the principle of benignant construction in the twenty-odd charitable registration appeals it has decided since.[72]

B. Presumption of Lawful Trustee Behaviour

A second equitable principle that tends towards the effectuation of charitable gifts is closely related to the first. Where the terms of an

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69. *Ibid* at para 193.
70. *Ibid* at para 195.
71. See *ibid* at para 116, per Gonthier J. The Supreme Court of Canada has since confirmed that an appellate court may only raise new issues on its own initiative when failing to do so would risk an injustice: see *R v Mian*, 2014 SCC 54 at para 41; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 26.
72. The registered charities jurisprudence contains a singular, passing reference to the principle of benignant construction. In *Vancouver Regional FreeNet, supra* note 6, Justice Décary in dissent described the majority of the Federal Court of Appeal as having "applied a benignant construction" in construing the Native Communications Society's "deficient constituting document" as charitable at para 42. It does seem likely that the Court implicitly relied on the equitable principle in *Native Communications*, one of the few successful charitable registration appeals. In recent years, however, the Federal Court of Appeal has neither relied upon nor rejected the equitable principle. The Supreme Court of Canada did not address benignant construction in the *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42 [*AYSA*] decision, but arguably construed the appellant's objects strictly at para 41.

otherwise charitable trust allow for the possibility of improper action, equity allows the court to presume that the trustees will act in a lawful and appropriate way.[73] In *McGovern v A-G*,[74] Justice Slade applied this presumption in support of his conclusion, in *obiter dicta*, that a trust for the undertaking and dissemination of research into the maintenance and observance of human rights would be a valid charitable trust.[75] The "mere theoretical possibility" that trustees might implement these objects in a political manner would not render them non-charitable, Slade J held, as the clauses would be entitled to a benignant construction and "to the presumption … that the trustees would only act in a lawful and proper manner appropriate to the trustees of a charity and not, for example, by the propagation of tendentious political opinions".[76] In *Re Koeppler's Will Trusts*,[77] the English Court of Appeal relied on this presumption of lawful trustee behaviour in upholding a gift for the furtherance of potentially political work.[78]

Equity's presumption of lawful trustee behavior is not irrefutable; in cases where it is unclear whether an organization's objects are exclusively charitable and trustees have acted pursuant to those purposes, extrinsic evidence of those acts is admissible for purposes of clarifying the charitable nature of the enterprise.[79] However, the Federal Court of Appeal has not allowed applicants for registered charity status to benefit from the presumption of lawful trustee behaviour, even absent any

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73. Warburton, *supra* note 54 at 175-76; Peter Luxton, *The Law of Charities* (Oxford: Oxford University Press, 2001) at 205 [Luxton].
74. *McGovern v A-G*, [1982] Ch 321 (CA)(Eng)).
75. *Ibid*.
76. *Ibid* at 353, 346 (the court should infer that trustees will act lawfully and only use means appropriate to the trustees of the charity). See also, *Southwood and Parsons v AG* [1998] EWHC Ch 297 at para 15.
77. [1986] Ch 423 (CA (Civ)(Eng)).
78. *Ibid* at 438. The gift was for the furtherance of the Wilton Park project which organized and conducted conferences on a wide variety of topics, some of which, the Court acknowledged, had a political flavour.
79. *Guaranty Trust Co of Canada v Minister of National Revenue*, [1967] SCR 133. See also, Warburton, *supra* note 54.

evidence of improper acts. In *Travel Just v Canada (Revenue Agency)*,[80] for example, the Federal Court of Appeal considered the appeal of a not-for-profit corporation that had not carried out any activities or even accrued any funds before unsuccessfully applying to the Minister for charitable registration.[81] The objects of the organization included the creation and development of "model tourism development projects that contribute to the realization of international human rights and environmental norms".[82] In rejecting this object as excessively broad and vague, the Court stated that the development of such model tourism development projects *could* include "the financing and operation of luxury holiday resorts in developing countries".[83] The Court implied that this would be an unlawful or at least inappropriate usage of charity funds, but did not address the appellant's argument that it was entitled to the presumption that its trustees would not use the funds in this way.[84] In the result, despite the absence of any evidence of improper trustee behavior, the organization's appeal was dismissed.

