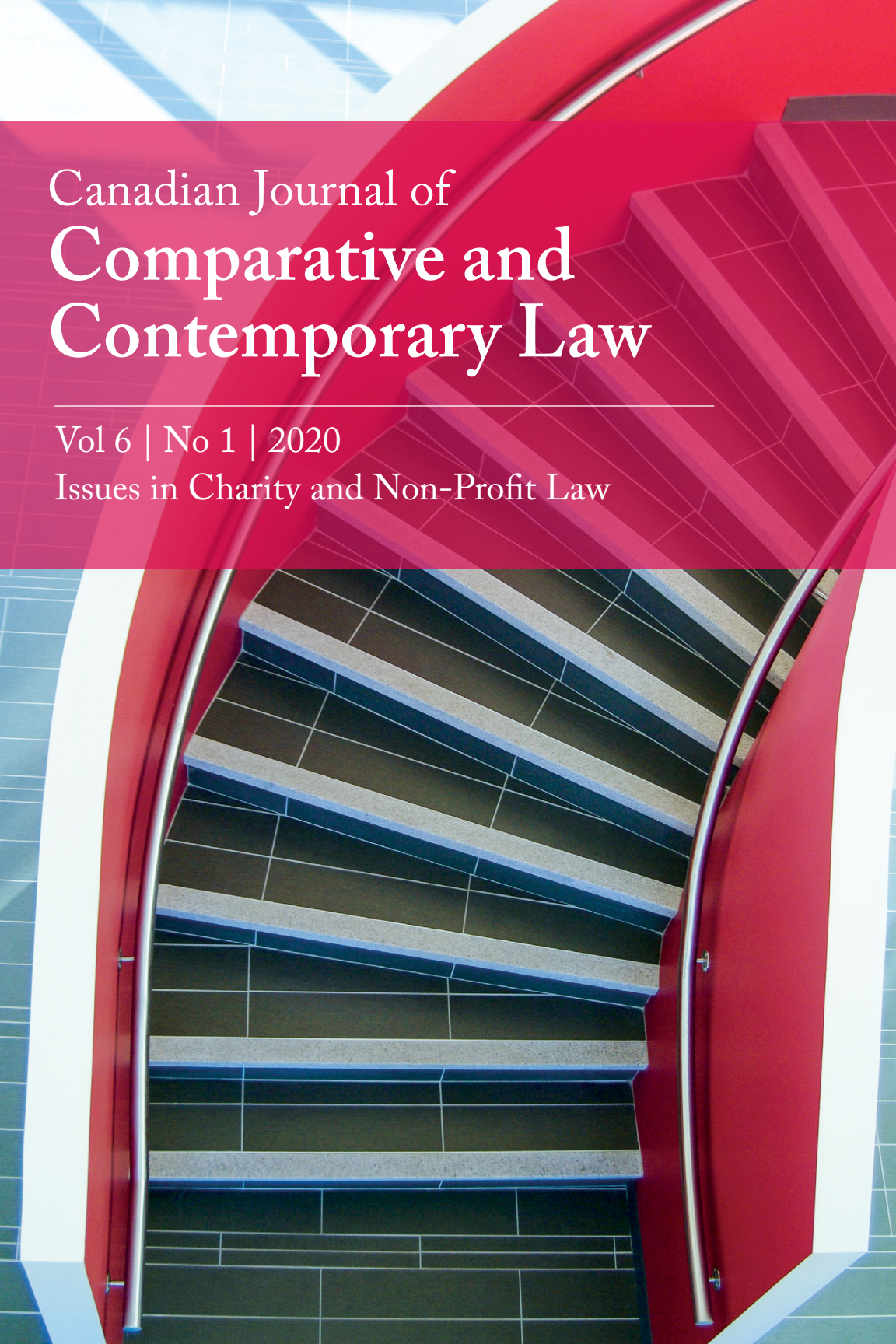

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The front cover depicts the main stairwell that leads to the atrium of Thompson Rivers University, Faculty of Law. The back cover depicts the distinct exterior of the Faculty of Law. The curved design of the roof was inspired by the natural beauty of the mountains visible from the building.

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Articles

Advocacy by Charities: What is the Question?

Susan Barker*

"There are no right answers to wrong questions." - Ursula K Le Guin

Despite the decision of the Supreme Court of New Zealand in Re Greenpeace of New Zealand Incorporated, *the issue of advocacy by charities remains unsettled in New Zealand, with at least three cases awaiting determination by the New Zealand courts at the time of writing.*

This article seeks to examine the questions that decision-makers should be asking themselves when considering the issue of advocacy by charities. First, the article considers the legal position prior to the Charities Act 2005, *and concludes that New Zealand charities were able to undertake unlimited non-partisan advocacy in furtherance of their stated charitable purposes. The article then considers whether that position was changed by the* Charities Act, *or by the Supreme Court decision, and concludes that it was not.*

The article then argues that current government interpretations of the Supreme Court decision that require charities to demonstrate public benefit in all of their activities are resulting in a framework in New Zealand that is complex, highly subjective and unworkable in practice. Provided the advocacy is not partisan and complies with other general legal restrictions on speech, charities should be free to advocate for their charitable purposes as they see fit, without undue government interference.

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I. Introduction

The decision of the New Zealand Supreme Court in *Re Greenpeace of New Zealand Inc*[1] was heralded as a victory for charities, ostensibly correcting an unduly strict approach, to the issue of advocacy by charities, that had been taken by the agencies responsible for administering New Zealand's charities' legislation (first, the Charities Commission, and then the Department of Internal Affairs — Charities Services *Ngā Rātonga Kaupapa Atawhai* ("Charities Services") and the Charities Registration Board (the "Board"), collectively referred to below for convenience as "Charities Services").

However, in practice, Charities Services' interpretation of the Supreme Court decision appears even more restrictive of charities' advocacy than that impugned by the Supreme Court. Charities Services' current approach to the issue of advocacy by charities has been described as "complex, highly subjective and … unworkable"[2] in practice. It also puts New Zealand out of step with comparable jurisdictions, such as Australia and Canada.

This article suggests that the Supreme Court decision did not in fact change the law in New Zealand; the law in New Zealand regarding the issue of advocacy by charities, in the writer's respectful submission, was and remains broadly aligned in principle with the approach recently adopted in Canada: that charities may undertake unlimited non-partisan

1. [2015] 1 NZLR 169 (SC) [*Re Greenpeace SC*].
2. Krystian Seibert, "Could the Charities Act 2013 Pose a Problem for Advocacy Charities?" (18 December 2018), online: *Pro Bono Australia* <www.probonoaustralia.com.au/news/2018/12/charities-act-2013-pose-problem-advocacy-charities/>.

advocacy in furtherance of their stated charitable purposes.[3] If such advocacy is in the best interests of those charitable purposes, charities in fact have a duty to undertake it. This article respectfully suggests that, when it comes to the issue of advocacy by charities, Charities Services are not asking themselves the right question.

In considering whether the law in New Zealand was or was not changed by the Supreme Court decision, it is first necessary to consider the law prior to the decision. This article does so in two parts: the position prior to the enactment of the *Charities Act 2005*,[4] and then whether that legislation changed that position.

II. The Position Before the *Charities Act*

Prior to the passing of the *Charities Act*, charities cases in New Zealand generally arose under tax legislation.[5] For decades, the *Income Tax Act 2004*[6] and its predecessors had defined 'charitable purpose' inclusively by reference to the four '*Pemsel* heads':[7] (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; and (4)

3. On 13 December 2018, Bill C-86, *Budget Implementation Act*, No 2, 1st Sess, 42nd Parl, 2018 amended the Canadian *Income Tax Act*, RSC 1985, c 1 (5th Supp) to permit charities to carry on unlimited advocacy in support of their stated charitable purposes (although some question marks appear to remain over how the term "public policy dialogue and development activities" will be interpreted in practice, see draft Canada Revenue Agency guidance CG-027, "Public policy dialogue and development activities by charities" (21 January 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>).
4. 2005/39 (NZ) [*Charities Act*].
5. *Foundation for Anti-Aging Research v Charities Registration Board*, [2015] NZCA 449 at para 8 [*Charities Registration Board*] referring to *Molloy v Commissioner of Inland Revenue*, [1981] 1 NZLR 688 (CA) [*Molloy*]; and *Latimer v Commissioner of Inland Revenue*, [2002] 1 NZLR 535 (HC) [*Latimer HC*].
6. 2004/35 (NZ).
7. See *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) [*Pemsel*].

other purposes beneficial to the community. The current definition in section YA 1 of the *Income Tax Act 2007*[8] is preceded by corresponding definitions in sections OB 1 and OB 3A of the *Income Tax Act 2004*, sections OB 1 and OB 3B of the *Income Tax Act 1994*,[9] section 2 of the *Income Tax Act 1976*,[10] section 2 of the *Land and Income Tax Act 1954*,[11] and so on.

III. The Test for Whether a Purpose is Charitable

The test for whether a purpose fell within this statutory definition was set out by the Court of Appeal in *Latimer v Commissioner of Inland Revenue*[12] as follows:

> [i]t is … common ground that there must be a *two-step inquiry*: first, whether the *purpose* is for the *public benefit* and, if so, secondly, whether the *purpose* is charitable in the sense of coming within the *spirit and intendment of the preamble* to the Statute of Charitable Uses 1601 (43 Eliz. c.4).[13]

It can be seen at once that this two-step test applies to *purposes*. It does not apply to activities, and it does not apply to the organisation itself. The common law definition of 'charitable purpose' 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.[14]

It is also axiomatic that a purpose must meet both limbs of the test. A conclusion that a purpose is 'charitable', by definition, meant that the purpose was both within the spirit and intendment of the preamble to the *Statute of Charitable Uses 1601*[15] (the "preamble"), and for the benefit of the public.

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8. 2007/97 (NZ).
9. 1994/164 (NZ).
10. 1976/65 (NZ).
11. 1954/67 (NZ).
12. [2002] 3 NZLR 195 (CA) [*Latimer CA*].
13. *Ibid* at para 32 [emphasis added].
14. This fundamental principle was noted by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10 at para 144, Iacobucci J [*Vancouver Society*].
15. (UK), 43 Eliz I, c 4.

A. Ascertaining an Entity's Purposes

Before applying the common law test to an entity's purposes, it was first necessary to ascertain what those purposes were. This required interpretation of the entity's constituting document, in a manner similar to the process used for interpreting other written documents, but with an added overlay of a 'benignant construction' in favour of charity.[16] The Court's role in this process was interpretation, not creation.[17] An entity's *activities* were regarded as relevant only to the extent that the entity's constituting documents were unclear as to its purpose, or where there was evidence of activities by an entity that displaced or belied its stated charitable purpose[18] (for example, in the case of sham). It was as rare for a purpose to be inferred from activities as it was for extrinsic material to cause the terms of a contract or a statute to be interpreted to mean something they did not say.

16. See *Latimer v Commissioner of Inland Revenue*, [2004] 3 NZLR 157 (PC) at para 29 [*Latimer PC*]; and *Re Collier (Deceased)*, [1998] 1 NZLR 81 (HC) at 95 [*Re Collier*]. See also: *Perpetual Trust Ltd v Roman Catholic Bishop of Christchurch*, [2006] 1 NZLR 282 (HC) at 286; *Hadaway v Hadaway*, [1955] 1 WLR 16 (PC (Eng)) at 19; *Inland Revenue Commissioners v McMullen*, [1981] AC 1 (HL (Eng)) at 4-5; and *McGovern v Attorney-General*, [1982] 1 Ch 321 (Eng) at 343, 346, 353 [*McGovern*].
17. See *Inglis v Dunedin Diocesan Trust*, [2011] NZAR 1 (HC) at paras 29-33.
18. See *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia*, [2016] NZHC 2328 at para 85 [*Re The Foundation for Anti-Aging Research*] referring to *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, [1992] 1 NZLR 570 (HC) at 572; *New Zealand Society of Accountants v Commissioner of Inland Revenue*, [1986] 1 NZLR 147 (CA) at 148 [*Accountants*]; and *Molloy*, *supra* note 5 at 693.

To meet the requirements for income tax exemption,[19] an entity's purposes had to be *exclusively* charitable.[20] However, the requirement for exclusivity "[did] not mean what at first sight it might be thought to mean".[21] A non-charitable purpose that was ancillary, secondary or subsidiary to a charitable purpose would not have a vitiating effect.[22] Importantly, the 'ancillary' rule applied to *purposes* of an ancillary or subordinate nature; it did not apply to activities.[23]

Advocacy is inherently an activity, rather than a purpose. The common law of charities said very little about charities' activities, the key requirement being that charities' activities must be carried out in furtherance of the charity's stated charitable purposes.[24] Conceptually, it would have been very rare for 'advocacy' to have constituted a purpose

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19. Under the charitable income tax exemption, currently contained in section CW 41 of the *Income Tax Act 2007*, *supra* note 8; the predecessors of which include section CW 34 of the *Income Tax Act 2004*, *supra* note 6; paragraph CB 4(1)(c) of *the Income Tax Act 1994*, *supra* note 9; subsection 61(25) of the *Income Tax Act 1976*, *supra* note 10 and so on.
20. *Latimer PC*, *supra* note 16 at para 30.
21. *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, [1992] 1 NZLR 570 (HC) at 573. See also *Latimer HC*, *supra* note 5 at paras 67-74.
22. *Molloy*, *supra* note 5 at 695.
23. *Ibid*.
24. This common law is in the process of being codified in New Zealand. Sections 22, 24, 26(b) and 9 of the recently-enacted *Trusts Act 2019*, 2019/38 (NZ) provide that the trustees of a trust have a mandatory duty to further the charitable purposes of the trust, in accordance with the terms of the trust. Sections 131 and 134 of the *Companies Act 1993*, 1993/105 (NZ) provide that a director of a company has a duty to act in what the director believes to be the best interests of the company, and must not agree to the company contravening its constitution. Clauses 48 and 50 of the exposure draft Incorporated Societies Bill online (pdf): Ministry of Business, Innovation & Government <www.mbie.govt.nz/assets/7d5df7c03a/exposure-draft-incorporated-societies-bill.pdf> (a final version of which is expected to be introduced into Parliament in late 2019) propose to codify similar requirements for officers of incorporated societies. Most charities in New Zealand take the form of a trust, incorporated society or company.

in itself; it is difficult to conceive of a situation whereby a charity would engage in advocacy for its own sake, without connection to a charitable purpose.

Charities were of course subject to general laws governing advocacy, such as electoral law, laws proscribing breach of copyright, defamation, 'hate speech', and the like. Beyond that, however, as a matter of charities law, there was no legal restriction on charities' ability to engage in non-partisan advocacy activity, provided that it was permitted by their constituting document and carried out in furtherance of their stated charitable purposes.[25] Advocacy activity that was not in furtherance of a charity's stated charitable purposes was *prima facie ultra vires* and liable to be treated as such.

Having ascertained the entity's purposes, or its main or "true"[26] purpose, the next step was to consider whether that purpose was charitable. This required application of the two-step test set out by the Court of Appeal.

B. The Public Benefit Test

The first limb of the two-step test, the *public benefit test*, comprises two parts: a 'benefit' limb, and a 'public' limb. It asks, firstly, whether the purpose in question is beneficial to the community, and secondly whether the class of persons eligible to benefit constitutes the public, or a

25. This factor did not stop then Prime Minister, Right Honourable Rob Muldoon, from stripping CORSO (Incorporated) of its government funding and its legislated tax privileges, in retaliation for its opposition to the 1981 Springbok rugby team's tour of New Zealand (in protest against the South African apartheid regime). However, the legitimacy of these actions was never tested in a court of law. See the discussion in Myles McGregor Lowndes & Bob Wyatt, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) at 192.

26. In *Commissioner of Inland Revenue v Medical Council of New Zealand*, [1997] 2 NZLR 297 (CA) at 309, 318 [*Medical Council*], a majority of the Court of Appeal held that the Medical Council of New Zealand had a non-charitable purpose to benefit individuals, but also had a wider charitable purpose of safeguarding the health of the community. This latter purpose was found to be its 'true purpose'.

sufficient section of the public.[27]

The 'benefit' limb required forming an opinion *on the evidence* before the decision-maker as to whether the particular purpose in question was beneficial to the community, bearing in mind that in many classes of case the existence of public benefit will be readily assumed;[28] the facts may "speak for themselves",[29] or a purpose may be "so manifestly beneficial to the public that it would be absurd to call evidence on this point".[30] Purposes for the relief of poverty, the advancement of education and the advancement of religion were presumed to meet the 'benefit' limb of the public benefit test unless the contrary was shown.[31] Otherwise, Parliament's involvement in, or regulation of, an activity may provide a guide as to public benefit.[32] On rare occasions, direct evidence of public benefit may be required.[33]

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27. See *e.g. Accountants*, *supra* note 18, at 152.
28. *Molloy*, *supra* note 5 at 695, referring to *National Anti-Vivisection Society v Inland Revenue Commissioners*, [1948] AC 31 (HL (Eng)) at paras 49, 65-66, 78-79 [*National Anti-Vivisection Society*]. See also *Medical Council*, *supra* note 26, as noted by counsel for the plaintiff in *Latimer HC*, *supra* note 5 at para 83, there was no direct evidence before the Court that a benefit to the public arose from the maintenance of a Register of Medical Practitioners.
29. *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*, [1968] AC 138 (HL (Eng)) at 156, per Lord Wilberforce [*Scottish Burial Reform*].
30. *McGovern*, *supra* note 16 at 333.
31. *Re Greenpeace SC*, *supra* note 1 at para 27, n 57. See also *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 16, Ellis J; *Re Family First New Zealand*, [2015] NZHC 1493 at para 21 [*Re Family 2015*]; *Re Education New Zealand Trust*, [2010] NZHC 1097 at para 24 [*Re Education*]; *Re New Zealand Computer Society Inc*, [2011] NZHC 161 at para 13; *Re Queenstown Lakes Community Housing Trust*, [2011] 3 NZLR 502 (HC) at para 32 [*Re Queenstown*]; *Liberty Trust v Charities Commission*, [2011] 3 NZLR 68 (HC) at para 99 [*Liberty Trust*].
32. *Latimer HC*, *supra* note 5 at para 83, referring to *Scottish Burial Reform*, *supra* note 29 at 150; and *Latimer CA*, *supra* note 12 at paras 34-36.
33. See *Latimer HC*, *ibid*.

Importantly, in addressing this evidential question, and in recognition, perhaps, that the courts are the source of the law on the definition of charitable purpose, charities were able to access a full *de novo* oral hearing of evidence before a trier of fact, either the Taxation Review Authority or the High Court.[34] Such a hearing allowed for the evidence of witnesses, including expert witnesses, the decision maker, or both, to be tested by cross-examination if the circumstances required it. In addition, charities were not prevented from adducing evidence simply because it had not been provided earlier.[35] This process allowed for an evidential platform from which decision-makers could make a robust, informed decision as to whether any particular purpose operated for the public benefit.[36]

The 'public' limb of the public benefit test required a comparative weighing of public and private benefits.[37] Incidental private benefits were not inconsistent with charitable purpose.[38] It was acknowledged by the Court of Appeal that "any application of funds by a charitable trust is likely to be for the private pecuniary profit of someone".[39] It was also acknowledged that qualifying public benefit could be achieved indirectly by means of direct assistance to individuals.[40]

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34. See section 138B, and the definition of "hearing authority" in section 3 of the *Tax Administration Act 1994*, 1994/166 (NZ).
35. See *Charities Registration Board*, *supra* note 5 at para 44. Note that section 138G of the *Tax Administration Act 1994*, *ibid* originally contained an 'evidence exclusion rule', which was subsequently relaxed to an 'issues and propositions of law' exclusion rule only.
36. In this regard, see in particular *Latimer HC*, *supra* note 5 at paras 81-131, this point upheld by the Court of Appeal in *Latimer CA*, *supra* note 12 at paras 30-41 and not in issue before the Privy Council in *Latimer PC*, *supra* note 16.
37. See *e.g.* the arguments of counsel for the plaintiff in *Latimer CA*, *ibid* at para 35, which arguments were upheld by the Court of Appeal at para 36.
38. *Latimer PC*, *supra* note 16 at para 35; and *Accountants*, *supra* note 18 at 152.
39. *Hester v CIR*, [2005] 2 NZLR 172 (CA) at 181.
40. See *e.g. Medical Council*, *supra* note 26 and the assistance purpose in *Latimer CA*, *supra* note 12.

C. Was There a Political Purposes Exclusion?

It can also be seen at once that the two-step test for whether a purpose is charitable does not specifically address the question of whether any particular purpose is 'political'.

The writer submits that, despite interpretations to the contrary, there was in fact no political purposes exclusion in New Zealand law prior to the *Charities Act*.

It is acknowledged that purposes to further the interests of a particular political party or a particular candidate for political office were excluded.[41] However, beyond partisan political purposes, to say that a purpose was 'political' in New Zealand was 'code'. It simply meant that the purpose in question had not met the public benefit test on the facts of the particular case.

It is acknowledged that New Zealand case law had referred to the dicta of Lord Parker in *Bowman v Secular Society Ltd*,[42] that a trust for the attainment of political objects is invalid, "because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit".[43]

For example, the Court of Appeal in *Molloy*[44] held that the main purpose of the Society for the Protection of the Unborn Child was to vigorously oppose a change in the law in relation to abortion, a public and very controversial issue at the time.[45] After referring to *Bowman,* the Court of Appeal held this purpose to be political, and not charitable, on

41. See *Molloy*, *supra* note 5 at 695; and *Re Collier*, *supra* note 16 at 90. See also NZ, *Second Report of the Working Party on Registration, Reporting and Monitoring of Charities* (31 May 2002) at 12 [NZ, *Second Report of the Working Party*].
42. [1917] AC 406 (HL (Eng)) at 442 [*Bowman*].
43. See *In Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand*, [1941] NZLR 1065 (SC) [*Re Wilkinson*]; *Knowles v Commissioner of Stamp Duties*, [1945] NZLR 522 (SC) [*Knowles*]; and *Molloy*, *supra* note 5.
44. *Molloy*, *ibid*.
45. *Ibid* at 694-95.

the basis that the Court could not judge the public benefit.[46]

However, the writer respectfully submits that this decision, and the earlier decisions of *Knowles*,[47] regarding temperance, and in *Re Wilkinson*,[48] regarding the failed League of Nations, did not translate into a 'hard and fast rule' that all purposes directed at law reform or changes in government policy were inherently unable to be charitable in New Zealand, forevermore.

With respect, conclusions to the contrary appear to have overlooked the subsequent decision of the New Zealand Court of Appeal in *Latimer CA*.[49]

The *Latimer CA* litigation concerned the Crown Forestry Rental Trust, one of the purposes of which was to assist Māori, the Indigenous population of New Zealand, in the preparation, presentation and negotiation of claims before the Waitangi Tribunal involving licensed Crown forest land (the "assistance purpose"). The High Court upheld the Crown Forestry Rental Trust's argument that providing assistance to the defined class of Māori claimants was an integral part of achieving the wider public benefit of settling historical grievances arising under the Treaty of Waitangi (the "Treaty").[50] The Court of Appeal upheld the assistance purpose as charitable, and not 'political', even though the process of Treaty settlement was highly controversial at the time, and always leads, without exception, to an Act of Parliament being enacted to settle the wrongs.[51]

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46. *Ibid* at 695-96.
47. *Knowles*, *supra* note 43.
48. *Re Wilkinson*, *supra* note 43.
49. *Latimer CA*, *supra* note 12. See *e.g. Re Family First New Zealand*, [2018] NZHC 2273 at paras 4, 10 [*Re Family HC*]; *Re Greenpeace New Zealand Incorporated*, [2011] 2 NZLR 815 (HC) at para 44 [*Re Greenpeace HC*]; *Re Greenpeace of New Zealand Inc*, [2013] 1 NZLR 339 (CA) at paras 56, 60-64 [*Re Greenpeace CA*]; *Re Greenpeace SC*, *supra* note 1 at paras 39-47; and *Re Draco Foundation (NZ) Charitable Trust*, [2011] NZHC 368 [*Re Draco*].
50. *Latimer HC*, *supra* note 5 at para 95.
51. As noted by Justice Williams, speaking extra-curially at the "Charitable purpose forum" organised by the Charities Commission in April 2012.

Clearly a controversial purpose directed towards law reform was not inherently incapable of being charitable in New Zealand law. To the contrary, what the cases demonstrate is the inadvisability of attempting to draw hard and fast lines in an inherently equitable area of law.

As demonstrated by the decision of the House of Lords in *National Anti-Vivisection Society*[52] where a purpose of abolishing vivisection was held to be detrimental to the public, the court sometimes can judge whether a proposed change in the law will or will not be for the public benefit.[53] A policy not to do so has been described as a "judicial cop out".[54]

Further, as subsequently acknowledged by the New Zealand Supreme Court,[55] the decision in *Molloy* seems correct in its factual context. The topic of abortion was extremely divisive in New Zealand society at the relevant time.[56] The writer recalls news media reports of doctors' houses being burned. It seems understandable in all the circumstances that the Court might have considered such an issue not appropriately justiciable. Similarly, while controversy may have been a factor in the Court of Appeal's decision, this did not translate into a 'hard and fast rule' that controversial purposes were inherently unable to be charitable.

Controversy and law and policy reform were simply factors to be taken into account in analysing public benefit. The writer submits that the decision in *Molloy* is simply authority for the proposition that the public benefit test was not met on the facts of that particular case, with the Court of Appeal using a shorthand expression 'political' to convey that particular point.

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52. *National Anti-Vivisection Society*, *supra* note 28.
53. See *e.g.* the comments of Lord Wright in *ibid* at para 47.
54. *Attorney-General for New South Wales v The NSW Henry George Foundation Ltd*, [2002] NSWSC 1128 (Austl) at para 63 [*Henry George Foundation*].
55. *Re Greenpeace SC*, *supra* note 1 at para 73.
56. *Re Greenpeace HC*, *supra* note 49 at para 45.

In addition, the courts have clearly held that the definition of charitable purpose is not static and is constantly developing.[57] The decision in *Molloy* and its 1941 and 1945 predecessors[58] predated important developments in New Zealand, such as: (1) the 1985 changes to standing orders which reorganised the system of Select Committees, opening up their proceedings to the public and the media;[59] (2) the passing of the *New Zealand Bill of Rights Act 1990*[60] and the *Human Rights Act 1993*;[61] (3) developments in Australia (ultimately culminating in the decision of the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*[62] and its subsequent codification);[63] (4) New Zealand's ratification of a number of international treaties;[64] and (5) a developing awareness of the importance of civil society participating in the democratic process in a participatory democracy.

Coupled with mounting criticism of any political purposes exclusion, there was ample authority available to support the proposition that there was no political purposes exclusion in New Zealand law prior to the

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57. See *e.g. Re Greenpeace SC*, *supra* note 1 at para 23; *Molloy*, *supra* note 5 at 695; and *DV Bryant Trust Board v Hamilton City Council*, [1997] 3 NZLR 342 (HC) at 348.
58. *Re Wilkinson*, *supra* note 43; *Knowles*, *supra* note 43; and *Molloy*, *supra* note 5.
59. See Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government*, 2d (Oxford University Press, 1990).
60. 1990/109 (NZ) [*Bill of Rights*].
61. 1993/82 (NZ).
62. [2010] HCA 42 [*Aid/Watch*].
63. Subsections 12(1)-(3) of the *Charities Act 2013*, 2013/100 (Austl) define charitable purpose to mean the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if the change is in furtherance or in aid of, or in opposition to, a charitable purpose.
64. Such as the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the *Universal Declaration on Human Rights*, 10 December 1948, GA Res 217A (III) UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Charities Act.[65]

Importantly, the public benefit test, and therefore any exclusion from the public benefit test on 'political' grounds, applied to purposes, not to activities.[66] This explains the reference to a "political *purposes* exclusion".[67] Charities were not prevented from applying political *means* in furthering purposes that were acknowledged to be charitable.[68] Indeed, many important pieces of law reform and changes in government policy in New Zealand were achieved through the advocacy of charities prior to

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65. See *e.g. Re Collier*, *supra* note 16 at 89-90; *Public Trustee v Attorney-General of New South Wales*, [1997] 42 NSWLR 600 (SC (Austl)); *Henry George Foundation*, *supra* note 54 at paras 63-64. See also subsequent developments such as *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*, [2008] FCA 983 at paras 128-29; and *Re Greenpeace HC*, *supra* note 49 at para 59.
66. Lord Parker's dicta in *Bowman*, *supra* note 42 at 442 referred to "political objects" not activities, as noted in Canada, Minister of National Revenue, *Report of the Consultation Panel on the Political Activities of Charities*, (Ottawa: Consultation Panel on the Political Activities of Charities, 2017) at en 13, online: <www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html#ndnts>.
67. *Re Greenpeace SC*, *supra* note 1, n 119, 128 [emphasis added].
68. See *e.g.* the comments of Atkin LJ in *Commissioners of Inland Revenue v Yorkshire Agricultural Society*, [1928] 1 KB 611 (CA (Eng)) at 632: "[i]t is perfectly consistent with the main object of the Society being one for the promotion of agriculture generally, that in order to carry out its object it should watch and advise on legislation affecting agriculture". See also the comments of Slade J in *McGovern*, *supra* note 16 at 340: "the mere fact that trustees may be at liberty to employ political means in furthering the non-political purpose of a trust does not necessarily render it non-charitable". See also NZ, *Second Report of the Working Party*, *supra* note 41 at 12 referring to the permissibility of "advocacy for any cause that is itself charitable", and the fact that, in contrast to the position taken by the Court of Appeal in *Re Greenpeace CA*, *supra* note 49 at para 42, the definition of charitable purpose suggested by the Working Party would not alter the scope of charitable purpose but would be "clearly stating the position that has developed through 400 years of case law".

the passing of the *Charities Act*.[69]

D. The 'Spirit and Intendment' Test

If the purpose in question was found to operate for the benefit of the public under the first limb of the two-step test, the question then turned to the second step: is the purpose 'charitable' in the sense of coming within the spirit and intendment of the preamble.

In this context, the Court of Appeal made it clear that it is "important to be guided by principle, rather than by a detailed analysis of decisions on particular cases".[70]

Purposes for the relief of poverty, the advancement of education and the advancement of religion were accepted as coming within the spirit and intendment of the preamble and therefore charitable.[71] For other purposes, the courts proceeded first by seeking an analogy with purposes enumerated in the preamble. They then went further and were satisfied if they could find an analogy with previous cases found to be within the spirit and intendment of the preamble. In fact, the gradual extension by analogy had proceeded so far that there were "few modern reported cases where a clearly specified object for the benefit of the public at large and not of individuals was not held to be within the spirit and intendment" [72] of the preamble.

The law in New Zealand had in fact extended to the point where there were two approaches to determining whether a purpose was within the spirit and intendment of the preamble; the first was the analogy approach and the second was the presumption of charitability.

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69. Although, in the environment which exists in New Zealand at the time of writing, it seems inadvisable to mention any names.
70. *Medical Council*, *supra* note 26 at 314, cited with approval in *Latimer CA*, *supra* note 12 at para 39.
71. See *e.g.* the statutory definition of charitable purpose in section OB 1 of the *Income Tax Act 2004*, *supra* note 6.
72. *Accountants*, *supra* note 18 at 157 referring to *Scottish Burial Reform*, *supra* note 29 at 147.

The presumption of charitability is described in the following terms:

> [*e*]*ven in the absence of an analogy* with the purposes mentioned in the Preamble to the Statute of Elizabeth, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the Preamble, and *in the absence of any ground for holding that they are outside that spirit and intendment*, are charitable at law.[73]

A presumption of charitability was not part of Canadian law.[74] However, the fact that it was firmly part of New Zealand law was acknowledged by the New Zealand tax authority, the Inland Revenue Department ("IRD"), in its *Tax and charities* 2001 discussion document:

> [p]erhaps more importantly, the court confirmed that the correct approach today is that *objects that are beneficial to the community* or are of public utility *are prima facie charitable* under the fourth category *unless there are good reasons*

73. Margaret A Soper, "Charities" in *The Laws of New Zealand* (Wellington, NZ: Butterworths, 2011) at para 12, citing *Morgan v Wellington City Corporation*, [1975] 1 NZLR 416 (CA) at 419-420 [emphasis added].

74. *Vancouver Society*, *supra* note 14 at paras 47-48.

> *why they should not be*.[75]

In other words, the requirement to be charitable within the spirit and intendment of the preamble was determined in New Zealand by analogy with purposes previously found to be charitable but, even in the absence of an analogy, objects beneficial to the public were *prima face* held to be within the spirit and intendment of the preamble, in the absence of any ground for holding otherwise.

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75. NZ, Policy Advice Division, *Tax and Charities: A Government Discussion Document on Taxation Issues Relating to Charities and Non-profit Bodies* by Hon Dr Michael Cullen, Hon Paul Swain & John Wright MP (Wellington: Inland Revenue Department, 2001) at para 3.17 [*Tax and charities* 2001 discussion document], referring to the decision of the Court of Appeal in *Medical Council*, *supra* note 26 [emphasis added]. Other authority for recognition of the presumption of charitability in New Zealand law includes: *Auckland Medical Aid Trust v Commissioner of Inland Revenue*, [1979] 1 NZLR 382 (SC) at 388 [*Auckland Medical Aid*]; and *Latimer HC*, *supra* note 5 at paras 106, 131. Counsel for the Commissioner of Inland Revenue in the *Latimer CA*, *supra* note 12, litigation argued before the Court of Appeal that the High Court had erred in adopting the presumption of charitability, suggesting that, in the *Medical Council* case, McKay J, although discussing the presumption of charitability, had not in fact followed it and had actually proceeded by reference to analogy. However, the Court of Appeal in *Latimer CA*, found at para 39 that it was unnecessary to reach a view on this point. Their Honours noted that Thomas J had certainly adopted the presumption of charitability approach, McKay J had referred with apparent approval to a passage in *Halsbury's* to that effect, and Keith J had concurred with both McKay J and Thomas J. Their Honours held (agreeing with McKay J's view, at 314) that in applying the spirit and intendment of the preamble, it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases. In finding that the relevant purpose was charitable, and although a reference was made to there being "some analogy", the Court of Appeal did not clearly apply either the presumption of charitability or the analogy test. However, arguably, the relevant "principle" applied by the Court of Appeal is that purposes beneficial to the public are presumed to be charitable unless there are grounds for holding otherwise (that is, the presumption of charitability).

Importantly, the presumption of charitability does not equate with a single test of public benefit. It is simply an alternative and "more intellectually honest"[76] means of satisfying the second limb of the two-step test.

E. Summary

To summarise, prior to the *Charities Act*, the writer submits that there was no 'political purposes exclusion' in New Zealand law. A finding that a purpose was 'political' simply meant that the public benefit test was not met on the facts of the particular case. In principle, charities were able to engage in unlimited non-partisan advocacy activity, provided it was carried out in furtherance of their stated charitable purposes.

IV. Was the Position Changed by Passing the *Charities Act*?

The definition of charitable purpose in New Zealand prior to the *Charities Act* was acknowledged to be very broad.[77]

In this respect, the New Zealand position differed from the position in Canadian jurisprudence, which appears to have taken a more narrow and restrictive approach to the definition.[78] Although the difference in approach may be partly attributable to the different statutory frameworks applicable in the respective jurisdictions, a key reason for the difference appears to be the inability of Canadian charities to access a *de novo* oral

76. *Re Collier*, *supra* note 16 at 95.
77. *Tax and charities* 2001 discussion document, *supra* note 75 at para 5.1.
78. See *e.g. Vancouver Society*, *supra* note 14 at paras 196-98, 200.

hearing of evidence.[79]

In New Zealand in 1996, a majority of the Court of Appeal held that the income of the Medical Council of New Zealand (the "Medical Council") was exempt from income tax. Although the principal statutory function of the Medical Council was to maintain a register of qualified medical practitioners, which provided private benefits to those individuals, the Court of Appeal interpreted the purpose of the relevant constituting legislation more widely, finding the true purpose of the Medical Council to be the safeguarding of the health of the community. This purpose was found to be charitable.[80]

Some years earlier, the New Zealand Court of Appeal had held the purposes of the New Zealand Council of Law Reporting to be charitable.[81]

IRD's lack of success in these Court of Appeal cases led IRD to surmise, in its *Tax and charities* 2001 discussion document, that case law "may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity".[82] This led IRD to put forward two proposals for changing the definition of charitable purpose, to limit the "fiscal privileges" accorded to charities to those charitable purposes that accorded with "current objectives".[83]

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79. See *e.g. Human Life International in Canada Inc v MNR*, [1998] 3 FC 202 [*Human Life International*], Strayer JA: "[t]he Court must therefore review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence". See also the *Report of the Consultation Panel on the Political Activities of Charities*, *supra* note 66, Recommendations 2(b) and 4:
> the standard of review … favours the government by requiring a judicial review application to the Federal Court of Appeal. The Federal Court of Appeal is not mandated to review whether the government's decision is correct, but only whether it is reasonable. An appeal to the Tax Court of Canada would allow charities to fully argue why the decision of the Government is wrong and balance the position of the parties through this process.

80. *Medical Council*, *supra* note 26 at 309, 318.

81. *Commissioner of Inland Revenue v New Zealand Council of Law Reporting*, [1981] 1 NZLR 682 (CA).

82. *Tax and charities* 2001 discussion document, *supra* note 75 at paras 4.2, 5.11.

83. *Ibid* at para 4.3.

Under both these proposals, the Government would have been permitted to override any registration and 'deem' a particular entity not to be charitable.[84] IRD argued this approach would be "in keeping with recognising the tax exemption as an expenditure decision by the government and would allow the government to target those entities undertaking activities that it wishes or does not wish to support".[85]

This sentiment may have been imported into the *Charities Bill* as originally introduced in 2004[86] as the explanatory note to the original Bill[87] stated that the Charities Commission would "register and monitor charitable entities … to ensure that those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit".[88]

However, it is not clear that any initial intention to limit fiscal privileges in fact survived the *Charities Bill*'s passage through Parliament. The *Charities Bill* as originally introduced was widely regarded to be fundamentally flawed;[89] it was almost completely rewritten at the Select Committee stage in response to hundreds of submissions.[90]

This transformation casts doubt on the probative value of statements previously contained in the explanatory note and on the first reading of the *Charities Bill*. Certainly, it can be seen from the two-step test set out above that "fiscal consequences"[91] form no part of the common

84. *Ibid* at paras 5.5, 5.15 and at 9.
85. *Ibid* at para 5.5.
86. *Charities Bill 2004 (108-1)* (NZ) [*Charities Bill*].
87. *Ibid.*
88. *Ibid*, Explanatory Note, at 1.
89. NZ Select Committee, Report on *Charities Bill 2004 (108-2)* at 21; and New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19980 (Sue Bradford). See also the discussion in *Regulating Charities: The Inside Story*, *supra* note 25, ch 10.
90. Report on *Charities Bill 2004 (108-2)*, *ibid*; and New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19944 (Georgina Beyer).
91. *Re Greenpeace SC*, *supra* note 1 at paras 30, 52.

law test for whether a purpose is charitable.[92] This is understandable, conceptually, as income tax post-dated the common law concept of charity by at least a century. It is also understandable in principle. As noted by Justice Mackenzie in *Re Queenstown*,[93] Parliament has seen fit to adopt the common law definition of charity; to the extent that Parliament has elsewhere legislated that taxation consequences are determined by reference to that definition, those consequences must follow the application of the common law principles which govern the definition. Taxation consequences should not play a part in the application of those common law principles.