C. Resolution of Technical Defects

A third equitable principle that tends towards the effectuation of charitable gifts authorizes the court to perfect an otherwise charitable transfer that suffers from a technical defect.[85] As Lord Eldon stated in *Moggridge v Thackwell*[86] ("*Moggridge*"):

> if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity: but, if the substantial intention is charity, the law will substitute

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80. 2006 FCA 343 [*Travel Just*].
81. *Ibid*.
82. *Ibid* at para 9.
83. *Ibid* at para 6.
84. *Travel Just,* Factum of the Appellant at para 39. I was involved in the preparation of the appellant's factum.
85. Jones, *supra* note 1 at 60-68, 80. It was originally thought that this jurisdiction flowed from the preamble of the 1601 Statute, but by the late 17th century it was accepted that imperfect transfers could be perfected in Chancery, even if the proceedings were brought by bill or information.
86. (1803), 7 Ves 36 (Ch (Eng)).

> another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.[87]

A court of equity may intervene to perfect an otherwise charitable transfer where a donor's directions are indefinite, ambiguous, or insufficient. It may also intervene where the prescribed manner of carrying out the donor's general charitable intention is *illegal*.[88] In *Re Bradwell*,[89] for example, the Court of Chancery considered a contested bequest with a direction to accumulate income and apply the proceeds of the accumulation to the benefit of Wesleyan ministers. The direction was in plain violation of the governing property law statute. Nevertheless, the Court of Chancery rejected the argument that the bequest was invalid. As the testator had expressed his intention that his estate "be, in substance, applied for charitable purposes," the Court held that the fact that he had chosen an illegal mode for effecting those purposes should not undermine the bequest.[90] The function of a court of equity in such circumstances was not to declare the gift invalid, but rather to carry the testator's charitable intention into effect through an administrative or *cy-près* scheme.

Canadian case law includes several examples of superior courts exercising the curative power described in *Moggridge*. Most often it has been invoked to effectuate indefinite or ambiguous gifts, such as a bequest "to the work of the Lord".[91] In recent years, however, at least one provincial superior court has relied on its scheme-making powers to bring a charitable trust into conformity with the rules of the registered charity regime. In *Toronto Aged Men's and Women's Homes v Loyal True Blue and*

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87. *Ibid* at 69.
88. A gift will fail if the general intention is illegal or contrary to public policy. However, if it is evident that the donor had a general charitable intention, but the prescribed manner of carrying of the intention is illegal, the court will execute the gift cy-pres; see Picarda*, supra* note 51 at 450-51.
89. [1952] Ch 575 (Eng)) [*Bradwell*].
90. *Ibid* at 579-80.
91. See *e.g. Re Brooks Estate* (1969), 4 DLR (3d) 694 (Sask QB). See also *Re Leslie*, [1940] OWN 345 (SC) and *Phelps v Lord,* [1894] 25 OR 259.

Orange Home,[92] the testatrix had created an endowment under which the trustees were to retain the capital of the residue, while distributing the income to charitable beneficiaries.[93] The trust was subsequently registered as a private foundation under the *ITA*, which placed upon the trust a requirement to disburse annually an amount equal to at least 4.5% of the fair market value of its property.[94] Since the trustees had no power to encroach on the capital of the residue, they were in a difficult position: compliance with the *ITA* would require them to breach their trust, while a failure to comply would entitle the Minister of Customs and Revenue to revoke the trust's charitable registration and render it liable to a ruinous revocation tax. In these circumstances, the court had "no real concern" with exercising its equitable jurisdiction to declare the trust "impracticable" and to order a *cy-près* scheme that expanded the investment and distribution powers of the trustees.[95]

Assuming that the Federal Court of Appeal has all the same equitable powers as the superior courts with respect to disputes within its jurisdiction, it has never followed the Ontario Superior Court in exercising a scheme-making power to bring an imperfect applicant for registered charity status into conformity with the *ITA*. One applicant for registered charity status that might have benefited from such an exercise of the Court's equitable jurisdiction is the Fuaran Foundation, a religious not-for-profit society that appealed a negative registration decision in 2004.[96] The Minister of National Revenue had refused to register the Foundation as a charitable organization on the ground that its objects permitted the distribution of resources to persons who were not "qualified donees" under the *ITA*. The constitution of the Foundation provided, in relevant part:

> [t]he objects and purposes of the Foundation are to advance the Christian Religion and to advance education by undertaking programs and projects in pursuit of its purposes as are exclusively charitable at law by … (a) providing financial assistance for the establishment and continued support of individual

92. (2003), 68 OR (3d) 777 (SupCtJ).
93. *Ibid*.
94. *Ibid* at para 14.
95. *Ibid* at para 15.
96. *Fuaran Foundation v Canada (Customs and Revenue Agency)*, 2004 FCA 181 [*Fuaran Foundation*].