A similar point was made by Justice Mallon in *Liberty Trust*.[94] In that case, Her Honour found that Liberty Trust's purposes advanced religion and were therefore presumptively charitable. Her Honour then noted that this presumption was "not displaced merely because the Court may have a different view as to the social utility of the Liberty Trust scheme and whether it is an activity deserving of the fiscal advantages that charitable status brings".[95]

Importantly, none of IRD's 2001 suggestions for amending the definition of charitable purpose were accepted. The Select Committee considering the *Charities Bill* made it clear that the definition of charitable purpose was not intended to be changed.[96] Instead, the long-standing, inclusive, statutory definition of charitable purpose was uplifted from the income tax legislation into section 5 of the *Charities Act*.[97] In other words, the statutory definition was not substantively changed; the Courts have confirmed that the *Charities Act* did not change the common law

92. Compare the comments of the Supreme Court in *Re Greenpeace SC*, *supra* note 1 at para 30.
93. *Re Queenstown*, *supra* note 31 at para 78.
94. *Liberty Trust*, *supra* note 31.
95. *Ibid* at para 101. See also *Pemsel*, *supra* note 7 at 591, Lord Macnaghten: "[w]ith the policy of taxing charities I have nothing to do".
96. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 3.
97. See *Re Greenpeace HC*, *supra* note 49 at para 38.

definition of charitable purpose.[98]

Accordingly, the definition of charitable purpose that IRD acknowledged was very broad survived the passing of the *Charities Act*. The key change made by the legislation was simply that, from 1 July 2008, charities had to be registered with the Charities Commission (as it was then) in order to be eligible for the charitable exemptions from income tax.[99] In addition, registered charities had to make certain information publicly available on the charities register.[100] This information would enable charities to be monitored, to ensure that they were continuing to act in furtherance of their stated charitable purposes over time.[101]

A. Unintended Consequences

Despite clarity that the pre-existing common law definition of charitable purpose continued, the *Charities Act* is otherwise an example of how 'fast law does not make good law'. The substantial changes made to the *Charities Bill* at the Select Committee stage were not subject to proper consultation[102] and, together with further minor, but extensive, changes

98. *Re Greenpeace SC*, *supra* note 1 at paras 16-7; *Re Family 2015*, *supra* note 31 at para 21; *Re Education*, *supra* note 31 at para 13; and *Charities Registration Board*, *supra* note 5 at para 10.

99. See paragraph CW 41(5)(a) and subsection CW 42(1) of the *Income Tax Act 2007*, *supra* note 8.

100. See sections 40-42A of the *Charities Act*, *supra* note 4, containing the requirements for registered charities to file annual returns and notify certain changes.

101. Lack of information to monitor whether charities were continuing to act in furtherance of their stated charitable purposes over time was the key issue that the *Charities Act*, *ibid* was intending to address. See the NZ, *Report by the Working Party on Registration, Reporting and Monitoring of Charities* (28 February 2002) at 21-22. See also the NZ, *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (November 1989) at iv-v, 10, 21, 63, 67; *Tax and charities* 2001 discussion document, *supra* note 75 at para 8.7; *Charities Act*, *supra* note 4, s 10(h); and *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88. See also the discussion in *Regulating Charities: The Inside Story*, *supra* note 25, ch 10.

102. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 20.

made by Supplementary Order Paper,[103] were passed through under urgency, with all final stages occurring on one day (12 April 2005). The comment was made in Parliament that "we do not really know what we are passing tonight, or what the implications are".[104]

In addition, the 14 years since the *Charities Act* was passed have been characterised by a series of 'kneejerk' amendments that have similarly been rushed through under urgency without proper consultation.[105]

The writer submits that the net result is a *Charities Act* that is replete with unintended consequences.

These unintended consequences have given rise to uncertainty as to whether provisions such as subsections 5(3), 18(3), 5(2A) and section 59 of the *Charities Act* might have inadvertently changed the law. The writer submits that the answer is no, for the reasons discussed below.

B. Subsection 5(3)

Subsections 5(3) and (4) of the *Charities Act* provide that a non-charitable purpose will not prevent registration if the purpose is "merely ancillary to a charitable purpose". Subsections 5(3) and (4) were inserted at the Select Committee stage in response to concerns by submitters that the *Charities Act* regime might be used as a means for government to exercise political control of the charitable sector.[106] The subsections were intended to codify the rule regarding ancillary purposes, discussed above; they were not intended to change the law in any way.[107]

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103. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19950 (Sue Bradford).
104. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19981 (Sue Bradford).
105. See *e.g. Statutes Amendment Bill 2015 (71-1)* (NZ); *Charities Amendment Bill (No 2) 2012 332-3C* (NZ) (which began as the *Crown Entities Reform Bill 2011 332-1* (NZ) [*Crown Entities Reform Bill*]); and the *Statutes Amendment Bill (No 2) 2011 271-2* (NZ) [*Statutes Amendment Bill (No 2)*].
106. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 616 (30 March 2004) at 12108 (Sue Bradford); and Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 4.
107. Report on *Charities Bill 2004 (108-2)*, *ibid.*

Subsection 5(3) included the words "for example, advocacy", in brackets, with the specific intention of reassuring the charitable sector that they would continue to be able to undertake advocacy work in support of their charitable purposes.[108]

However, the bracketed words appear to have been used by Charities Services as legislative authority for the imposition of a strict political purposes exclusion. Under the *Charities Act* regime, many charities were surprised to find themselves declined registration or deregistered for engaging with the democratic process,[109] despite clear indications that the definition of charitable purpose was not intended to be changed.

It seems unlikely that a change so significant would have been made by way of parenthetic illustration without further articulation.[110] The more likely explanation is that the words "for example, advocacy"[111] were intended simply to confirm that, in the rare situation where advocacy activity might have become viewed as a purpose in itself, this would not prevent registration if such a purpose could be said to be ancillary to the charitable purposes of the organisation, as discussed above.

The provision did not provide a legislative bar on such an advocacy purpose ever being charitable in itself.[112]

In other words, the words "for example, advocacy"[113] did not codify a political purposes exclusion and should, at the very least, have been no impediment to charities continuing to advocate in furtherance of their

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108. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19941 (Judith Tizard): the changes would "make it clear that the Commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose" at 19941. See also Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 4.
109. See *e.g. National Council of Women of New Zealand Incorporated v Charities Registration Board*, [2014] NZHC 1297 at para 17.
110. See the arguments of counsel for Greenpeace in *Re Greenpeace SC*, *supra* note 1 at para 54.
111. *Charities Act*, *supra* note 4, s 5(3).
112. As was subsequently found to be the case by the Supreme Court in *Re Greenpeace SC*, *supra* note 1 at paras 56-58.
113. *Charities Act*, *supra* note 4, s 5(3).

stated charitable purposes as they had always done.

C. Subsection 18(3)

Subsection 18(3) of the *Charities Act* requires that, in assessing applications for registration, Charities Services must "have regard" to a charity's activities. Unfortunately, subsection 18(3) did not specify what Charities Services is to "have regard" to activities for.

Subsections 50(1)(a) and (2)(a) of the *Charities Act* similarly enable Charities Services to inquire into a charity's activities, but without specification as to why.

These provisions appear to have encouraged Charities Services to assess entities' activities to ascertain whether those activities are 'charitable' As a result, many worthy charities have been deregistered or declined registration on the basis of their activities, even though such activities were carried out in good faith in furtherance of their stated charitable purposes.[114]

It is axiomatic that the common law recognises a distinction between purposes and activities; this distinction is reflected in subsection 13(1) of the *Charities Act*, which sets out the essential requirements for registration, and requires *purposes* to be charitable, not activities.

When the history of the *Charities Act* regime is examined, it is clear that, beyond "serious wrongdoing"[115] as defined, the reason for considering activities is to ensure that charities are continuing to act in

114. Published decisions of the Charities Registration Board can be found on Charities Services' website (2019), online: <www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/>. However, these decisions do not include the bulk of decisions, which are made by Charities Services under delegation from the Board under section 9 of the *Charities Act*, *ibid*.

115. See the definition of "serious wrongdoing" in section 4 of the *Charities Act*, *ibid*.

furtherance of their *stated* charitable purposes over time.[116] It is not to ascertain whether those activities are 'charitable'.

There is, in fact, no such thing as a 'charitable activity'. Activities only make sense in the context of the purpose in furtherance of which they are carried out.[117] In limited exceptional circumstances, activities may assist in determining what a charity's purposes are, or whether those purposes are charitable, as discussed above. But there is no indication that subsection 18(3) and section 50 were intended to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry".[118]

D. Subsection 5(2A)

Subsection 5(2A) of the *Charities Act* provides that the promotion of amateur sport may be a charitable purpose "if it is the means by which a charitable purpose … is pursued". Subsection 5(2A) was inserted into the legislation by the *Charities Amendment Act 2012*,[119] with effect from 25 February 2012.[120]

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116. See the NZ, *Report by the Working Party*, *supra* note 101 at 21-22. See also the NZ, *Report to the Minister of Finance*, *supra* note 101 at iv-v, 10, 21, 63, 67; *Tax and charities* 2001 discussion document, *supra* note 75 at para 8.7; *Charities Act*, *supra* note 4, s 10(h); and *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88.
117. As noted by the Supreme Court of Canada in *Vancouver Society*, *supra* note 14 at para 152:

    > 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.

    See also the discussion in Susan Barker, "The Myth of 'Charitable Activities'" (2014) New Zealand Law Journal at 304, online (pdf): <www.lawnewzealand.co.nz/resources/The%20myth%20of%20charitable%20activities.PDF>.
118. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 86.
119. 2012/4 (NZ).
120. *Ibid*, s 2.

The Court of Appeal considered this amendment to be evidence of a political purposes exclusion in New Zealand law.[121] However, the writer respectfully submits that the history of the provision does not support that conclusion.

The process of inserting subsection 5(2A) began quietly in early 2010 with a "technical review of the Charities Act", aimed at "improving the operation of the legislation and charities register".[122] Contemporaneously, Cabinet approved a first principles review of the *Charities Act*, to take place in 2015.[123] The promised first principles review was publicly announced some months' later, in November 2010.[124] In December 2010, the High Court of Australia issued its decision in *Aid/Watch*.

The New Zealand technical review culminated in the *Statutes Amendment Bill (No 2)*[125] which was introduced into Parliament on 22 February 2011, and referred to the Government Administration Select Committee in April 2011. By definition, items included in a Statutes Amendment Bill should be minor, non-controversial and technical amendments that do not affect the substance of the law or people's rights and obligations.[126]

A few weeks later, on 6 May 2011, the High Court issued its decision in *Re Greenpeace HC*,[127] declining to follow the decision of the High Court

121. *Re Greenpeace CA*, *supra* note 49 paras 56-57.
122. NZ Cabinet Office, "Minute of Decision" CAB Min (10) 35/3A at para 1.1.
123. NZ Cabinet Office, "Minute of Decision", CAB Min (10) 12/6; NZ Cabinet Social Policy Committee, "Minute of Decision", SOC Min (10) 6/4; and NZ Cabinet Office, "Minute of Decision", CAB Min (10) 35/3B.
124. Tariana Turia, "Charities Commission Annual General Meeting" (1 December 2010), online: *Beehize.govt.nz* <www.beehive.govt.nz/speech/charities-commission-annual-general-meeting-0>.
125. *Statutes Amendment Bill (No 2)*, *supra* note 105.
126. See the NZ, "Report of the Government Administration Committee on the Statutes Amendment Bill (No 2) 271-1" (6 July 2011) at 1; and NZ, House of Representatives, *Standing Orders*, s 305(2) (2017). See also NZ Select Committee, Report on *Charities Amendment Bill 2016 71-2B* at 1-2.
127. *Re Greenpeace HC*, *supra* note 49.

of Australia in *Aid/Watch*. Greenpeace of New Zealand Incorporated ("Greenpeace") appealed to the Court of Appeal.

On 31 May 2011, the Government announced that it would disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs.[128] The vehicle to effect this change, the *Crown Entities Reform Bill*,[129] was introduced into Parliament a few weeks later in September 2011.

The *Statutes Amendment Bill (No 2)*[130] received its second reading on 16 February 2012, following which the proposed amendments to the *Charities Act*, including subsection 5(2A), were removed into a separate *Charities Amendment Act 2012* and passed into law.[131]

Contemporaneously, the passage of the *Crown Entities Reform Bill* moved quickly, receiving its third reading on 30 May 2012 and passing into law on 6 June 2012. The Charities Commission was disestablished from 1 July 2012.

In November 2012, only four months after the Charities Commission was controversially disestablished, and precisely 21 minutes after the Court of Appeal delivered its decision in *Re Greenpeace CA*,[132] the promised first principles review of the *Charities Act* was controversially cancelled.[133]

With respect, the disestablishment of the Charities Commission and the cancelling of the first principles review of the *Charities Act* are examples of kneejerk reactions that were rushed through without proper consultation, against the strong opposition of the charitable sector. The technical review is of a similar ilk.

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128. "Government reviews more state agencies" (31 May 2011), online: *Scoop Parliament* <www.scoop.co.nz/stories/PA1105/S00611/government-reviews-more-state-agencies.htm>.
129. *Crown Entities Reform Bill*, *supra* note 105.
130. *Statutes Amendment Bill (No 2)*, *supra* note 105.
131. The *Charities Amendment Act 2012*, *supra* note 119, received Royal Assent on 24 February 2012.
132. *Re Greenpeace CA*, *supra* note 49.
133. Jo Goodhew, "No review of the Charities Act at this time" (17 November 2012), online: *Beehive.govt.nz* <www.beehive.govt.nz/release/no-review-charities-act-time>.

Subsection 5(2A) is an unhelpful amendment. On its face, it appears to provide a statutory prohibition on the promotion of amateur sport being considered charitable in and of itself, placing an unhelpful barrier in the way of the socially cohesive and other public benefits that might otherwise be derived from such promotion. In doing so, it puts New Zealand out of step with other comparable jurisdictions which have found such a purpose to be charitable by statute.[134] Such a significant amendment hardly seems minor, technical, non-controversial or non-substantive, raising the question of why it was included in a Statutes Amendment Bill, and why it was not subject to proper consultation.

Subsection 5(2A) appears to have been inserted in response to reluctance by charitable organisations to fund sport in case doing so might threaten their charitable status.[135] The provision appears to reflect Charities Services' interpretation of the decision of the High Court in *Travis Trust v Charities Commission*.[136] In that case, the High Court found that the promotion of the particular horse race in question was not a charitable purpose in and of itself, unless it could be established that the true intention was the promotion of a deeper purpose such as health, education or animal welfare.[137] On the facts before the Court, this was not found to be the case; however, the writer respectfully submits that the case is not authority for the proposition that the promotion of amateur sport could never be charitable in New Zealand in and of itself.

Subsection 5(2A) is arguably another illustration of the inadvisability of seeking to create 'hard and fast' rules in a nuanced and subtle area of law. With respect, it is drawing a long bow to say that the provision evidenced a political purposes exclusion in New Zealand law.[138]

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134. See *Charities Act 2011* (UK), c 25, ss 3(1)(g), 2(d); *Charities Act 2006* (UK), c 50; *Charities and Trustee Investment (Scotland) Act 2005*, ASP 10, ss 7(2)(h), 3(c); and *Charities Act (Northern Ireland) 2008*, c 12, ss 2(g), 3(d), as amended by the *Charities Act (Northern Ireland) 2013*, c 3.
135. *Statutes Amendment Bill (No 2)*, *supra* note 105, Select Committee Report, at 5.
136. [2008] 24 NZHC 1912.
137. *Ibid*.
138. Contrary to the finding in *Re Greenpeace CA*, *supra* note 49 at paras 56-57, 60.

E. Section 59

The most significant bearer of unintended consequences appears to have been section 59, the provision which provides New Zealand charities with a right of appeal.

As discussed above, prior to the *Charities Act*, charities were able to access a full *de novo* oral hearing of evidence. The *Charities Bill* as originally introduced would have continued this, by providing for charities to have a right of appeal to the District Court.[139] Appeals to the District Court are normally conducted as a first instance *de novo* trial, which would include a full hearing of oral evidence if any party so insisted.[140]

However, this formulation was changed at the Select Committee stage in response to submissions. Submitters were concerned that to restrict appeals to the District Court (whose decision was to be final) would significantly impede the development of the common law of the definition of charitable purpose as the definition of charitable purpose derives from equity, which is traditionally the preserve of the High Court and not the District Court; submitters were also concerned that charities should continue to have recourse to the highest Court in the land on this important issue.

The majority agreed that, given its experience in considering matters relating to charitable entities, the High Court would be the most appropriate forum for hearing *Charities Act* appeals. The majority also agreed that the initial appeal should not be the final resort for charities.[141]

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139. *Charities Registration Board*, *supra* note 5 at para 45 referring to *Charities Bill*, *supra* note 86 at 38-41, cls 67, 69(6).
140. See *Charities Registration Board*, *supra* note 5 at para 45. See also *Shotover Gorge Jet Boats Ltd v Jamieson*, [1987] 1 NZLR 437 (CA), considering section 5 of the *Lakes District Waterways Authority (Shotover River) Empowering Act 1985*, 1985/2 (NZ) at 440, line 15: "[t]here can be no doubt that the District Court *was intended to hear the case de novo*, which would include a *full hearing of oral evidence if any party so insisted*. That is the normal way in which the District Court exercises its civil jurisdiction" [emphasis added].
141. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 13-4. See also *Charities Registration Board*, *supra* note 5 at para 46.

However, in making this change from the District Court to the High Court, the Select Committee did not clarify the nature of the hearing to be conducted on appeal.[142]

The absence of any wording in section 59 regarding the nature of the appeal means that appeals to the High Court under the *Charities Act* are interpreted as general appeals subject to Part 20 of the High Court Rules.[143] General appeals to the High Court are usually conducted as a rehearing. Part 20 of the High Court Rules precludes appellants from having any automatic right to present any evidence to the Court that was not before the decision-maker when it made its decision.[144] Part 20 also requires evidence to be presented by affidavit, rather than by witnesses giving oral evidence and being available for cross-examination.[145] These requirements are strict, but they are premised on an assumption that a full oral hearing of evidence has already been undertaken at first instance in the court or tribunal appealed from, in an adjudicated dispute between two parties. However, this is not the case under the *Charities Act*. The decision-maker (Charities Services or the Charities Registration Board) does not adjudicate a dispute between two parties and, despite statutory requirements to comply with the rules of natural justice,[146] neither conducts an oral hearing.[147]

In other words, replacing the words "District Court" with the words "High Court" in section 59[148] appears to have inadvertently removed charities' ability to access a trier of fact altogether.

This factor is significant because, as discussed above, whether an entity qualifies for registration often turns on important questions of fact. Facts are established by evidence and an oral hearing of evidence allows that evidence to be tested. Section 59 in its current formulation

142. *Charities Registration Board*, *ibid* at paras 38-43.
143. *High Court Rules*, 2016/225 (NZ) [*High Court Rules*]. See generally *Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 23-27.
144. *High Court Rules*, *ibid*.
145. *Ibid.*
146. *Charities Act*, *supra* note 4, ss 18(3)(b), 36.
147. *Charities Registration Board*, *supra* note 5 at para 20.
148. *Charities Act*, *supra* note 4.

means that, among other things, charities have no means of adequately testing the material that Charities Services finds from internet searches, whether that material, and the conclusions drawn from it, are correct, or what weight should be placed on it.[149]

The inability to call and test evidence also places Courts in a difficult position, as they will often simply not have the evidence they need to make a properly-informed decision as to whether any particular charity is eligible for registration. This has led to an unhelpful development whereby courts are referring cases back to the Charities Registration Board for reconsideration in light of their judgment, causing further cost, uncertainty and delay for the affected charities.[150]

There is no indication in any of the material surrounding the *Charities Bill* that Parliament intended to remove charities' ability to access an oral hearing of evidence when the right of appeal was changed from the District Court to the High Court at the Select Committee stage. The removal of charities' ability to access a trier of fact appears instead to have been an unintended consequence of the Select Committee's attempt to strengthen charities' rights of appeal. As discussed above, the original *Charities Bill* was almost completely rewritten at the Select Committee stage, and then rushed through under urgency without proper consultation.

Inability to access a trier of fact places charities at a significant disadvantage in the task of establishing important questions of fact, such as what their purposes are, and how those purposes operate for the public benefit. In this respect, New Zealand charities now seem to have been placed at a similar disadvantage to that which has faced Canadian charities, as discussed above.

This factor is exacerbated by the fact that, in New Zealand, an appeal

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149. The results of Charities Services' internet searches has been a significant issue in cases decided under the *Charities Act*, *ibid* to date. See *e.g. Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 74-75; and *Re Greenpeace CA*, *supra* note 49 at para 31.

150. See *Re Greenpeace CA*, *ibid*; *Re Greenpeace SC*, *supra* note 1; and *Re Family HC*, *supra* note 49. In both the Greenpeace and Family First cases, the result of the Board's reconsideration was to reach the same conclusion which, in both cases, is now subject to further appeal.

to the High Court, which must be lodged within 20 working days of decision,[151] is simply beyond the resources of most New Zealand charities. The net effect is that, for the most part, charities simply have no practical means of holding Charities Services accountable for its decisions.

The writer respectfully submits that these factors are causing New Zealand charities law to become distorted. Decisions decided under the current New Zealand *Charities Act* should be viewed through this lens of inherent structural impediment, and in particular the lack of a sufficient evidential platform.

F. Summary

To summarise, despite the difficulties inherent in many provisions in the *Charities Act*, there is nothing to indicate that the common law definition of charitable purpose was intended to be changed by the passing of that legislation. The broad common law definition of charitable purpose that existed prior to the *Charities Act* continued following the passing of the legislation.[152]

Despite this, it is acknowledged that Charities Services applied a strict political purposes exclusion in practice, even though, in the writer's submission, it was not necessary to do so as a matter of law.

However, the question is, following the Supreme Court decision, what is the law now?

V. Did the Supreme Court Decision Change the Law?

A. Greenpeace's Purposes

At issue in the *Re Greenpeace SC* litigation were two of Greenpeace's purposes.

The first was originally in the following terms:

> 2.2 Promote the protection and preservation of nature and the environment, including the oceans, lakes, rivers and other waters, the land and the air and

151. *Charities Act*, *supra* note 4, s 59(2)(a).

152. See *e.g. Re Greenpeace CA*, *supra* note 49 at para 44.

> flora and fauna everywhere and including but not limited to the promotion of conservation, disarmament and peace.[153]

But was amended at the Court of Appeal stage of the litigation to read as follows:

> 2.2 Promote the protection and preservation of nature and the *environment*, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of *conservation, peace, nuclear* disarmament and the *elimination of all weapons of mass destruction*.[154]

Although this purpose was clearly couched in terms of protecting the environment, the references to the promotion of peace and the promotion of disarmament were analysed separately.[155]

The second of Greenpeace's impugned purposes was originally in the following terms:

> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society and support the enforcement or implementation through political or judicial processes, as necessary.[156]

But was amended at the Court of Appeal stage to read as follows:

> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society *listed in clauses 2.1-2.6* and support *their* enforcement or implementation through political or judicial processes, as necessary, *where such promotion or support is ancillary to those objects*.[157]

All of Greenpeace's other stated purposes were accepted as charitable, either for the protection of the environment or the advancement of education.[158]

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153. *Re Greenpeace SC*, *supra* note 1 at para 77.
154. *Re Greenpeace CA*, *supra* note 49 at para 7 [emphasis added].
155. *Application of Greenpeace of New Zealand Incorporated*, (2010) Charities Commission 7 (NZ), online (pdf): *Charities Services* <www.charities.govt.nz/assets/Uploads/Greenpeace-decline-decision.pdf> at paras 36-50 [*Greenpeace of New Zealand Incorporated 2010*].
156. *Re Greenpeace SC*, *supra* note 1 at para 77.
157. *Re Greenpeace CA*, *supra* note 49 at para 7 [emphasis added].
158. *Greenpeace of New Zealand Incorporated 2010*, *supra* note 155 at para 34; *Re Greenpeace HC*, *supra* note 49 at para 10; and *Re Greenpeace CA*, *ibid* at paras 8, 16.

B. The Commission's Decision

The Charities Commission (as it was then) considered that if disarmament and peace were promoted through 'political' means, such as through a change of law or government policy, it could not be charitable.[159] Although the Commission cited the decision in *Latimer CA* as authority for the proposition that a purpose must be for the public benefit,[160] the Commission did not refer to the *Latimer CA* decision in reaching its conclusion that "the promotion of disarmament and peace"[161] is a political purpose and not charitable. The Commission referred instead to the earlier decision of the High Court in *Re Collier*,[162] which itself cast significant doubt on any political purposes doctrine,[163] and four cases from other jurisdictions.

The Commission similarly considered that clause 2.7 was not charitable, on the basis that it allowed for 'political activities'; it considered this was an 'independent purpose' that was not charitable.[164]

With respect, the Charities Commission's approach appears to conflate the concepts of purposes and activities. Under the pre-existing law, the question should have been, were Greenpeace's activities non-partisan and carried out in furtherance of its stated charitable purpose of protecting the environment. If so, there should have been no difficulty.[165]

C. The High Court Decision

Greenpeace appealed to the High Court but, following the hearing of the appeal in November 2010, two developments occurred.

The first was the December 2010 decision of the High Court of Australia in *Aid/Watch*. In that case, the majority held that there was no

159. *Greenpeace of New Zealand Incorporated 2010*, *ibid* at para 42.
160. *Ibid* at para 12.
161. *Ibid* at para 73.
162. *Re Collier*, *supra* note 16.
163. *Ibid* at 89-90.
164. *Greenpeace of New Zealand Incorporated 2010*, *supra* note 155 at paras 52, 73.
165. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88.

general doctrine in Australia which excludes "political objects"[166] from charitable purposes, and the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty is itself a charitable purpose.[167]

The second development was the decision of the High Court of New Zealand in *Re Draco*,[168] which was delivered on 15 February 2011.

D. *Re Draco*

The stated purposes of the Draco Foundation (NZ) Charitable Trust ("Draco") included to protect and promote democracy and natural justice in New Zealand, and to raise awareness of and involvement in the democratic process.[169] Citing *Bowman* and *Molloy,* Justice Ronald Young declined to follow the majority judgment in *Aid/Watch,* and held that "New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects".[170] His Honour further considered that *Aid/Watch* may be limited to cases involving the relief of poverty, and that the decision is reliant on "Australian constitutional principles not applicable in New Zealand".[171]

Ostensibly on the basis of an analysis of Draco's activities, or the 'prominence' given to editorial pieces on its website,[172] His Honour went on to hold that expressing the opinion writer's view on issues in the public arena which are "essentially political"[173] meant that Draco was engaging in "partisan advocacy".[174] This *activity* was considered to be a non-charitable *purpose* that was not ancillary to a charitable purpose.[175]

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166. *Aid/Watch*, *supra* note 62 at paras 27, 28, 36, 40, 42, 46, 48, 49.
167. *Ibid* at paras 47-48.
168. *Re Draco*, *supra* note 49.
169. *Ibid* at para 4.
170. *Ibid* at paras 58-59.
171. *Ibid* at para 60.
172. *Ibid* at paras 63-64.
173. *Ibid* at para 67.
174. *Ibid* at para 68.
175. *Ibid* at paras 71, 79.

With respect, the reasoning in the case is surprising. There was no mention of the two-step test for whether a purpose is charitable, or any reference to the preamble. In fact, there was no mention of the *Latimer CA* decision at all, or how it might have impacted interpretation of the *Bowman* and *Molloy* decisions, particularly given developments in New Zealand's participatory democracy since 1917. There was no consideration of whether the purposes of Draco were entirely within the four corners of the *Bowman* and *Molloy* decisions, or whether they might have been distinguishable on their facts. The *Re Draco* decision in fact appears to demonstrate how disadvantaged New Zealand charities currently are by their inability to access a trier of fact, with the decision repeatedly commenting on the lack of evidence necessary to demonstrate the points contended for by the appellant trust.[176]

More fundamentally, the *Re Draco* decision appears to conflate the concepts of purposes and activities, treating purposes, activities and functions as more or less interchangeable.[177] The decision also appears to treat case law from other jurisdictions as if it were directly applicable in New Zealand, without analysis of the different statutory framework on which those decisions were based.[178] This appeared to be particularly the case with Canadian jurisprudence, which at the time contained a specific statutory override of certain common law rules in a manner that was simply not applicable in New Zealand.[179]

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176. See *e.g. ibid* at paras 26, 32, 35, 48-49, 62, 77.
177. See *e.g. ibid* at paras 33-35, 47, 54, 66, 70-72, 78-79.
178. *Ibid* at paras 55, 75-76.
179. Subsection 149.1(6.2) of the *Income Tax Act*, *supra* note 3 required a "charitable organization" to devote substantially all its resources to "charitable activities carried on by it" with a carve-out for certain types of 'political activities', applying an 'ancillary' test to activities rather than purposes. As noted by the High Court of Australia in *Aid/Watch*, *supra* note 62 at para 26, the special treatment in the Canadian statute law of "political activities" distinguishes it from Australian legislation. Contrary to the comments of the Court of Appeal in *Re Greenpeace CA*, *supra* note 49 at para 45, the writer submits that the New Zealand position is similarly distinguished.

The writer respectfully submits that *Re Draco* must be regarded as a 'rogue decision'.

E. *Re Greenpeace HC*

Nevertheless, the *Re Draco* decision appears to have influenced Justice Heath in reaching his decision in *Re Greenpeace HC* a few weeks later in May 2011.

In *Re Greenpeace HC,* the High Court began by noting that, in the most general terms, Greenpeace's object is to promote a philosophy that encompasses protection and preservation of nature and the environment.[180]

Justice Heath noted the questionable foundations of any political purposes exclusion (albeit confusingly referring to it as a "political activity exception"),[181] and considered that, in modern times, there was much to be said for the majority judgment in *Aid/Watch.*[182] Unlike Ronald Young J, Heath J had no real concerns that the political system in Australia ought to bring about a different conclusion, having regard to New Zealand's mixed member proportional system of parliamentary election, New Zealand's reliance on Select Committees to enable policy to be properly debated, and the existence of sections 13 and 14 of the *Bill of Rights*,[183] dealing respectively with freedom of thought, conscience and religion, and freedom of expression.[184]

However, after referring to *Re Draco,* His Honour stated that he felt constrained to apply *Bowman* and *Molloy,* in effectively the same manner, "[a]lbeit with a degree of reluctance".[185]

Again, the decision in *Latimer CA* is not mentioned in the judgment.

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180. *Re Greenpeace HC*, *supra* note 49 at para 1.
181. *Ibid* at paras 47-57.
182. *Ibid* at para 59.
183. *Bill of Rights*, *supra* note 60.
184. *Re Greenpeace HC*, *supra* note 49 at para 59.
185. *Ibid*.

F. The Court of Appeal Decision

Greenpeace's appeal of the High Court decision was heard on 4 September 2012, with the Court of Appeal delivering its decision a few weeks later on 16 November 2012.

With respect to clause 2.2 of Greenpeace's purposes, the Court of Appeal continued the approach of analysing the promotion of peace, and the promotion of nuclear disarmament and the elimination of weapons of mass destruction ("ND and EWMD") as separate purposes, rather than as part of a wider purpose of protection of the environment.

In setting out the applicable test for whether a purpose is charitable, the Court of Appeal referred to the *Latimer CA* decision, and articulated the test as follows:

> The purpose must be for the public benefit and charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c 4) (the preamble). The public benefit requirement focuses on whether the purpose is beneficial to the community or a sufficient section of the public. The requirement to be charitable within the spirit and intendment to the preamble focuses on analogies or the presumption of charitable status. Even in the absence of an analogy, objects benefit to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.[186]

The writer respectfully submits that this is an accurate statement of the test for whether a purpose is charitable in New Zealand law.

However, the Court of Appeal found that the words "for example, advocacy" in subsection 5(3) of the *Charities Act* had codified a political purposes exclusion in New Zealand law,[187] albeit one that was limited to "contentious political purposes".[188] The Court of Appeal noted criticism of such an exclusion, but considered that the rationale for the prohibition remained. In this context, the Court of Appeal referred to the comments of the Canadian Federal Court of Appeal in *Human Life International*[189] that a "guarantee of freedom of expression … is not a guarantee of public

186. *Re Greenpeace CA*, *supra* note 49 at para 43 [footnotes omitted].
187. *Ibid* at paras 45, 56, 59-60, 63, 67.
188. *Ibid* at paras 60, 64.
189. *Human Life International*, *supra* note 79.

funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held" inferring an "underlying concern that taxation benefits should not be available to a society pursuing one side of a political debate".[190]

The Court of Appeal did not refer to the decision in *Latimer CA* in this context.

The writer would respectfully disagree with the Court of Appeal that a strict political purposes exclusion was "part of the current law of New Zealand"[191] on the basis of *Molloy,* or that subsection 5(3) operated to enact one,[192] for the reasons discussed above.

G. The Promotion of Peace

With respect to the promotion of peace, the Court of Appeal held that it was:

> uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit of and intendment of the preamble, either by way of analogy or on the basis of the presumption of charitable status.[193]

The Court of Appeal agreed with the decision in *Southwood v Attorney-General*,[194] that promoting peace through either disarmament, or maintaining military strength, would not be charitable, on the basis that promoting peace through these means would be "contentious and controversial with strong, genuinely held views on both sides of the debate".[195]

However, the Court of Appeal held that the foreshadowed amendments to clause 2.2 of Greenpeace's objects would "remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today,

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190. *Re Greenpeace CA*, *supra* note 49 at paras 59, 63, referring to *Human Life International*, *ibid*.
191. *Re Greenpeace CA*, *ibid* at para 63.
192. *Ibid* at para 58.
193. *Ibid* at para 72.
194. [2000] EWCA Civ 204 [*Southwood*].
195. *Re Greenpeace CA*, *supra* note 49 at paras 73-74.

an uncontroversial public benefit test".[196] In reaching this view, the Court of Appeal looked to New Zealand's status as a signatory to the *Treaty on the Non-Proliferation of Nuclear Weapons*,[197] the passing of the *New Zealand Nuclear Free Zone Disarmament, and Arms Control Act 1987*,[198] and "overwhelming public opinion in New Zealand"[199] as demonstrating that the promotion of ND and EWMD was beneficial to the community. The Court of Appeal also held that the purpose was within the spirit and intendment of the preamble, both on the basis of analogy with the promotion of peace, and on the basis that there was no ground for holding otherwise.

On that basis, the Court of Appeal concluded that the public benefit of ND and EWMD is now "sufficiently well accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition".[200]

It seems difficult to argue with the premises that the promotion of peace and the promotion of ND and EWMD are inherently beneficial to the public, and that there is no apparent reason why they should not be considered within the spirit and intendment of the preamble and therefore charitable.

However, in reaching this conclusion, the Court of Appeal appeared to accept the reasoning in *Southwood,* whereby, in analysing whether a purpose for the promotion of peace was charitable, the Court found it necessary to consider the means by which peace would be promoted. If that premise was accepted,[201] it does raise the question of why a similar purpose for the promotion of ND and EWMD should not also require

196. *Ibid* at para 76.
197. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).
198. 1987/86 (NZ).
199. *Re Greenpeace CA*, *supra* note 49 at para 79.
200. *Ibid* at paras 76-82.
201. *Ibid* at paras 73-74, 100.

analysis of the means by which that purpose would be promoted.[202]

The writer would also respectfully differ from the Court of Appeal in the emphasis placed on controversy. Rather than having such a determinative effect, the writer respectfully submits that controversy is simply one factor to be taken into account in assessing whether the public benefit test is met on the facts of any particular case.

H. Ancillary Purposes

With respect to clause 2.7 of Greenpeace's purposes, the Court of Appeal noted that Greenpeace had changed the wording of its constituting document to require promotion of the adoption of legislation etc to be *ancillary* to Greenpeace's other objects.[203] Greenpeace appears to have made this change on the basis of the findings by the High Court and the Court of Appeal that there was a strict exclusion against non-ancillary 'political' purposes in New Zealand law.

However, if there was no such strict exclusion, such an amendment was unnecessary. Further, the amendment appears to have caused confusion with respect to the distinction between purposes and activities.[204] The writer respectfully agrees with the subsequent finding of the Supreme Court that, even if a strict political purposes exclusion was to be recognised, if it was correct to find that the promotion of peace, ND, and EWMD was charitable, it would not have been necessary to find advocacy activity properly connected with those purposes to be proscribed unless shown to be ancillary only;[205] among other things, the ancillary rule applies to purposes, not activities, as subsection 5(3) of the *Charities Act* makes clear. In addition, as a matter of law, Greenpeace should have been able to engage in unlimited non-partisan advocacy activities in furtherance of its stated charitable purposes, as discussed above. Arguably, those stated charitable purposes were the protection of

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202. *Re Greenpeace SC*, *supra* note 1 at paras 87, 98, 100; *cf. Re Greenpeace CA*, *ibid* at para 81.
203. *Re Greenpeace CA*, *ibid* at paras 83-92.
204. *Ibid* at paras 91-92.
205. *Re Greenpeace SC*, *supra* note 1 at paras 74, 85.

the environment, as noted by the High Court;[206] however, even if it had been correct to analyse clause 2.2 in separate components, the Court of Appeal had now found all of Greenpeace's purposes to be charitable.

However, the difficulty was that the amended wording of Greenpeace's object now did require Greenpeace's advocacy to be 'ancillary', even if such a requirement did not make sense as a matter of common law. As the Court of Appeal noted, organisations have a legal requirement to comply with the terms of their constituting document.[207] Failure to do so raises issues of breach of duty and *ultra vires*. Having made the amendment, Greenpeace now had a legal obligation to ensure that its advocacy work was 'ancillary'.