> Christians and Christian organizations engaged worldwide in [Christian teaching and poverty relief.][97]

In presenting its case for charitable registration, the society submitted that its constitution "clearly and expressly" limited the discretion of its trustees to the carrying out of projects that were exclusively charitable at law.[98] The Fuaran Foundation also invoked the principle of benignant construction and offered to specifically undertake that its directors would only donate to "qualified donees" as the *ITA* required.[99] Nevertheless, the Federal Court of Appeal upheld the Minister's refusal to register the society on the ground that the language of the constitution was broad enough to allow the trustees to undertake "non-charitable activities" under the *ITA*, including the provision of financial assistance to non-qualified donees.[100] Neither the parties nor the court appeared to consider whether the Federal Court of Appeal might invoke the scheme-making powers of the Court of Chancery to affirm the validity of the charity and to cure its illegal mode.[101]

IV. Is it Appropriate to Invoke Equitable Doctrines in the Application of the Registered Charity Regime?

In Part II of this work, I argued that, subject to any specific statutory provision to the contrary, the Federal Court of Appeal has the authority to exercise all of the equitable powers of the Court of Chancery in determining matters properly before it. In Part III, I described some of the specific doctrines and powers that characterized the Chancery jurisdiction over charities. I identified places in the registered charity jurisprudence where those tools were conspicuously absent and explored how those absences contributed to the negative resolution of each charitable registration appeal. The question that remains is whether the Federal Court of Appeal

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97. *Ibid* at para 6.
98. *Fuaran Foundation,* Factum of the Appellant at paras 45 and 53.
99. *Ibid* at para 10.
100. *Fuaran Foundation, supra* note 96 at para 6.
101. *Ibid* at para 11.

should actually apply these curative doctrines in determining whether an organization's purposes and activities are exclusively charitable under the *ITA*. Despite *Vancouver Society*'s suggestion that a court's determination of registered charity status is an exercise of its equitable jurisdiction in matters of charity, such application would clearly be a departure from the *status quo.* In the final part of this piece, I address some of the arguments in favour of having the Federal Court of Appeal act as a court of equity in the adjudication of charitable registration appeals, as well as some of the possible objections to that position.

A. The "Moving" Nature of Charity Law

For those concerned about the Canadian law of charities having long since ceased to be the "moving subject" described by Lord Wilberforce,[102] there are several compelling arguments for having the Federal Court of Appeal apply the traditional doctrines of the Court of Chancery in the adjudication of charitable registration appeals. A first is that it might give applicants for registered charity status a fighting chance in challenging the decisions of the Minister. With no not-for-profit organization having won a charitable registration appeal in almost twenty years, and even *Vancouver Society* having been lost on the basis of the strict construction of an ancillary object, unsuccessful applicants for registered charity status are today generally being advised to surrender or reconstitute themselves, rather than appeal even questionable revenue decisions. This trend is evidenced by the steady decrease in the number of charitable registration appeals that have been brought in recent years.[103]

Less litigation is not, of course, problematic in itself. However, the cumulative result of the dramatic record of losses at the Federal Court of Appeal has arguably been the near eradication, in Canada, of the common law method of developing the legal definition of charity by judicial

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102. *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*, [1968] AC 138 (HL).

103. From 1999 to 2008, 13 different organizations appealed negative registration decisions to the Federal Court – an average of more than one appeal per year. Betweem 2009 and the time of writing, there had only been four charitable registration appeals.

analogy. The recent charitable registration decisions of the Federal Court of Appeal can scarcely claim to be charity law decisions at all, so brief are their reasons and so fleeting their allusions to the appellants' disputed objects.[104] For a jurisdiction with no statutory definition of charity, the effect of this trend is to tether the concept of charity ever more rigidly to a dated body of English case law. In addition to causing frustration for not-for-profit litigants, the disappearance of the common law analogical method is at odds with the apparent design of the registered charity regime. In *Vancouver Society,* Gonthier J described that regime as a signal of Parliament's acceptance that the courts "have a continuing role to play" in keeping the definition of charity in tune with social and economic developments.[105] If we accept that analysis, we may regard the current trend not only as a loss to the sector, but as a subversion of Parliamentary intent.

B. Federal-Provincial Consistency

A second principal argument in favour of having the Federal Court of Appeal exercise the curative powers of equity in charitable registration appeals is that such exercise would better align the federal charities jurisprudence with the charity law of the provinces. Based on the comments of certain members of the Supreme Court of Canada, it is arguably an open question whether there is still a single "common law of charities" in Canada or whether the field is split between the common law of the provinces and the "common law" of the federal courts.[106] The majority decision in *Vancouver Society* supports the better view that the

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104. See *Humanics Institute v Minister of National Revenue*, 2014 FCA 265; *World Job and Food Bank Inc v R*, 2013 FCA 65 and *Sagkeeng Memorial Arena Inc v Minister of National Revenue*, 2012 FCA 171.
105. *Vancouver Society*, *supra* note 7 at para 28, per Gonthier J (The Supreme Court of Canada has subsequently stated that the scheme of the *ITA* "does not support a wide expansion of the definition of charity" and that "wholesale reform" is best left to Parliament, but it has not denied this continuing role); see *AYSA*, *supra* note 72 at paras 43-44.
106. *Vancouver Society*, *supra* note 7 at para 28, per Gonthier J. See also *AYSA*, *supra* note 72.

Federal Court of Appeal draws upon and contributes to a single equitable tradition that was received by the provinces from England when it interprets the statutory term "charitable" under the *ITA.*[107] If this is the case, it follows that the federal and provincial courts should rely on the same equitable principles in developing this body of law. If, on the other hand, there are effectively two common laws of charity in Canada, it is nonetheless the case that each of these bodies of law tends to influence each other.[108] In either case, therefore, it must be considered preferable that the same body of equitable principles apply throughout.

C. Equity and Charitable Corporations

If there are compelling arguments in favour of having the Federal Court of Appeal act as a court of equity in the adjudication of charitable registration appeals, there are also predictable objections to this approach. A first is that the majority of applicants for registered charity status are corporations rather than trusts. To the extent that this objection reflects a view that corporate charities fell outside the traditional jurisdiction of the courts of equity, it can be dealt with in short order. While Chancery's jurisdiction over charities tends to be portrayed as a branch of its inherent jurisdiction over trusts,[109] and the two jurisdictions undoubtedly overlap,

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107. For a discussion, see Kathryn Chan, "Taxing Charities/Imposer les Organismes de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law" (2007) 55 Canadian Tax Journal 481.
108. There are a number of provincial charity law decisions, for instance, that have relied on *Vancouver Society*: these include *Re TLC The Land Conservancy of British Columbia Inc No S36826*, 2014 BCSC 97 at paras 221-26; *Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 (SC) at paras 28, 29; *Save the Heritage Simpson Covenant Society v Kelowna (City)*, 2008 BCSC 1084 at paras 112, 113, 115; *Chénier v Canada (Attorney General)* (2005), 12 CBR (5th) 173 (Ont Sup Ct J) at para 47; and *Alberta Assn for Community Living v Alberta (Municipal Government Board)*, 2000 ABQB 263 at para 29.
109. Picarda, *supra* note 51 at 729, noting that the 8th edition of Warburton suggested that the inherent jurisdiction depended exclusively on the existence of a trust. See also *Construction Industry Training Board v A-G*, [1973] Ch 173 (CA (Civ)(Eng)) at 176.

the judicial power to cure uncertain and defective charitable dispositions predates the legal form of the trust and was historically applied by the Chancellor to a variety of charitable vehicles.[110] Because of the manifest authority of the Crown, the Court of Chancery admittedly had a very limited authority to administer charitable corporations founded by statute or Royal Charter.[111] That being said, the court would intervene in the administration of a charitable corporation where there was no other person to ensure that the charitable funds were being properly managed or where it could find within the corporate structure a trust upon which its authority could be based.[112] Modern Canadian courts have confirmed that, because of the trust-like obligations of corporate charities, "the court maintains its supervisory scheme-making power whether a charity's legal form is as a charitable trust or a charitable corporation".[113] Thus, there is little merit in the argument that the Federal Court of Appeal has no equitable jurisdiction over charitable corporations *per se.*[114]