Nevertheless, in perhaps another demonstration of the difficulties caused by the absence of a trier of fact, the Court of Appeal considered that the issue of compliance with clause 2.7 in its amended form was a matter of evidence that needed to be addressed by Charities Services at first instance, and not by the Court on a second appeal. The Court of Appeal referred the matter back for reconsideration in light of its judgment.[208]

Greenpeace appealed to the Supreme Court.

I. The Supreme Court Decision

The writer respectfully agrees with the findings of the Supreme Court that there is no political purposes exclusion in New Zealand law, and that subsection 5(3) did not operate to enact one.[209] A blanket exclusion is neither necessary nor beneficial, risks rigidity in an area of law which should be responsive to the way society works, and distracts from the underlying inquiry whether a purpose is of public benefit.[210] Instead, the question of whether a purpose is 'political' is simply one facet of the

206. *Re Greenpeace HC*, *supra* note 49 at para 1.
207. *Re Greenpeace CA*, *supra* note 49 at paras 87-88.
208. *Ibid* at para 92.
209. *Re Greenpeace SC*, *supra* note 1 at paras 56-58, 86, 115.
210. *Ibid* at paras 3, 59, 69, 70, 114.

public benefit test,[211] as is the issue of controversy.[212]

In this respect, the writer respectfully submits that the Supreme Court confirmed the pre-*Charities Act* position.

In two respects, however, the Supreme Court disagreed with the approach taken by the Court of Appeal to assessing whether a purpose to promote ND and EWMD was charitable: (1) the application of the presumption of charitability; and (2) whether it was necessary to consider the manner of promotion of ND and EWMD.[213]

Importantly, however, the Supreme Court did not appear to question the two-step test. In fact, despite at times using a short-hand expression that might appear to conflate the two limbs of the test,[214] the Supreme Court appears to have been at pains to emphasise that both limbs of the test must be satisfied.[215]

J. The Presumption of Charitability

With respect to the presumption of charitability, the Supreme Court disagreed with the Court of Appeal's approach to the second limb of the two-step test, appearing to hold that this limb could be satisfied by analogy only.[216]

However, the writer respectfully submits that the Supreme Court appears to have misdirected itself as to the nature of the presumption. The Supreme Court appears to have mistakenly equated the presumption of charitability with the "single test of public benefit"[217] suggested by counsel for the appellant in *Vancouver Society*.[218] In the *Vancouver Society* case, counsel urged the Supreme Court of Canada to consider adopting

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211. *Ibid* at paras 72-74.
212. *Ibid* at paras 75, 99.
213. *Ibid* at paras 3, 31, 87-100.
214. *Ibid* at paras 3, 18, 73, 103, 114.
215. *Ibid* at paras 27, 29, 30, 32, 113. See also *Re Family HC*, *supra* note 49 at para 8.
216. *Re Greenpeace SC*, *ibid* at paras 29-31.
217. *Ibid* at paras 29, 113.
218. *Vancouver Society*, *supra* note 14; *Re Greenpeace SC*, *supra* note 1 at paras 24-25, 27, 29-30, 113.

an "entirely new approach"[219] to the definition of charitable purpose, in response to the "unduly restrictive"[220] interpretation of the definition that prevailed in Canadian jurisprudence at that time.[221]

Adoption of such a test would clearly have been a radical change for Canada.[222] However, with respect, the presumption of charitability does not correspond with the "single test of public benefit"[223] put forward in that case. In addition, the presumption does not "lose the concept of charity"[224] but seeks to find it, in way that has been recognised by the High Court as being in the public interest, "more intellectually honest"[225] and based on sound policy.[226] Recognition of the presumption would also not have constituted a "radical change"[227] in New Zealand as, in contrast to Canada, the presumption was firmly part of New Zealand law, as discussed above.[228]

A further difficulty is that the Supreme Court appears to hold that the presumption of charitability can only be rebutted if shown to be contrary to analogous cases,[229] citing the comments of Lord Justice Russell in *Incorporated Council of Law Reporting for England and Wales v*

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219. *Vancouver Society*, *ibid* at para 196.

220. *Ibid* at para 168.
221. *Ibid* at paras 196-198, 200.
222. *Re Greenpeace SC*, *supra* note 1 at para 29.
223. *Ibid* at paras 29, 113.
224. *Ibid*.
225. *Re Collier*, *supra* note 16 at 95.
226. *Ibid*.
227. *Vancouver Society*, *supra* note 14 at para 200.
228. The comments of the Court in *Vancouver Society*, *ibid*, referred to in *Re Greenpeace SC*, *supra* note 1 at para 29, were referring to the single test of public benefit, not the presumption of charitability. The presumption of charitability in New Zealand in fact bears more, although not complete, resemblance to the approach put forward by the intervener in *Vancouver Society*, *ibid* at paras 201-02. This too would have been a change in Canada, which as noted above interpreted the definition of charitable purpose much more restrictively than in New Zealand.
229. *Re Greenpeace SC*, *supra* note 1 at paras 25-26.

Attorney-General.[230] With respect, the reference to analogous cases in this context appears misplaced. As discussed above, Russell LJ's comments, which have been cited with approval in many New Zealand cases,[231] hold that a purpose for the public benefit is presumed to be charitable *in the absence of any ground for holding otherwise*. There is no apparent reason why such grounds should be limited to contrariety to analogous cases; indeed, such a limitation would appear to equate the presumption with the analogy test to which it was specifically providing an alternative.

Even so, given four centuries of case law, there are now so many analogies available that, as the Supreme Court notes, whether the second limb of the test is assessed by means of analogy, or by means of a presumption, may make "little difference in result".[232]

K. Manner of Promotion

In terms of the second respect in which the Supreme Court disagreed with the approach taken by the Court of Appeal, the writer respectfully submits that some conflation of the distinction between purposes and activities appears to have occurred.[233] For example, the Supreme Court appears to consider that subsection 18(3) had changed the law to enable the purposes of an entity to be "inferred from the activities it undertakes",[234] apparently without reference to an entity's constituting document.[235]

With respect to this specific point, the High Court has subsequently clarified in *Re The Foundation for Anti-Aging Research* that subsection 18(3) was not intended to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities

230. [1972] Ch 73 (CA (Eng)).
231. See *e.g. Morgan v Wellington City Corporation*, [1975] 1 NZLR 416 (CA) at 419-20; *Medical Council*, *supra* note 26 at 310; *Auckland Medical Aid*, *supra* note 75 at 388; and *Latimer HC*, *supra* note 5 at paras 106, 131. See also *Re Greenpeace CA*, *supra* note 49 at para 43.
232. *Re Greenpeace SC*, *supra* note 1 at paras 27, 31.
233. See *e.g. ibid* at paras 32, 47, 55, 65, 71, 73-74, 102, 104.
234. *Ibid* at para 14.
235. *Ibid*.

inquiry".[236] In other words, subsection 18(3) did not change the pre-*Charities Act* approach to ascertaining a charity's purposes, and the limited role of activities in that regard. The Court's role remains interpretation of the constituting document, not creation, as discussed above.

The fact that it would be very rare for advocacy activity to constitute a purpose in its own right is also significant in this context. The writer submits that this factor explains the following statements of the Supreme Court: that "advancement of causes will often, perhaps most often, be non-charitable",[237] on the basis of difficulty of establishing public benefit;[238] that "the promotion itself, if a standalone object not merely ancillary, must itself be … a charitable purpose"[239]; and that it may be "difficult" or "unusual" to show that "the promotion of an idea is itself charitable".[240] The writer submits that, in these statements, the Supreme Court is simply referring to the rare situation where an advocacy activity may have become a purpose in itself, and is holding that, even in such a case, there is no reason in principle why such a purpose could not be charitable if the two-step test is satisfied. In so doing, the writer respectfully submits that the Supreme Court affirms the pre-*Charities Act* position, and does not disturb the principle that charities may engage in unlimited non-partisan advocacy activity in furtherance of their stated charitable purposes.

Such statements might otherwise be highly problematic as, conceptually, every charitable purpose is a 'cause' and charities must by law act in furtherance of, and therefore 'advance', their charitable purposes. If, by the above statements, the Supreme Court was intending

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236. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 82-87, Ellis J. The High Court decision was recently cited with approval in *Graham Hipkiss v The Charity Commission for England and Wales* (2018) First-Tier Tribunal (Charity) CA/2017/0014, online (pdf): <charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20(23%20August%202018).pdf>.
237. *Re Greenpeace SC*, *supra* note 1 at para 73.
238. See also the comment in *Re Greenpeace SC*, *ibid* at para 74 that such a finding "will not be common".
239. *Ibid* at paras 103, 102; see also para 73.
240. *Ibid* at paras 114-15.

to import an entirely new approach that would see essentially every purpose having difficulty establishing public benefit, and therefore being charitable, the Supreme Court would surely have signalled this clearly, particularly given the extent to which Supreme Court appeared to be eschewing any "radical change".[241] The writer respectfully submits that the former interpretation seems more likely and is to be preferred.

Another issue relates to the comments of the Supreme Court that assessment of whether "advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted".[242] Similarly, the Supreme Court states that: "[e]ven if an end in itself may be seen as of general public benefit (such as the promotion of peace) the means of promotion may entail a particular point of view which cannot be said to be of public benefit".[243]

The Supreme Court does not analyse how these statements relate to the comments of the Privy Council that the relevant distinction is between "ends, means and consequences",[244] and that it is ends, not means, that must be exclusively charitable.[245] Again, such statements might on their face appear highly problematic given that, broadly, every charitable purpose can be conceptualised as "promotion of a cause".[246] However, again, it seems unlikely that the Supreme Court would have meant these statements to usher in a fundamental overhaul of the test for whether a purpose is charitable, particularly given the extent to which the Supreme Court seemed at pains to maintain the traditional two-step test for whether any purpose was charitable.[247]

In principle, there seems no practical distinction between 'means' and 'manner', except in the context of the unique, three-layered abstract

241. *Ibid* at para 29.
242. *Ibid* at para 76.
243. *Ibid* at para 116.
244. *Latimer PC*, *supra* note 16 at para 36.
245. *Ibid*.
246. *Re Greenpeace SC*, *supra* note 1 at paras 76, 116.
247. *Ibid* at paras 29-30.

purpose that was at issue before the Court. In other words, the better interpretation appears to be that the promotion of peace through the promotion of ND and EWMD is one of the exceptions where it may be necessary to look to activities to ascertain the true purpose of an organisation. In other words, the purpose of referring to 'means' and 'manner' was to require a consideration of the means of promoting the means of promoting peace, to ascertain the true nature of the specific purpose before the Court. The specific reference to the promotion of peace provides support for this interpretation.[248]

The writer respectfully submits that the purpose of referring to means and manner was not to ascertain whether 'means' and 'manner' are charitable, or to require a charity to show public benefit in all of its activities. As the High Court has noted in *Re The Foundation for Anti-Aging Research*, it seems unlikely that the Supreme Court was intending to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry".[249]

L. Assessing Public Benefit

In disagreeing with the approach taken by the Court of Appeal to assessing whether a purpose to promote ND and EWMD was charitable, the Supreme Court stated that it is "no answer" to point to the international and domestic framework for nuclear disarmament.[250]

However, the writer respectfully submits that these statements do not displace the approach to assessing public benefit that was set out by the High Court in *Latimer HC*.[251] To the contrary, while Parliament's involvement may, in the Supreme Court's view, not have resolved the question of public benefit on the facts of the *Re Greenpeace SC* case,[252] that does not translate into a 'hard and fast rule' that Parliament's involvement can never provide a guide as to public benefit. The issue comes down to the facts of each specific case.

248. *Ibid* at para 116.
249. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 86.
250. *Re Greenpeace SC*, *supra* note 1 at para 101 [emphasis added].
251. *Latimer HC*, *supra* note 5; *ibid* at para 83.
252. *Re Greenpeace SC*, *supra* note 1 at para 101.

As perhaps another indication of the disadvantage experienced by charities through their inability to access a trier of fact, the Supreme Court considered that it did not have the evidence necessary to determine whether a purpose to promote peace through ND and EWMD was charitable, and referred the matter back to Charities Services for reconsideration in light of its judgment.[253]

VI. What is the Question Following the Supreme Court Decision?

To summarise, in the writer's respectful submission, the Supreme Court decision did not change the law, but restored it to its pre-*Charities Act* position. The test for whether a purpose is charitable remains the two-step test set out by the Court of Appeal in *Latimer CA*, with a question mark over whether the second limb of the test can in fact be met by the presumption of charitability. There is no political purposes exclusion in New Zealand law. Whether a purpose is 'political', 'controversial', or both, are simply facets of the public benefit test. Charities remain lawfully permitted to undertake unlimited non-partisan advocacy in furtherance of their stated charitable purposes, as was the case before the *Charities Act*. In the rare case where advocacy activity may have become a purpose in itself, such a purpose may still be charitable if it can meet both limbs of the two-step test.

A. The Board's Second Decision

However, Charities Services clearly interpret the Supreme Court decision differently.

On 21 March 2018, almost four years after the Supreme Court had delivered its decision, and almost a decade after Greenpeace had first applied for registration, the Board completed its reconsideration in light of the Supreme Court decision. It again declined Greenpeace's

253. *Ibid* at paras 104, 117.

application.[254]

With respect, although the High Court in *Re The Foundation for Anti-Aging Research* had confirmed the distinction between purposes and activities, the Board appears to recast the test set down by the High Court to fit within a paradigm that conflates purposes and activities.[255] The Board now appears to require public benefit to be found in all of a charity's activities.[256] As discussed above, this results in a complex and highly subjective approach under which a charity cannot have certainty as to whether its purposes are charitable unless Charities Services says that it is. This results in a 'deeming' approach similar to the one suggested by IRD in 2001 but was rejected by the Select Committee in 2004.

With respect, the approach seems arbitrary. Is there really a principled basis on which Save Animals from Exploitation qualifies for registration[257] but Greenpeace does not? Or on which Restore Christchurch Cathedral qualifies[258] but the Society for the Protection of Auckland Harbours does not?[259] Greenpeace's purposes for the protection of the environment and the advancement of education, are now no longer found to be charitable,

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254. *Application of Greenpeace of New Zealand Incorporated*, (2018) Charities Registration Board 1 (NZ), online (pdf): <www.charities.govt.nz/assets/Uploads/Greenpeace-of-New-Zealand-Incorporated-Decision.pdf> [*Greenpeace of New Zealand Incorporated*].
255. *Ibid* at para 10.
256. *Ibid* at para 28.
257. *Application of Save Animals From Exploitation*, (2018) Charities Registration Board 1 (NZ), online: <charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/save-animals-from-exploitation>.
258. *Application of Restore Christchurch Cathedral Group Incorporated*, (2015) Charities Registration Board 1 NZ) online (pdf): <charities.govt.nz/assets/Uploads/Restore-Christchurch-Cathedral-Group-Incorporated-decision.pdf>.
259. *Application of Society for the Protection of Auckland Harbour*, (2016) Charities Registration Board 1 (NZ) online (pdf): <charities.govt.nz/assets/Uploads/Society-for-the-Protection-of-Auckland-Harbours-decision.pdf.pdf>.

despite having been found to be charitable throughout the litigation.[260]

Charities advocating against government policy now appear to be particularly vulnerable to non-registration,[261] raising the spectre of original concerns that the *Charities Act* regime would be used as a means for government to exercise political control of the charitable sector.

The writer respectfully submits that the new approach of Charities Services and the Board does not make sense in charities law terms, is unworkable in practice, and puts New Zealand out of step with comparable countries such as Canada and Australia. Greenpeace has appealed again, and also sought judicial review.[262] At the time of writing, Greenpeace's consolidated appeal is awaiting hearing. Other appeals are also in progress,[263] highlighting that the position in New Zealand is not settled.

The topic of advocacy by charities is specifically included within the terms of reference for the current review of the *Charities Act* (despite the definition of charitable purpose itself being outside the scope).[264] The issue of advocacy has been a key issue raised in consultation meetings and submissions to date.[265] It is the policy of both Labour and the Green Party (two of the three political parties that currently form the coalition government of New Zealand) to support the independence of community

260. *Greenpeace of New Zealand Incorporated*, *supra* note 254 at paras 35, 50, 76.

261. Examples include Greenpeace, Kiwis Against Seabed Mining Incorporated, Family First New Zealand.

262. *Greenpeace of New Zealand Incorporated v Charities Registration Board*, [2019] NZHC 929.

263. Family First New Zealand has appealed the decision of the High Court in *Re Family HC*, *supra* note 49 with a hearing expected in October 2019. The Better Public Media Trust has appealed the decision of the Board to decline its application for registration *Application of Better Public Media Trust*, (2019) Charities Registration Board 1 (NZ), online (pdf): <www.charities.govt.nz/assets/Uploads/Better-Public-Media-Trust4.pdf>.

264. The terms of reference can be found here: "Modernising the Charities Act 2005" (2019), online: *Department of Internal Affairs* <www.dia.govt.nz/charitiesact>.

265. The writer is a member of the Core Reference Group for the review of the *Charities Act*, *supra* note 4.

sector advocacy, and ensure that charities can engage in advocacy without fear of losing their charitable status.[266] Despite this, early indications are that officials may seek to devolve law-making to Charities Services providing guidance on their controversial interpretation, on the basis of promoting 'clarity'.

B. Freedom of Expression

Although freedom of expression is one of the most essential elements of a democratic society,[267] the right to freedom of expression under section 14 of the *Bill of Rights*[268] has not been meaningfully considered in decisions regarding the advocacy functions of charities to date.[269]

The rights and freedoms contained in the *Bill of Rights* may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[270] Restrictions on the right to freedom of expression must conform to strict tests of necessity and proportionality,[271] and, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the *Bill of Rights*, that meaning is to be preferred to any other meaning.[272]

The burden of justifying a limitation upon a guaranteed right, and of demonstrating that the limitation does not impair the democratic

266. See New Zealand Labour Party, "Community and Voluntary Sector" (2017), online (pdf): *New Zealand Labour Party* <d3n8a8pro7vhmx.cloudfront.net/nzlabour/pages/8546/attachments/original/1504489890/Community___Voluntary_Sector_Manifesto.pdf>; and Green Party of Aotearoa New Zealand, "Community and Voluntary Sector" (2011), online (pdf): *Green Party of Aotearoa New Zealand* <www.greens.org.nz/sites/default/files/community_and_voluntary_sector_2011_0.pdf>.
267. *Wall v Fairfax New Zealand Ltd*, [2018] 2 NZLR 471 (HC) at para 26 [*Wall*].
268. *Bill of Rights*, *supra* note 60.
269. John Hancock, "Advocacy – Are Charities able to Advocate Against Government Policy?" (Presentation delivered at the 2019 New Zealand CLAANZ Conference, New Zealand, 11 April 2019) online: <www.charitylawassociation.org.au/events-nzconf2019>.
270. *Bill of Rights*, *supra* note 60, s 5.
271. *Wall*, *supra* note 267 at para 26.
272. *Bill of Rights*, *supra* note 60, s 6.

functioning of society, lies with the state.[273] The onus is therefore on Charities Services to demonstrate how the limitations it seeks to impose on charities' right to freedom of expression can be justified.[274]

The recent decision of the Ontario Superior Court of Justice in *Canada Without Poverty v Attorney-General of Canada*[275] lends support to the proposition that the *Human Life International* approach, discussed above, should not be followed.[276] A government agency denying charitable registration to a charity on the basis of its work advocating for its stated charitable purposes is a limitation on that charity's freedom of expression that needs to be, but has not yet been, demonstrably justified in a free and democratic society.[277]

It is no answer to say that some may disagree with particular positions advocated for by particular charities. There is no requirement, or even realistic possibility, for all to agree with every position taken by every charity. Rather than analysing the tax privileges available to charities in terms of the positions taken by particular individual charities, those tax privileges should be seen in the wider context of generating public debate in a marketplace of ideas in a participatory democracy. It is a case of, 'I may not agree with what you say, but I will defend to the death your right to say it'. As the High Court of Australia has noted, the generation by lawful means of public debate is itself in the public interest.