A more challenging question is whether the principle that the court leans in favour of charity extends to the construction of corporate documents or whether it applies only where a disposition of property would otherwise be void. Several English cases have considered this question but the case law does not provide a unanimous response. In *Inland Revenue Commissioners v Oldham Training and Enterprise Council*[115] ("*Oldham*"),

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110. Jones, *supra* note 1 at 5, 59, 80. See also Marion R Fremont-Smith, *Foundations and Government: State and Federal Law and Supervision* (New York: Russell Sage Foundation, 1965) at 17.
111. Warburton, *supra* note 54 at 131, 371-73.
112. For a more detailed explanation of the court's historical jurisdiction over charitable corporations, see Maurice Cullity, "The Charitable Corporation: a 'Bastard' Legal Form Revisited" (2001) 17 The Philanthropist 17 at 19-23. See also Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Bloomsbury, 2016) at ch 2.
113. *Re Christian Brothers of Ireland in Canada* (2000), 184 DLR (4th) 445 (Ont CA) at para 71. This is to ensure that gifts made with charitable intent will not fail even if the object of the gift is unclear or uncertain, or contains a technical defect.
114. *Ibid*.
115. [1996] STC 1218 (Ch (CA)(Eng)) [*Oldham*].

the Chancery Division of the High Court refused to bring the principle of benignant construction in aid of a not-for-profit company that sought to benefit from an exemption available to charities under the applicable UK legislation. Justice Lightman opined that so far as he could see, the principle "only applies where a provision or a gift will be held void and fail unless held charitable … I cannot see how this principle has any application where the validity of the provision or gift is not affected by the determination whether the gift is charitable or not".[116] However, in the earlier case of *Guild v Inland Revenue Commissioners*[117] ("*Guild*"), the House of Lords had no hesitation in applying the doctrine of benignant construction in circumstances where the validity of the disposition was not in issue.[118] The First-Tier Tribunal acknowledged these competing approaches in the recent *Human Dignity Trust v The Charity Commission For England and Wales*[119] decision, but found it "unnecessary in the circumstances" to comment on the availability of benignant construction to a corporate body seeking charitable status.[120] However, a benignant approach has been taken with regards to statutory corporations in other jurisdictions.[121] Given the scope of the traditional Chancery jurisdiction and the strange consequences that might arise from having different rules of construction for different types of charitable institutions, the better argument seems to be that the favourable posture towards charity should extend to all charities, regardless of form.[122]

D. Equity and Tax

Another set of objections to having the Federal Court of Appeal apply the tools of equity in adjudicating charitable registration appeals relate to the particular statutory context in which that adjudication takes

116. *Ibid* at 1235.
117. [1992] 2 AC 310 (HL) [*Guild*].
118. *Ibid* at 316.
119. [2014] UK First Tier Tribunal 2013_0013_B (General Regulatory Chamber).
120. *Ibid* at paras 18, 19, 29.
121. *CIR v Medical Council of NZ*, [1997] 2 NZLR 297 (CA) at 318.
122. Luxton, *supra* note 73 at 204.

place. Within the context of the *ITA*, the Court's determination that an appellant's purposes and activities are exclusively charitable results in the appellant being subject to both the significant tax advantages and the significant regulatory burdens of registered charity status.[123] It also results in the overturning of a decision of the Minister of National Revenue. In these circumstances, two questions must be considered. First, as a general matter, do the curative principles of equity apply where an allegedly charitable instrument is being construed for tax purposes? Second, in the specific context of the registered charity regime, has Parliament precluded resort to the rules of equity by enacting a comprehensive code?