It is also axiomatic that all advocacy undertaken by a charity must be undertaken in furtherance of that charity's stated charitable purposes. If barriers are placed in the way of charities' ability to advocate, the risk is that the debate will be skewed in favour of vested, monied interests, who

273. Siracusa principles on the limitation and derogation provisions in the *International Covenant on Civil and Political Rights*, *supra* note 64 at paras 12, 20. See also UN Human Rights Committee General Comment 34 on the right to freedom of opinion and expression under Article 19 at para 27.

274. *Bill of Rights*, *supra* note 60, ss 3, 29.

275. 2018 ONSC 4147.

276. Noting that the Court of Appeal's approval of the statements in *Human Life International*, *supra* note 79, were contained within the paragraphs that were overturned by the Supreme Court on appeal.

277. *Bill of Rights*, *supra* note 60, s 5.

may have the resources to dominate the narrative without the discipline of charitable purposes or the transparency and accountability requirements that registered charitable status entails.

As with childhood diseases, we can better resist those germs to which we have been exposed.[278] Rather than silencing charities for their speech, what is really needed in New Zealand is a mature debate as a society about what freedom of speech really means, and why it is important to our democracy.

VII. Conclusion

When it comes to the issue of advocacy by charities, the writer respectfully submits that Charities Services is not asking itself the right question. The question is not whether there is public benefit in any particular point of view. The question, with respect to any advocacy, is whether it is undertaken in furtherance of the charity's stated charitable purposes. If so, and provided the advocacy is not partisan, and complies with other restrictions on speech, such as the requirements of electoral law, defamation law and proscriptions on hate speech, and is otherwise in accordance with the charity's constituting document, there should be no difficulty. Within those parameters, charities should be free to exercise their right to freedom of expression as they see fit without undue government interference.

As Hammond J has observed,[279] the Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. The function of the Court ought to be to sieve out debates which are for improper purposes; and to then leave the public debate to lie where it falls, in the public arena.

It is hoped that, in addressing the issue of advocacy by charities, the review of the New Zealand *Charities Act* will be guided by principles, such as: (1) purposes are not to be conflated with activities; (2) charities'

278. Submission by Rowan Atkinson to the English Parliament in 2012 seeking reform to section 5 of the *Public Order Act 1986* (UK) (which made it a public order offence to use "insulting" words).

279. *Re Collier*, *supra* note 16 at 90.

rights to freedom of expression must be respected; (3) there is no political purposes exclusion in New Zealand law; and (4) charities are able to engage in unlimited non-partisan advocacy in furtherance of their stated charitable purposes. In the writer's respectful submission, these principles reflect the pre-existing position and have not been substantively changed by either the passing of the *Charities Act* or the Supreme Court decision. It is to be hoped that the review of the New Zealand Charities Act will follow Canada's lead on this issue and make these principles clear.

Indigenous Peoples, Legal Bodies, and Personhood: Navigating the "Public Body" Exemption with Private Law Hybrid Entities

Bradley Bryan*

Over the past 40 years, the Canada Revenue Agency's application of the 'public body exemption' in paragraph 149(1)(c) to First Nation governments has evolved to include all 'Indian bands' and what are called 'Modern Treaty Nations'. Paragraph 149(1)(c) – the so-called 'public body exemption' – exempts public bodies performing a function of government from taxation on income received regardless of the geographic origin of the income-generating activity. To this day, this exemption is referred to as the 'Municipal Exemption' in the Income Tax Act, *RSC 1985, c 1 (5th Supp). The story of the emerging application of the exemption to 'Indian bands' and First Nations, however, is not to be gleaned from a study of the jurisprudence, nor of a legislative history of successive amendments to the* Income Tax Act. *Instead, the story of this evolution lies in the interactions of the various First Nations across Canada with the Canada Revenue Agency by way of applications for Advance Tax Rulings, or through audits and reassessments. This article explores some of the legal categories at play in this evolution, along with some of the corporate law issues that were also arising for First Nations as they pursued economic self-determination from the early 1980s to the present.*

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I. Introduction

Over the past 40 years, the Canada Revenue Agency's ("CRA") application of the 'public body exemption' in paragraph 149(1)(c) of the *Income Tax Act*[1] ("*ITA*") to First Nation governments has evolved to include all 'Indian bands' and what are called 'Modern Treaty Nations'. Paragraph 149(1)(c) – the so-called 'public body exemption' – exempts public bodies performing a function of government from taxation on income received regardless of the geographic origin of the income-generating activity.[2] To this day, this exemption is referred to as the 'Municipal Exemption' in the *ITA*.[3] The story of the emerging application of the exemption to 'Indian bands' and First Nations, however, is not to be gleaned from a study of the jurisprudence, nor of a legislative history of successive amendments to the *ITA*. Instead, the story of this evolution lies in the interactions of the various First Nations across Canada with the CRA by way of applications for advance tax rulings ("ATR") or through audits and reassessments. This article explores some of the legal categories at play in this evolution, along with some of the corporate law issues that were also arising for First Nations as they pursued economic self-determination from the early 1980s to the present.

First Nations today are caught between legal notions of public and private, and their status as legal subjects rests precariously on different forms of legal personhood and as recognized 'bodies'. Since the inception

of both the *British North America Act*[4] and the *Indian Act*,[5] 'Indian bands' and First Nations have been essentially wards of the state as existing under the jurisdiction of the federal government under subsection 91(24) of the former.[6] Indeed, First Nations in Canada largely still exist in something akin to a wardship relationship, notwithstanding the inconsistent applications of subsection 91(24) and section 35.[7]

'Indian bands', First Nations, the Métis, the Inuit, Aboriginal groups, tribes and tribal councils, clans, and houses are all various ways that Indigenous peoples are described as legal bodies, and the various rights they hold under the common law of Canada are said to be inalienable and to be held collectively. A note on terminology may be helpful at the outset: it should go without saying that there are deep differences between and among the Indigenous peoples in Canada, not only in their colonial experiences but also in their linguistic and cultural heritage and territories. This deep diversity is not reflected in the handful of referents for Indigenous peoples; sadly, this paper is attendant only to the colonial side of the legal situation, and as such will work with the set of referents used to distinguish various political and legal subjects. The way certain terms are used in referring to Indigenous peoples in Canada has changed over the past number of years, largely in recognition of the nuance that colonial systems of law have missed. The words "Indian" and Indian "band" are still legal definitions in the *Indian Act*,[8] and notwithstanding its legal provenance, I place those terms in quotes given the generally pejorative sense they carry. The word 'Aboriginal' refers to the overall and generalized reference by the common law to Indigenous people, and thus 'Aboriginal law' refers to the common law expression of the rights, obligations and place of Indigenous peoples in Canada, and it extends to those aspects of corporate law that deal with Aboriginal rights. 'Indigenous' is the broad term that contemplates peoples who have occupied what came to be called the Americas prior to contact with European settler societies, and includes those peoples tied to the

4. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*BNA Act*].
5. *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

land that came to be post-contact (*i.e.* Métis peoples); Indigenous law refers to those customs and traditions grounded in the relationships of a specific people to territorial practices and reflected in Indigenous legal traditions. First Nations are simply the particular political entities of specific Indigenous peoples, and while there ought to be some debate about this, I use the term consistent with section 35 jurisprudence (*i.e.* to include both Inuit and Métis peoples).[9]

In what follows, I do not aim to provide a normative assessment of the development of the changing rhetoric accompanying and defining the emergence of notions of legal personhood under contemporary colonial law, but simply to pick up some of the disparate and seemingly unrelated strands of legal identity that are tied in with the appearance of economic development in Indigenous territories and communities across Canada. I aim to show how colonialism exists in these different legal notions, and how we must work to make them visible so that we can understand them better and begin to counteract them.

II. The Straitjacket of Section 87 of the *Indian Act*

Over the past 40 years, First Nations in Canada have organized their affairs so as to shift their exposure to tax, moving from the quasi-private tax exemption under section 87 of the *Indian Act*[10] to the 'public body' exemption under paragraph 149(1)(c) of the *ITA*.[11] But the aim of 'structuring for the exemption' comes after a more fundamental shift in the way First Nations ostensibly became subject to tax.[12] The difference between tax immunity and tax exemption has not had much judicial consideration, and when it has, it has simply assumed that tax immunity

9. *Constitution Act, 1982*, *supra* note 7, s 35.
10. *Indian Act*, *supra* note 5, s 87.
11. *ITA*, *supra* note 1, s 149(1)(c).
12. Merrill Shepard, *Structuring for the Tax Exemption* (Vancouver: Continuing Legal Education, 2002).

is a question of sovereignty and consent.[13] Indeed the lack of clarity regarding the question of Indigenous tax immunity is emblematic of the blurry subjects that Indigenous people have come to be under Canadian colonial law.[14]

In general, section 87 of the *Indian Act*[15] exempts 'Indians' and 'bands' from taxation by exempting property that is an interest in "reserve lands or surrendered lands" or is the "personal property" of an Indian or band on a reserve.[16] The exemption is extended in subsection (2) by noting that no Indian or band is subject to tax "in respect of the ownership, occupation, possession or use of any property" in subsection (1) and is not "otherwise subject to taxation in respect of any such property".[17] In tax parlance, the words 'in respect of' and 'otherwise' connote a very broad exemption. However, there is very little legislative guidance in the *Indian Act*[18] or the *ITA*[19] as to how to apply this exemption. While it seems like a blanket exemption, one wonders whether it was meant simply to be an

13. See "Chapter One" of Merle C Alexander et al, *The Taxation and Financing of Aboriginal Businesses in Canada* (Scarborough: Carswell, 1998). An exception to this quick movement to exemption is considered with depth and a nuanced understanding of the factual issues involved in consent and sovereignty in the trial decision in *Benoit v Canada*, 2002 FCT 243. A consideration of the way that a consideration of First Nation entities become enmeshed in Administrative Law by virtue of their discrete identities is well-canvassed in the recent decision of *McCargar v Métis Nation of Alberta Association*, 2019 ABCA 172.
14. This holds for 'Indian bands' under the early, numbered treaties as well as for modern treaty First Nations (such as the Maa-nulth, or the Yukon First Nations under the Umbrella agreement).
15. *Indian Act*, *supra* note 5, s 87.
16. The fact that may be most striking to the tax lawyer is the territoriality of the exemption, and certainly invites speculation as to whether international tax concepts and norms might be more suitable. In this regard see the important observations about 'international law' as a possible source for 'legal transplants': Martha O'Brien, "Getting Back on Track: Income Tax, Investment Income, and the Indian Act" (2002) 50:5 Canadian Tax Journal 1570.
17. *Indian Act*, *supra* note 5, ss 87(1)-(2).
18. *Ibid*.
19. *ITA*, *supra* note 1.

exemption for any Indigenous person.[20] While there is plenty of caselaw and interpretation on the application of section 87,[21] it is interesting that the contemporary period in which section 87 judicial interpretation is said to begin is with the Supreme Court of Canada's (SCC) decision in *Nowegijick v The Queen*.[22] One must remember that the distance in time from the Trudeau government's White Paper of 1969[23] (recommending the assimilation of 'Aboriginal' peoples) to 1982 is but 13 years, during which section 35[24] came into being; it is at this moment that the SCC's decision appears, after a contested trial and appeal. Given the context of 1983, the decision in *Nowegijick* can be seen as remarkably progressive insofar as it provided a guide for interpreting Aboriginal tax cases. The case stands for a number of inaugural propositions of Aboriginal taxation, but the three most important are that: (1) taxing statutes are to be construed as liberally as possible, and where there is doubt they are to be interpreted in favour of the 'Indian(s)';[25] (2) the property of an 'Indian' or band includes intangible property such as income;[26] and (3) the place or location of that property (*i.e*. the 'debtor *situs*' test) is a crucial factual determination in establishing any exemption.[27]

Seven years later, in *Mitchell v Peguis Indian Band*, Justice La Forest described the way for a trier of fact to locate the personal property of

20. An ambiguity that has only recently been (somewhat) clarified in *Daniels v Canada,* 2016 SCC 12; however, the CRA has interpreted the ruling to not apply to the section 87 exemption in the *Indian Act*: see CRA Views 2016-0656851E5.
21. *Indian Act, supra* note 5, s 87.
22. *Nowegijick v The Queen*, [1983] 1 SCR 29 [*Nowegijick*].
23. Canada, Indian and Northern Affairs, "Statement of the Government of Canada on Indian Policy, 1969" (Ottawa: Department of Indian and Northern Affairs, 1969), online (pdf): <epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf> [White Paper of 1969].
24. *Constitution Act, 1982*, *supra* note 7, s 35.
25. *Nowegijick*, *supra* note 23 at para 25.
26. *Ibid* at para 29. The Crown's main argument in the case was that income could not be property that could have a physical location, like a reserve, and hence could not be the kind of property referred to in section 87 of the *Indian Act*.
27. *Ibid* at para 17.

an 'Indian' on a reserve by looking to factors that would connect it to the 'life of the reserve'[28] as opposed to the 'commercial mainstream',[29] as follows:

> [t]hese provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.[30]

This approach was solidified in *Williams v The Queen*, where the court both expanded upon *Nowegijick* by partially acknowledging the Crown's argument in that case (*i.e.* that the site of the debtor is not important)[31] and, following *Mitchell*, the court shifted the analysis away from the debtor to the factors that connect the property to the reserve by laying out the "connecting factors" test.[32] While the 'commercial mainstream' factor has been softened, if not jettisoned, by the SCC's decision in *Bastien Estate v Canada*, the 'connecting factors' test remains the current way to interpret section 87,[33] and the exemption remains very narrow.[34]

III. Other Tax Exemption: Paragraph 149(1)(c) of the *Income Tax Act*

There is another way that First Nations enjoy an exemption from taxation, and that is under paragraph 149(1)(c) of the *ITA*, called the 'Municipal Exemption' but commonly referred to as the exemption for "public bodies performing a function of government".[35] Because the *ITA* exemption under paragraph 149(1)(c) is much broader, many First Nations (and 'Indian bands') are able to use corporate structures that are not limited to the geographical location of their income. The provision

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28. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at para 98 [*Mitchell*].
29. *Ibid* at para 88.
30. *Ibid* at para 131.
31. *Williams v Canada*, [1992] 1 SCR 877 at para 26 [*Williams*].
32. *Ibid* at para 34.
33. *Indian Act*, *supra* note 5, s 87.
34. *Bastien Estate v Canada*, [2011] 2 SCR 710.
35. *ITA*, *supra* note 1, s 149(1)(c).

reads as follows:

> **Municipal exemption**
>
> **149(1)** No tax is payable under this Part on the taxable income of a person for a period when that person was …
>
> **(c)** a municipality in Canada, or a municipal or public body performing a function of government in Canada; … .[36]

It is listed in Division H of Part 1 of the *ITA*,[37] which deals with various exemptions and houses the specific exemption for charities, non-profit organizations, and qualified donees among a host of other specialized entities, rights, relationships, and transactions. In short, insofar as a taxpayer is a public body performing a function of government, it will be exempt from tax on income earned in the year from any source in Canada.

Subsection 248(1) of the *ITA* contains a definition of "person" that helps us see that an 'Indian band' or First Nation would be a person for the purposes of the *ITA*, and thus for paragraph 149(1)(c):

> ***person*** … includes any corporation, and any entity exempt, because of subsection 149(1), from tax under Part I on all or part of the entity's taxable income … , according to the law of that part of Canada to which the context extends; … .[38]

While subsection 149(11) stipulates a geographic limit, it does not have the effect of limiting the earning of income to the boundaries of a reserve, settlement land, or territory.[39] As noted above, however, the corporate entities owned and controlled by First Nations in Canada are not 'Indians' or 'Indian bands', and are separate taxpayers. Paragraph 149(1)(d.5) provides an exemption for corporate entities wholly owned by public bodies performing a function of government.[40] Note that paragraph 149(1)(d.5) exempts corporations wholly owned by a public body, but only the income that is earned within the geographic boundaries of the

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36. *Ibid*.
37. *Ibid*.
38. *Ibid*, s 248(1).
39. *Ibid*, s 149(11).
40. *Ibid*, s 149(1)(d.5).

First Nation at all times in the year (be it a reserve, settlement land, or other form of federally sanctioned territorial limit).[41]

While this form of exemption would seem to present an interesting possibility for recognizing First Nations as self-determining polities, one must remember that this 'municipal exemption' has been conferred on various non-governmental organizations, non-profits, and community associations. And yet, unlike charitable organizations or qualified donees, there is no process by which an entity can 'apply' to become registered or otherwise known as a public body, which has led to uncertainty for First Nations. Because there is no administrative process for ascertaining whether a First Nation fits within the rule, coupled with an aversion to the risk involved with simply assuming that a First Nation has the 'status' of a public body so as to enjoy the exemption, First Nations must apply for an ATR with respect to a specific transaction so as to ascertain whether, in a specific instance, the First Nation would be considered to be within the purview of paragraphs 149(1)(c), (d.5), and subsection 149(11).[42]

IV. Legal Personhood and Public Versus Private Bodies

This alternative form of exemption may seem to set up an adequate regime for fiscal self-determination among the First Nations and Indigenous peoples of Canada. However, First Nations that remain subject to the *Indian Act* are not recognized as 'legal persons' for the purposes of many provincial statutes, including owning land. While it is the case that an 'Indian band' can sue and be sued in its name, can bind itself in contract, and can be liable for debts, under many provincial statutes a band is not a person for the purposes of 'owning' or 'holding' title to various forms of property. This limitation of the legal personhood of 'Indian bands', tribal councils, and other Indigenous groups and organizations means that First Nations must use some of the most elaborate and complicated corporate structures to achieve their economic goals, which

41. *Ibid.*
42. *Ibid*, ss 149(1)(c), (d.5), (11).

often include tiers of limited partnerships, corporate entities, and trusts. This over-determination of corporate structures flows from the position of 'Indians' and 'Indian bands' as very particular kinds of legal subjects specifically defined under the *Indian Act* and extends to other forms of association. 'Indian bands' are not corporations,[43] and First Nations are not a legal "entity known to the law".[44] Strictly speaking, a "band" is only defined as a body of Indians in subsection 2(1) of the *Indian Act*,[45] and nowhere else.[46] The legal capacity that flows from this definition has been and remains unclear: 'Indian bands' can sue and be sued,[47] exist separately from their members,[48] but cannot hold land in fee simple.[49] It also remains unclear whether 'Indian bands' can hold shares or otherwise be 'persons' under provincial law.[50] Thus, in order to become secure in their use of discrete arrangements, structures, or transactions, many First Nations seek ATR from the CRA to ensure that the income they draw from their ventures will be exempt from tax.