With regard to the general question, we may once again seek guidance from the conflicting decisions of the English courts. In *Oldham,* the High Court refused to apply the principle of benignant construction to a party seeking a charitable tax exemption on the ground that the favourable rules of equity were only applicable where the gift would be otherwise void. However, the House of Lords espoused a different approach in *Guild*. Guild was the executor of the estate of one James Russell, a man who bequeathed part of his estate to a town council "for the use in connection with the sports centre in New Berwick or some similar purpose in connection with sport". The Inner House of the Court of Session approved a *cy-près* scheme in connection with the bequest, but the Inland Revenue subsequently ruled that the property had not been "given to charities" for purposes of a capital transfer tax exemption[124] under the *Finance Act 1975*.[125]

Before the House of Lords, the argument focused on whether the sports centre qualified as a charity under the *Recreational Charities Act 1958*,[126] and whether the second branch of the bequest, referring to

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123. Canadian courts have tended to emphasize the benefits rather than the burdens of regulatory status: see, for example, *Vancouver Society, supra* note 7 at para 128. However, the burdens are also significant: see generally Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013).
124. *Guild*, *supra* note 117 at 317.
125. (UK), c 7, Sch. 6, s 10.
126. (UK), c 17 6, s 1.

"some similar purpose in connection with sport", was so widely expressed as to admit of the funds being applied in a manner inconsistent with that legislation.[127] The executor urged the court to apply a benignant construction to the bequest, while the commissioners argued that a benignant construction should not be applied, "since the question was not whether the trust was valid or invalid, but whether it qualified for exemption from tax".[128] The House of Lords favoured the executor's approach, holding:

> the importation into [Scottish] law, for tax purposes of the technical English law of charities involves that a Scottish judge should approach any question of construction arising out of the language used in the relevant instrument in the same manner as would an English judge who had to consider its validity as a charitable gift. The English judge would adopt the benignant approach in setting about that task, and so the Scottish judge dealing with the tax consequences should do likewise.[129]

Adopting a benignant construction, the House of Lords concluded that the testator's intention had been that any "similar purpose" to which the town council might apply his bequest should display the characteristics that qualified the first bequest as a charity.[130] Both bequests had therefore been "given to charities" for purposes of the taxation regime.

Taken together with the Supreme Court of Canada's comments in *Vancouver Society*, *Guild* provides a persuasive argument that, as a general matter, the Federal Court of Appeal should approach the construction of purportedly charitable instruments in the same manner as would a Chancery judge considering the validity of charitable gifts, regardless of the tax consequences of the decision. Parliament retains the power to preclude or modify such an equitable approach, as we have seen, by creating a "comprehensive regulation" for charitable registration and its associated appeals.[131] The Supreme Court of Canada implied in *Vancouver Society* that Parliament had not done this, and that the *ITA* envisaged a resort to "the common law" and "the equitable jurisdiction"

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127. *Guild, supra* note 117 at 317.
128. *Ibid* at 322.
129. *Ibid* at 323.
130. *Ibid*.
131. *Glaxo Wellcome*, *supra* note 26 at para 36.

for the principles that should guide the court in applying the definition of charity.[132] The question that remains is whether subsequent statutory changes have so transformed the registered charity regime as to prohibit the Federal Court of Appeal from invoking the curative doctrines of equity in adjudicating charitable registration appeals.

The statutory framework governing the charitable registration process has not undergone radical changes since *Vancouver Society* was decided in 1999. The Minister of National Revenue's authority to register qualified organizations continues to flow from subsection 248(1) of the *ITA*, which defines a "registered charity" (*organisme de bienfaisance enregistré*) as:

> [a] charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1) [or a branch thereof], that is registered in Canada and was either created or established in Canada…that has applied to the Minister in prescribed form and that is at that time registered as a charitable organization, private foundation or public foundation.
>
> L'organisme suivant, qui a présenté au ministre une demande d'enregistrement sur formulaire prescrit et qui est enregistré, au moment considéré, comme oeuvre de bienfaisance, comme fondation privée ou comme fondation publique … au sens du paragraphe 149.1(1), qui réside au Canada et qui y a été constituée ou y est établie.

The subsection 149.1(1) definitions of a "charitable organization" and "charitable foundation" continue to rely heavily on the largely undefined concepts of "charitable purposes" (*fins de bienfaisance*) and "charitable activities" *(activités de bienfaisance*).[133] If the Minister decides that an applicant for registered charity status does not meet the criteria for registration under 149.1(1), an appeal lies from that decision to the

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132. *Vancouver Society*, *supra* note 7 at para 28. In 2007, the SCC also rejected the argument that the Registered Canadian Amateur Athletic Associations regime was a complete code for amateur sporting activities, or that it indicated an intent to modify the meaning of charity under the *ITA*: See *AYSA*, *supra* note 72 at para 23.