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43. *Afton Band of Indians v Nova Scotia (AG)*, [1978] 29 NSR (2d) 226 (NSSC (TD)) at para 19.
44. *Lac des Mille Lacs First Nation v Canada (AG)*, [2002] OJ No 1977 (QL) (Ont Sup Ct) at para 6.
45. *Indian Act*, *supra* note 5, s 2(1).
46. See Huddart JA's comments in this regard in *Gitga'at Development Corp v Hill*, 2007 BCCA 158.
47. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 75.
48. *Kelly v Canada (AG)*, 2013 ONSC 1220 at para 112, citing *Commandant v Wahta Mohawks,* [2006] OJ No 22 (QL) (Ont Sup Ct); *Wilson v British Columbia*, 2007 BCSC 1324.
49. *Land Titles Act*, RSBC 1996, c 250, s 1; *Interpretation Act,* RSBC 1996, c 238, s 29; *Land Titles Act*, RSO 1990, c L-5, s 1.
50. Compare the *Business Corporations Act*, RSBC 2002, c 57, s 1(1) and the *Interpretation Act,* RSBC 1996, c 238, s 29. For case law considering legal capacity, see *Telecom Leasing Canada (TLC) Ltd v Enoch Indian Band of Stony Plain Indian Reserves No 135*, [1994] 133 AR 355 (Alta QB), *Martin v BC*, [1986] 3 BCLR (2d) 60 (BCSC). See also Robert Yalden et al, "First Nation Business Structures", *Business Organizations: Practice, Theory and Emerging Challenges* (Toronto: Emond, 2017), at 240-44.

For example, a First Nation may have decided to enter into a limited partnership with an industry partner in pursuit of a local industrial project, and may also wish to have the income from the limited partnership directed into a trust, with the First Nation as both a settlor and beneficiary.[51] The First Nation would be relying on paragraph 149(1)(c)[52] to receive exempt income from the limited partnership or the trust, but would want to know if their 'entity' satisfies the criteria of being a public body performing a function of government. To this end, First Nations submit requests to the CRA for ATR, as there is no formal way to 'register' as or be deemed to be a public body under the *ITA* or the *Income Tax Regulations.*[53] When a First Nation receives a ruling, the CRA is always careful to note that the ruling applies to the transactions as listed and not to any future or past transactions.

The unclear and regimented classifications of the legal personhood of First Nations in Canada under the common law thus drive Indigenous peoples to utilize some of the most complicated corporate structures, instruments, and transactions to complete ordinary economic goals. In light of the arrays of corporate tiers and structures used by First Nations in pursuit of economic development, there are many questions that arise from the combination of paragraphs 149(1)(c) and (d.5).[54] While there may have been a shift towards what was considered a more liberal interpretation of how 'Indians' and 'Indian bands' were to be taxed around 1982-1983, the use of paragraphs 149(1)(c) and (d.5)[55] before this time and through the 1980s shows a less harmonious picture, as many attempts for public body status with respect to a transaction were turned down in ATR by the CRA simply because the First Nation did not demonstrate that it was in fact a public body, or could not show that it was performing a function of government. More on the reasoning in these ATR below.

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51. This would be a very ordinary sort of transaction: see *e.g.* CRA Doc Views 2012-0473041R3E; CRA Doc Views 2013-0476871E5.
52. *ITA*, *supra* note 1, s 149(1)(c).
53. CRC, c 945.
54. *ITA*, *supra* note 1, ss 149(1)(c), (d.5).
55. *Ibid*.

Legal personhood is an aspect of most modern treaties (*i.e.* comprehensive land claims agreements that begin with the *James Bay and Northern Quebec Agreement* signed in 1975[56]), and a permanent feature of all agreements after the Yukon Umbrella Agreement of 1993:[57] it is conferred in the treaty by stating that the First Nation (1) is a legal person, and (2) is a public body for the purposes of paragraph 149(1)(c) of the *ITA*.[58] But this conferral of personhood does not alter the application of paragraphs 149(1)(c) and (d.5) or subsection 149(11)[59] with respect to First Nation owned and controlled corporations. That is, modern treaty First Nations can *receive* income but may not be actively engaged in the businesses that create it — be they development corporations, limited partnerships, or other kinds of ventures. Thus, the identity of these legal persons is at once neither really public nor completely private, but rather 'quasi-private to quasi-public'.

V. The Administrative and Legislative Context of the Use of the Public Body Exemption

By the mid-1980s, the *Kamloops Amendment*[60] to the *Indian Act* was being drafted, which provided for 'Indian bands' to be able to pass property taxation bylaws on their reserve lands. As reserve lands cannot be held in fee simple, the tax is levied upon holders of certificates of

56. Canada, Royal Commission on Aboriginal Peoples, *The James Bay and Northern Quebec Agreement: Natural Resources, Public Lands, and the Implementation of a Native Land Claim Settlement*, by Alan Penn (Montreal: 1975), online (pdf): <publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-128-eng.pdf> [*James Bay North Quebec Agreement*].
57. Canada, Council for Yukon Indians, *Umbrella Final Agreement* (Whitehorse, Yukon: 1993), online (pdf): <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf>.
58. *ITA*, *supra* note 1, s 149(1)(c).
59. *Ibid*, ss 149(1)(c), (d.5), (11).
60. Bill C-115, *An Act to Amend the Indian Act (Designated Lands)*, SC 1988, c 23, amending the *Indian Act*, RSC 1985, c I-5, as amended [*Kamloops Amendment*].

possession, often with the provincial assessment authority. Passed in 1988, these new powers arose within a new federal legislative framework designed to allow 'Indian bands' the opportunity to leverage sources of capital revenue. Simultaneous to the enactment of these powers, the *First Nations Statistical and Financial Management Act*[61] was passed, and the First Nations Tax Commission ("FNTC") and the First Nations Finance Authority ("FNFA") were established. The FNTC was tasked with overseeing the drafting and implementation of a suite of local taxation and financial administration laws. So long as these bylaws or laws (it is unclear how they differ in the legislation) fit a rather standardized model, a First Nation could apply to the FNFA to borrow funds, and the said funds were used by the FNFA to issue bonds in a manner much like the municipal finance authorities of many provinces while the First Nation would have access to capital for capital projects on reserve or other lands. Within a few years of its inauguration, the FNFA became exceedingly successful, with a AAA bond rating equaled only by London (and then shortly thereafter it surpassed even this).[62] It is important to recognize that this conferral of power was not about creating a revenue source for First Nations, nor for making 'tax room', but for encouraging the mimicry of a certain style of governance: a revenue authority that cannot raise funds by engaging in active business, and that uses its revenues not as funds to spend but as capital to leverage for borrowings. In this way, the federal government understood that it was satisfying its obligations under subsection 91(24)[63] without having to actually spend any money, and by encouraging the taxation of holders of certificates of possession by 'Indian bands'. In short, the regime created taxing authorities and

61. SC 2005, c 9. The *First Nations Fiscal and Statistical Management Act* was later renamed the *First Nations Fiscal Management Act*.
62. There are a handful of theories about the successfulness of the FNFA, the most compelling of which is the perverse effect of holding the FNFA to a higher standard of fiscal accountability than any other finance authority has been in the history of Canada. See Shiri Pasternak, "The Fiscal Body of Sovereignty: To 'Make Live' in Indian Country" (2015) 6:4 Settler Colonial Studies 1.
63. *BNA Act*, *supra* note 4, s 91(24).

taxpayers, and a public body with a mandate to leverage and spend on capital projects.[64]

A key feature of the 'Financial Administration Law' (pursuant to the *First Nations Fiscal Management Act*[65]) that a First Nation may pass is the requirement that the First Nation not be involved in running any active businesses, or engage in any ventures that would otherwise expose it to liability. In short, First Nations come to face their economic development as passive public bodies that leverage capital, but then cannot carry out the projects without engaging external parties. Alternatively, should a First Nation decide to create a 'development corporation' (under provincial, territorial, or federal laws), these must operate at arm's length, and in practice often simply result in the forging of limited partnerships with industrial partners that are specialized in the area of the capital project. If the capital project has a revenue stream, for something like a garbage dump, then the First Nation receives a portion of it as a limited partner.[66] The subsequent passage of the *First Nations Land Management Act*[67] in 1999 added to this array of powers for bands to make their lands accessible to certain kinds of developments.

This new capital era for First Nations matched thinking that was happening in the United States, notably by Stephen Cornell and Joseph Kalt, the originators of the Harvard Project on American Indian

64. This regime has had very mixed results, as can be imagined, depending on the relative land-use values that various parcels have.

65. SC 2005, c 9.

66. There are more garbage dumps on reserve lands than on non-reserve lands in Canada. See J Berry Hykin, "Contaminated Sites on First Nation Lands" *Conference Proceedings: Site Remediation in BC* (Vancouver: MOE, 2016). See also Margo McDiarmid, "Native reserves polluted due to gaps in rules: AG" *CBC News* (3 November 2009), online: <www.cbc.ca/news/canada/native-reserves-polluted-due-to-gaps-in-rules-ag-1.785136>; and Chapter 6 of the Auditor General's report for 2009, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_200911_06_e_33207.html>.

67. *First Nations Land Management Act*, SC 1999, c 24.

Economic Development.[68] Their much-travelled and influential thesis has been that economic development for Indigenous peoples can happen only if there is a 'separation of business from politics'. Notwithstanding the tone-deaf and glib manner of this slogan, Cornell and Kalt have been widely successful in propagating this model, and it girds the deployment of the institutional arrangements set out in the *Kamloops Amendment*. But First Nation governments in Canada are not allowed to be 'governments' in the way they are regulated precisely because they employ private law entities to pursue various specific ventures as a means to economic development. By requiring Indigenous peoples in the body of their Nations to use private entities to pursue private ventures, and to enter the market as private actors, the call to separate business from politics becomes confusing: how are the *political* units of First Nations to develop economically if they are required to act through private bodies on specific ventures?

This conundrum is further complicated by the exceedingly bureaucratic way that Indigenous peoples are financed in Canada by the federal government. Any revenue that a First Nation generates on its own is not simply revenue that can be kept 'in addition' to any monies it may receive by virtue of federal transfers, or because of other contribution agreements it may have with the federal government, but instead becomes classified as 'own-source revenue' ("OSR"). OSR arose in the federal-provincial fiscal harmonization era as a specific term for identifying what sorts of provincial sources of revenue ought to be taken account of when calculating amounts for inter-provincial and federal-to-provincial transfers. With respect to First Nations in Canada, OSR describes a similar set of calculations regarding amounts that can be

68. Stephen Cornell & Joseph P Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22:3 American Indian Culture and Research Journal 187 [Cornell and Kalt]; Stephen Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States*, JOPNA No. 2006-02 (Tucson, AZ: Native Nations Institute for Leadership, Management, 2006) [Cornell, *Indigenous Peoples*]. This project is housed at Harvard University, online at <https://hpaied.org>.

clawed back (sometimes on a dollar-for-dollar basis) if a source of revenue is of the kind to be included in the calculation, or if otherwise excluded revenue sources are spent on areas of federal responsibility under those agreements.[69] While OSR continues to be the bugbear for First Nations, it is becoming widely recognized as presenting an austere handicap to any economic development in Indigenous communities.[70] That is, when attempting to access and use other sources of capital, federal administrative practices and policies operate to negate the use of such sources by clawing back funding that the First Nation may have otherwise received from Canada by applying what is known as its policy regarding the OSR of First Nations. The effect of these complicated federal policies is to push First Nations to use exceedingly complex and costly corporate structures simply to engage in ordinary economic activities that are supposed to generate economic activity for their communities. While pursuing their own economic development, First Nations in British Columbia often find that any finances they are able to secure and use to participate in processes like cooperative watershed governance are effectively clawed back under the federal government's funding formula, resulting in a net loss to the First Nation. While many First Nations and their staff understand the conundrum of Canada's fiscal policy with respect to Indigenous people, most non-Indigenous Canadians remain unaware of the mechanics and

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69. This formula-based practice is true under the federal financing agreements between Canada and modern Treaty First Nations, as well as for 'Indian bands': for bands, the OSR calculation is not subject to agreement *per se* but is found in the administrative policy of federal agencies or identified in contribution agreements. See Indigenous Services Canada, "Manual for the Administration of Band Moneys, Chapter 7: National Expenditure Request Procedure Guidelines -— Process Overview — Part 2" (2012), online (pdf): *Aboriginal Affairs and Northern Development Canada* <https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-INSTS/STAGING/textetext/bm_pubs_mon_pol_man_pdf_1358868879487_eng.pdf>.

70. Which may be why the federal government declared a moratorium on certain aspects of OSR in 2014. These are summarized in a report on federal financing in Bradley Bryan, "The Fiscal Structure of First Nation Governance in Canada" (BC: University of Victoria, 2019).

policy frameworks that create barriers for First Nations to exercise fiscal, government-like powers. This claw back is effectively a notional tax, which works against the fiscal self-determination of Indigenous peoples. Unlike other levels of government, the financial and taxation institutions, policies, and administrative frameworks that govern the financial options available to the different forms of Indigenous governments are at the same time both opaque and restrictive.

It is in the context of these administrative straits that First Nations had to manage some form of economic development in their communities, and through which the public body exemption became actively sought. In the early 1980s, the CRA routinely provided ATRs that denied that a First Nation was a public body performing a function of government on the basis that it "had not reached a sufficient level of advancement".[71] After the *Kamloops Amendment*, the rhetoric of 'stages of economic development' continued to be used in ATRs, but with an explanation that such 'a sufficient level of advancement' could be demonstrated by the passage of taxation bylaws and evidence of elections.[72] It was only in the late 1990s on the eve of the release of the Royal Commission on Aboriginal Peoples ("RCAP") in 1997 that this vocabulary of stages of economic development was dropped from CRA's ATRs for First

71. This rhetoric can be seen by canvassing hundreds of CRA rulings from 1978 to the 1990s.

72. Again, this trend in the vocabulary continued well into the 1990s. For an example, see CRA, Internal T.I. (3 August 1995) 1995- 9514567. Note that these elections were not in reference to the hereditary, traditional, or customary modes of governance. It is thus particularly puzzling that evidence of elections would be required given that the *Indian Act* and modern treaties, as enactments of federal law, all set out election policies and procedures.

Nations.[73]

The extinguishment of the tax exemption under section 87[74] enjoyed by 'Indians' and 'Indian bands' has been the most consistent objective of all modern treaties since the *James Bay and Northern Quebec Agreement,*[75] arguably even more so than any extinguishment of Aboriginal title. The recognition of legal personhood, by contrast, did not confer any more straightforward manner for holding lands or other forms of property, and modern treaty First Nations continue to employ the retinue of complex corporate structures as their *Indian Act* counterparts – largely because of the ideal made popular by Cornell and Kalt, *viz.* the separation of business and politics. Notwithstanding that the rise of bureaucracy has been a force for removing politics from statecraft for most Western forms of governance, both Canadian law and the view of Cornell and Kalt seem to imagine two very strict spheres of life resolvable by way of the public-private distinction, which maps onto politics and business.[76] Even while First Nations in Canada continue to have forms of legal and political authority in Canada, it is important to recognize that the use of the exemption for "public bodies performing a function of government"[77] has not (and likely will not) clarify the status of Indigenous peoples' self-determination.

VI. Conclusion: Contemporary Realignments?

There remain serious challenges for First Nations attempting to carry out economic development, however, and the absence of specific bureaucracies of finance (which exists within the residual jurisdiction of the federal government), has produced a situation for First Nation governments where they must outsource their own bureaucracy to

73. Library and Archives Canada, "Report of the Royal Commission on Aboriginal Peoples" (4 October 2016), online: <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>. See, specifically, Report of the Royal Commission on Aboriginal Peoples, *Volume 5: Renewal: A Twenty-Year Commitment*, (Ottawa: Canada Communication Group, 1996), online (pdf): <data2.archives.ca/e/e448/e011188230-05.pdf>.

74. *Indian Act*, *supra* note 5, s 87.

corporate entities while not having any jurisdiction over them. That is, any set of corporate entities deployed by a First Nation is necessarily created under the jurisdiction of the province, territory, or federal laws by which they were created. As Justice of Appeal Huddart noted in *Gitga'at Development Corporation v Hill*:

> … when the Gitga'at set up the [Gitga'at Development Corporation] to assist them with their economic development, they chose to use a vehicle provided under provincial legislation… By choosing to use existing commercial and legal structures, the Gitga'at chose to be governed by existing commercial laws of general application, *to the extent that Canadian law permits them to make those choices*.[78]

Because First Nations cannot create their own entities, the entities that they do employ inevitably become subject to private law, and engage as private entities, which reinforces the way that First Nations emerge as private actors in the economy, as passive interest holders or beneficiaries, as shareholders, but also as self-determining nations (and presumably 'entities') with rights under section 35 of the *Constitution Act, 1982*.[79]

More recently, there have been isolated and discrete attempts to provide authority, if not jurisdiction, to First Nations. Prior to 2014, a First Nation, tribal council, or 'Indian band' would need to request an ATR with respect to any series of transactions in order to be certain that they enjoyed paragraph 149(1)(c)[80] status. In 2014, the CRA conducted a pilot project regarding entity classification of First Nations and 'Indian bands' in Canada, and concluded, in 2016, that all 'Indian bands' in Canada were "public bodies performing a function of government" within the meaning of paragraph 149(1)(c).[81] Note that this widespread acknowledgement, however, is only that First Nations are public bodies for the purposes of paragraph 149(1)(c), notwithstanding the fact that the exemption remains titled the "Municipal Exemption" in the *ITA*.

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78. *Gitga'at Development Corp v Hill*, 2007 BCCA 158 at para 14 [emphasis added].
79. *Constitution Act, 1982, supra* note 7, s 35.
80. *ITA*, *supra* note 1, s 149(1)(c).
81. CRA, Internal T.I. (27 July 2016) 2016-0645031I7.

One aspect of the rhetorical force of colonialism thus lies in the variegated and particular strands of law that position First Nations as historically separate, as political entities with particular claims, as private actors in the market, and as bodies with *sui generis* rights. These often contradictory legal signifiers combine to create a significant barrier for First Nations' economic development in Canada. The historical force of the various legal claims that Indigenous peoples have with respect to self-determination and forms of sovereignty in Canada are undercut by the weight of the fact that private law structures remain required for First Nations, while their status as "public bodies performing a function of government" positions them somewhere in between. And even though the ideal of being "masters in their own houses" proposed by RCAP in 1997 can be seen as an important turning point, the ambiguous situation of First Nation legal personhood does not show signs of being resolved.

Modernizing the 'Definition' of Charity: Charting the Tax Terrain of Statutory Reform

Reid Buchanan* & Michelle Gallant**

Amid considerable chatter about the renovation of charities governance, there is a lot of clamor for a twenty-first century vision of benevolence. The contemporary state of affairs finds governance thoroughly tethered to a conception of 'charity', or 'charitable entity' planted 400 years ago. That conception, developed within and shaped by the common law, is perceived to reflect an antiquated idea about benevolence that has little relevance to the contemporary social order. While a statutory articulation of the definition of 'charity' could ensure that modern governance matched and served the needs of modern society, any renovation project happens within a tax context. In law, the meaning of 'charity' matters precisely because of its tax pertinence. The relationship between tax and charities means that the crafting of any new vision needs to develop within, and be framed by, an appreciation of the potential fiscal implications. This paper charts the tax-centric dimension of charities governance. With a specific focus on the definitional piece, it proffers an analysis of the fiscal considerations relevant to modernizing the definition of 'charity'.

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I. Introduction

Parliament has a long history of promoting benevolence through the tax system by nestling specific concessions in the *Income Tax Act* ("*ITA*").[1] This undergirds giving and shares some responsibility for fostering a vibrant Canadian charitable sector. Although the promotion of this vision exists in statute law, Parliament has never articulated a particular vision of benevolence. There is no statutory definition of 'charity'. Statute law confers special treatment onto charities but does not specify what entities qualify for this treatment. Instead, the promotional scheme applies to organizations that the common law decides are 'charitable'.