133. Subsection 149.1(1) also requires that no part of the income of either entity be available for the personal benefit of any proprietor, member, shareholder, trustee or settlor*: ITA*, *supra* note 4, at s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*) and "charitable foundation" (*fondation de bienfaisance*).

Federal Court of Appeal.[134]

Within this largely similar framework, one may identify two statutory changes that arguably signal a slight shifting away from the regime's traditional reliance on the charity law tradition of the Chancery court. First, Parliament has recently provided slightly more direction on what purposes and activities are charitable under the *ITA*, primarily by clarifying that it is not a "charitable purpose" to fund the political activities of another charity.[135] This amendment achieves a minor narrowing of the legislative gaps that have historically been filled in by the common law of charities, but is a long way from filling them in completely. Second, Parliament has introduced an internal appeals process for charitable registration decisions, requiring persons who want to appeal a failed application for registered charity status to first serve a written notice of objection on the Minister, and giving the Minister 90 days to respond.[136] This amendment has, to some extent, shifted decision-making authority over registered charity status away from the Federal Court of Appeal, and towards an administrative unit that has no equitable powers of its own.[137] Nevertheless, the Federal Court of Appeal continues to be vested with sole authority to hear appeals of the Minister's decision, and to review "extricable questions of law", such as the proper approach to the construction of charitable objects on the standard of correctness.[138] While both of these amendments move the registered charity regime some way

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134. This is the combined effect of *ITA*, *supra* note 4, at ss 149.1(22), 168(4), 172(3)(a.1).
135. As per s 149.1(1) of the *ITA*, "'charitable purposes' includes the disbursement of funds to a qualified donee, other than a gift the making of which is a political activity." This definition was introduced in 2012, in Bill C-38, *Jobs, Growth, and Long-term Prosperity Act*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012), RSC 2012 c 19.
136. *ITA*, *supra* note 4, at s 172(3)(a.1).
137. For a description of the motivation for s 168(4), see Terrance S Carter and Theresa LM Man, "March 2004 Federal Budget Rewrites Tax Rules for Charities" Charity Law Bulletin No. 41 at 1, online: <www.carters.ca/pub/bulletin/charity/2004/chylb41-04.pdf>.
138. *Prescient Foundation v Minister of National Revenue*, 2013 FCA 120 at para 12.

towards being a more comprehensive regime, therefore, neither provides a basis to presume that Parliament intended to preclude the application of equitable principles and doctrines in the determination of charitable registration appeals.

V. Conclusion

The equitable principles and doctrines that make up the common law charities tradition were, to a large extent, developed by the Court of Chancery in order to mitigate the rigour of the law and effectuate imperfect charitable gifts.[139] As the epicenter of Canadian charity law has shifted from the trust law to the tax law domain, the curative principles of equity have all but disappeared from view. The exclusion of these equitable principles from the registered charity jurisprudence has had a discernable impact on the development of charity law in Canada and has contributed to the dramatic record of failed appeals from the registration decisions of the Minister of National Revenue.

I have argued that the Federal Court of Appeal has the authority to exercise the curative powers of the Court of Chancery in determining charitable registration appeals under subsection 172(3) of the *ITA* and that there are compelling reasons for it to do so in an appropriate case. The most likely objections to the Federal Court of Appeal acting as a court of equity — that the appellants are corporations, that the Court's decisions have tax consequences and that the registered charity regime precludes such exercise — are far less potent than a first glance would admit. There remain reasons to be cautious about the exercise of equitable powers within the registered charity regime — especially where tax consequences are in issue, the public has an interest in the construction of purportedly charitable objects not being "strained". However, Parliament has signaled

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139. Equity, it is often said, "was introduced to mitigate the rigour of the law": see *Re Vandervell's Trusts (No 2)*, [1974] Ch 269 (CA (Civ)(Eng)) at 322, cited in The Hon BM McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective," in DWM Waters, ed, *Equity, Fiduciaries and Trusts* (Scarborough: Carswell, 1993) at 39.

through the *ITA* that the Federal Court of Appeal has a continuing role to play in developing and rationalizing the law of charity in Canada. If the Court refuses to allow a role for equity in mitigating the rigour of its decisions, that role may effectively disappear.