This benevolence framework, the coupling of explicit statute-based tax incentives with a concept determined by the common law, has never proven particularly controversial. In almost a century of promoting charity, statute law has never been modified to align tax concessions with a statutory definition. As recently as 2017, a doyen of charity law opined that "[n]o signs are evident that an agreed statutory definition or description is likely to appear in the foreseeable future in Canada".[2]

Nonetheless, winds of change may be stirring. After many years of scant scrutiny of the legal governance of charities, the years 2016, 2018, and 2019 witnessed the formation of three separate federally-

constituted bodies tasked with investigating the reform of charities law.[3] One set of recommendations has been introduced into law.[4] Rumblings of discontent with the state of the common law conception of charities, some of which has begun to percolate into the investigations,[5] provides fodder for the belief that one dimension of any statutory renovation might include the matter of a statutory definition. More pointedly, changes that have happened in foreign jurisdictions are likely to salt local discussions. A number of jurisdictions, including the United Kingdom and Australia, have recently shifted from the common law to a statute-based vision of charity.[6] Given our similar legal heritage, the statutory definitions implemented in Australia and the UK could guide Canadian

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3. See *Report of the Consultation Panel on the Political Activities of Charities* (Ottawa: Canada Revenue Agency, 2017) [*RCPPAC*] (in 2016, the Minister of National Revenue appointed the Consultation Panel on the Political Activities of Charities, which submitted a report in March 2017 detailing recommendations for change); see Canada, Senate, *Journals of the Senate*, 42-1, No 174 (30 January 2018) at 2900 (in 2018, a Special Senate Committee on the Charitable Sector was convened to examine the impact of federal and provincial laws and policies governing charities); see Canada Revenue Agency, News Release, "The Government of Canada Delivers on its Commitment to Modernize the Rules Governing the Charitable Sector" (7 March 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/news/2019/03/the-government-of-canada-delivers-on-its-commitment-to-modernize-the-rules-governing-the-charitable-sector.html> [perma.cc/ZGQ2-VERH] (in March 2019 a permanent Advisory Committee on the Charitable Sector was established to provide on-going advice on emerging issues in the sector).
4. See Bill C-86, *Budget Implementation Act, 2018, No* 2, 1st Sess, 42nd Parl, 2018, cl 17 (assented to 18 December 2018), SC 2018, c 27.
5. See Kathryn Chan, *Written Submission to the Senate Special Committee on the Charitable Sector*, (22 October 2018) [*Chan to Senate*] ("[t]he 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 analogy" at 2).
6. See *Charities Act 2011* (UK); *Charities Act 2013*, 2013/100 (Austl) [Austl *Charities Act 2013*].

reform.[7] At the very least, these hints of movement prime the idea that perhaps the time is ripe to consider whether the tax statute ought to explicitly articulate a definition of charity.

Any renovation as it relates to a statutory definition of charities is a complex undertaking. The very idea of a statutory vision cannot be severed from its fiscal dimension: tax and charities are intractably linked. In seeking to inform ideas about a statute-based model, this paper canvasses the relationship between fiscal incentives and charities. Its particular focus is on the definitional aspect: the common law conception, potential statute-based reform of the definition and the fiscal implications.[8]

After outlining the central themes of the connection between tax and charities, this paper rehearses the history of concessions and delineates the boundaries of contemporary statute law. Against this backdrop, it explores the common law conception of charities. The final section teases out fiscal considerations relevant to the crafting of a statutory model of

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7. See *e.g.* Kathryn Chan, "The UK's Raging Public Benefit Debate and its Relevance in Canada" (2008) at 15, online (pdf): *Canadian Bar Association* <www.cba.org/cba/cle/PDF/CHAR11_Chan_Paper.pdf> [perma.cc/8RBU-YDSR] [Chan, "UK's Raging Public Benefit Debate"].

8. For a discussion of the constitutional framework underpinning charities law, see generally Donald Bourgeois, *The Law of Charitable and Not-for-Profit Organizations,* 4d (Markham, Ont: LexisNexis Canada 2012) at 6-16 (for a discussion of the constitutional framework underpinning charities law); see also *International Pentecostal Ministry Fellowship of Toronto v Minister of National Revenue*, 2010 FCA 51 at para 8:

> [i]n our view, these provisions relate, in their pith and substance, to federal taxation, and accordingly they are *intra vires* the Parliament of Canada under subsection 91 (3) of the *Constitution Act, 1867*. Both the advantages of registration and the drawbacks of revocation relate solely to the tax treatment of charities and their donors. They do not impermissibly affect the affairs of charities in any other way, nor do they impede provinces from otherwise regulating charities.

See also Patrick J Monahan & Elie S Roth, *Federal Regulation of Charities: A Critical Assessment of Recent Proposals for Legislative and Regulatory Reform* (Toronto: York University, 2000) stating that "[t]o the extent that special tax treatment is provided to charities or non-profit organizations and their contributors, it is necessary and appropriate for Parliament to regulate the terms upon which special treatment is to be permitted" at 7.

benevolence.

II. Charities and Taxation

The relationship between charities and taxation is long, ubiquitous and, to a pronounced degree, inseverable. Ushered into the British charitable narrative with the 1799 introduction of income tax,[9] the relationship pre-dates the formation of Canada.[10] Access to tax concessions is what distinguishes charities from the commercial, business, or profit-oriented substrate and also sets charities apart from the wider not-for-profit sector.[11]

Tax is the tool used to encourage private financial transfers to the charitable sector. Deference to benevolence generally reflects the traditional valuing of the giving of resources to others, whether the selfless sharing of individual efforts and time — volunteerism — or the sharing

9. *Income Tax Act 1799* (UK), 39 Geo III, c 13.
10. See Canada, Policy Coordination Directorate, Secretary of State, *Charities: The Legal Framework*, by Neil Brooks (Ottawa: Policy Coordination Directorate, 1983) at 16-17 [N Brooks, *Legal Framework*]. The story of charities in the context of trusts is much older. For more information on the development of the charitable trust, see generally Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4d (Toronto: Carswell 2012) at 721.
11. Note that while not-for-profits receive some tax concessions, those concessions are less than the concessions received by charitable organizations. This is discussed in more detail later in this section.

of monetary possessions.[12] Some reduction in the cost of public tithing acknowledges a primacy, amongst competing social values, of fostering an ethic of giving. Part and parcel of this nod to benevolence is the idea that charities service the public good, and their presence enhances social welfare. In the legal language of the tax-charities narrative, the concept of charities is wedded to the creation of a public benefit that is to some purpose beneficial to the "community or of an appreciably important class of the community".[13] Tax privileges reflect this deference: they are the principal means of fostering contributions to charitable enterprise.[14]

Tax law's nod to benevolence conventionally assumes two forms: an exemption from taxation and the ability to confer benefits onto those who finance charitable operations.[15] Exemption simply means that charitable entities do not pay public tithings on any moneys they receive from donors or on any money generated by any assets or investments to

12. Volunteerism, the giving of self, of time, and of effort, does not receive the same treatment under taxation law as financial contributions. Discrete aspects of volunteerism — such as voluntary service in fire and rescue service — are acknowledged: see *ITA*, *supra* note 1, s 118.06. As a whole, however, tax law is not conventionally sympathetic to the voluntary contribution of services or time to charitable works; see David G Duff, "Charitable Contributions and the Personal Income Tax: Evaluating the Canadian Credit" in Bruce Chapman, Jim Phillips & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) 407 at 428. Cora Eaton offers an interesting gendered perspective on volunteerism, tax and charities: Cora Eaton, "Gender and Age Asymmetry in the Canadian Not-For-Profit Sector" (2018) [unpublished] copy on file with the author; permission to cite granted.

which they hold title.[16] They confer benefits onto donors by virtue of the deductibility, or crediting, of charitable contributions against any tax otherwise payable by the donor.

From a tax perspective, these two ingredients distinguish charities from commercial or for-profit enterprise and from the wider not-for-profit sector. For-profit entities — a phrase that resides within the charities narrative but has no particular relevance outside of that habitat — pay income tax. Charities form part of the corpus of organizations that comprise the not-for-profit sector, a sector exempt from income tax.[17] Uniquely, the ability to leverage tax benefits onto donors, and thus reduce the donor's cost of giving, lies exclusively within the prerogative of charities. Both ingredients — exemption and the leveraging of benefits onto others — are part of a charity's legal identity for the purposes of taxation.

Tax discourse habitually identifies tax concessions as subsidies.[18] To the extent that charities do not pay tax, and to the extent that contributors to charitable enterprise receive some relaxation from their tax liability, the concept of 'subsidies' reflects foregone revenues and the depletion of the public treasury occasioned by preferential tax treatment. Notably, charitable enterprise is merely one industry, or arena of social endeavour, 'subsidized' through the tax system.[19]

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16. Note that the money generated from assets or investments can be very significant. For example, The Governing Council of the University of Toronto (charitable registration number 108162330 RR 0001) earned over CAD $240 million in interest and investment income from May 1, 2017 to April 30, 2018; see Canada Revenue Agency, "The Governing Council of the University of Toronto" (T3010 Registered Charity Information Return, Schedule 6: Detailed financial information) (Ottawa: Canada Revenue Agency, 24 October 2018), online: *Charity Data* <www.charitydata.ca/charity/the-governing-council-of-the-university-of-toronto/108162330RR0001/> [perma.cc/A2TJ-29ZF].

19. See Canada, Department of Finance, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations 2018*, Catalogue No F1-47E-PDF (Ottawa: Department of Finance, 2018) at 14, online (pdf): *Department of Finance* <www.canada.ca/content/dam/fin/migration/taxexp-depfisc/2018/taxexp-depfisc18-eng.pdf>.

Although tax incentives have long been part of the charitable narrative, attempts to account for the 'costs' of any special treatment are relatively recent.[20] Tax expenditure analysis, a modern economic model conceived to quantify the 'costs' of any preferential tax treatment, estimates the 'costs' of the special treatment of charities.[21] The 2018 prediction of the costs associated with federal charitable donation tax credits was CAD $2.815 billion.[22] The 2019 prediction of the cost of the federal tax credit was CAD $2.885.billion.[23] Importantly, tax expenditure analysis only accounts for 'foregone revenue'. It does not account for any inherent social benefits that the presence of charities yields. Nor does it measure whether the concessions deliver more, in terms of economic impacts, than the costs of foregone revenue.[24]

Tax expenditure analysis estimates the contemporary costs of the relationship between concessions and charitable giving. That said, the precise relationship between incentives and giving has long been the

20. For the origins of tax expenditure analysis in Canada, see Neil Brooks, "The Tax Expenditure Concept" (1979) 1:1 Canadian Taxation 31.
21. While tax expenditure analysis 'counts' the cost of subsidies, it is not at all clear which parts of tax law constitute subsidies and which do not: see discussion in Tim Edgar, Arthur Cockfield & Martha O'Brien, eds, *Materials on Canadian Income Tax*, 15d (Toronto: Carswell, 2015) at 579-89.
22. See *Expenditure Tables*, *supra* note 19 at 32. Also note that this table lists costs associated with corporate donations accounted for as charitable deductions in 2018 to have been CAD $465 million. The tables do not contain estimates of the costs associated with non-taxation of charities.
23. See *ibid*. Costs associated with charitable deductions for corporate donations are predicted to be CAD $490 million for 2019.
24. Michael Gousmett, "The History of Charitable Purpose Tax Concessions in New Zealand: Part I" (2003) 19:2 New Zealand Journal of Taxation Law and Policy 139 at 141-43.

subject of sustained interest.[25] It is generally agreed that there is some correlation between incentives and charitable giving but the strength of that correlation is disputed. Some studies conclude that tax incentives have a significant impact on charitable giving.[26] Others indicate that the overall effect of tax reforms is modest.[27] Factors such as wealth, income, and education levels may also influence charitable giving, perhaps more than tax incentives.[28] Incentives also appear to matter more to those who have more income.[29] Moreover, donations to specific charities may react more strongly to tax incentives than others.[30] For instance, "a change in the price of giving, will have virtually no impact on contributions to religious organizations but will affect contributions to other charitable organizations".[31]

Long, ubiquitous and inseverable, the intersection between tax and charities is the reason the definition of 'charity' matters. Without the tax piece, there is no legal significance to differences between charities and any other institutions. The definition, whether a creature of the common law or statute, is the portal to tax privileges. Entry through that portal imports fiscal considerations and can vastly change the outlook of

25. The focus on this area has mainly been through the lens of studies conducted by economists. See *e.g.* Belayet Hossain & Laura Lamb, "An Assessment of the Impact of Tax Incentives Relative to Socio-Economic Characteristics on Charitable Giving in Canada" (2015) 29:1 International Review of Applied Economics 65; Gabrielle Fack & Camille Landais, "Are Tax Incentives for Charitable Giving Efficient? Evidence from France" (2010) 2:2 American Economic Journal: Economic Policy 117; Arthur C Brooks, "Income Tax Policy and Charitable Giving" (2007) 26:3 Journal of Policy Analysis and Management 599 [A Brooks, "Policy and Giving"]; Nicolas J Duquette, "Do Tax Incentives Affect Charitable Contributions? Evidence from Public Charities' Reported Revenues" (2016) 137 Journal of Public Economics 51; Harry Kitchen, "Determinants of Charitable Donations in Canada: a Comparison over Time" (1992) 24:7 Applied Economics 709.

'charitable' organizations.[32]

III. History, Concessions, and the Definition

The history of tax-based benevolence demonstrates the preoccupation with statutory incentives rather than any preoccupation with the statutory definition of the particular entities or subject matter to which those incentives attach. Apart from the brief life of a statutory definition of 'war charities', the concept to which the tax privileges attach has been largely confined to the common law.

Canada's policy of privileging benevolence was born in the context of war. In September 1917, Parliament enacted a 'temporary measure', the *Income War Tax Act* ("*IWTA*"), to fund participation in World War I.[33] The instrument initiated the policy of privileging benevolence by enabling the deductibility of amounts paid to the "Patriotic and Canadian Red Cross Funds, and other patriotic and war funds approved by the Minister".[34] The *IWTA* also exempted certain incomes from taxation including "the income of any religious, charitable, agricultural and educational institutions, Boards of Trade and Commerce".[35]

In conjunction with the *IWTA*, the *War Charities Act* ("*WCA*") was also passed.[36] The *WCA* did not confer any tax concessions but required

32. See Gousmett, *supra* note 24 (while this article references charity law in New Zealand, the following quote is well stated and applies equally to the Canadian context: "the reality is that an entity that is adorned with the status of having charitable purposes automatically benefits from fiscal privileges" at 141).
33. *Income War Tax Act, 1917*, SC 1917, c 28 [*IWTA*]. For a history of the relationship between tax and the voluntary sector, see Rod Watson, "Charities and the Canadian Income Tax: An Erratic History" (1985) 5:1 Philanthropist 3.
34. *IWTA*, *ibid*, s 3(1)(c).
35. *Ibid*, s 5(d). The same section also exempted the income of other not-for-profits such as clubs and societies operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes.
36. *War Charities Act, 1917*, SC 1917, c 38 [*WCA*].

that war charities be registered.[37] The *WCA* defined 'war charities' as:

> [a]ny fund, institution or association, other than a church … having for its object or among its objects the relief of suffering or distress, or the supplying of needs or comforts to sufferers from the war, or to soldiers, returned soldiers or their families or dependents, or any other charitable purpose connected with the present European War.[38]

After the war, the *WCA* and aspects of the *IWTA* were repealed, including the deductibility of contributions to war charities.[39] In 1930, as the government struggled to contend with high levels of unemployment, deductions re-entered the tax lexicon. The *IWTA* was amended to permit deductions of "not more than ten per centum of the net taxable income of any taxpayer which has been actually paid by way of donation … to … any charitable organization in Canada operated exclusively as such and not operated for the benefit or private gain or profit of any person, member or shareholder thereof".[40]At the outbreak of World War II in 1939, the *WCA* returned with the donation limit for war charities set at 50 percent of net taxable income.[41]

By this point, the word 'charitable' had settled into statute law. Apart from the *WCA* description of 'war charities', it was simply the word 'charitable' that defined the scope of tax concessions. The reference to "religious, charitable … and educational institutions" in the *IWTA* institutions reflected the idea, established in British common law, that

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37. The need for a registration system stemmed from parliamentarian concern regarding the possibility that fraudulent charities could take advantage of the tax benefits being offered. For information on this, see *Watson*, *supra* note 33 at 5.
38. *WCA*, *supra* note 36, s 2(b).
39. See *An Act to Repeal the War Charities Act, 1917*, SC 1926-27, c 39.
40. See *An Act to amend the Income War Tax Act*, SC 1930 (4th Sess), c 24, s 3.
41. See *An Act to amend the Income War Tax Act*, SC 1939-1940 (5th Sess), c 6, s 1. The 50 per cent limit set in 1939 was in relation to individual donations. That limit was reduced in 1941 to 40 per cent. See *An Act to amend the Income War Tax Act*, SC 1940-1941 (2nd Sess), c 18, s 8. Deductions for corporate donations were also introduced in 1941 and set at 5 per cent. For more information on the changes at this point in time, see Watson, *supra* note 33 at 9.

organizations that advanced religion and education were charities.[42] Equally, the extension of specific alms to war charities corresponded to a third British root, the relief of poverty.[43] From the 1940s onwards, the vision of benevolence captured by the tax statute law was simply referenced as 'charitable' or 'applicable to charities'.

With the policy of using the tax system to encourage benevolence entrenched by the 1950s, statute law continued to evolve with respect to incentivization. In 1957, a standard CAD $100 deduction, not strictly confined to charitable contributions, was introduced.[44] In 1972, the deduction limit on charitable donations rose to 20 per cent of net taxable income.[45] The limit rose again in 1996 to 50 percent and in 1997 to 75 percent of net taxable income.[46] These changing thresholds ensured that the interaction between the tax system and charitable giving retained its cogency, and ensured that the tax enticement retained relevance for

42. See *Special Commissioners of Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) at 598 [*Pemsel*].
43. *Ibid*.
44. See An Act to amend the *Income Tax Act*, SC 1957 (4th Sess), c 29, s 7(3). In 1972, this provision became former paragraph 110(1)(d) of the ITA. The standard deduction did not displace the existing concessions but aimed to enhance administrative efficiency, eliminating the need to document small charitable contributions; For more information on the standard deduction, see Duff, *supra* note 12 at 410-12.
45. See *An Act to amend the Income Tax Act*, SC 1970-71-72 (3rd Sess), c 63, s 110(1)(a).
46. See *An Act to amend the Income Tax Act*, SC 1997 (2nd Sess), c 25, s 26; *Income Tax Amendments Act, 1997*, SC 1998 (1st Sess), c 19, s 20(1).

those capable of giving a greater portion of their income.[47] In 1988, the general order of 'deductions' for charitable giving was converted into tax credits to "increase fairness" for low-income donors.[48] The conversion applied to individual donors only. Corporate donations continued to be treated as deductions. A final piece of incentivized giving was the short-lived (2013-2017) First-Time Donor's Super Tax Credit.[49] This credit was specifically designed to entice those who had not previously given to charity, inflating the value of credits for first-time donors as well as individuals who had not donated in the prior five years.

As the promotion of charities through specific changes to the tax statute progressed, the incentives became attached to an increasingly sophisticated regulatory apparatus. With the incentives as the bedrock, the framework morphed into more elaborate governance. The relatively informal registration system endorsed for war charities matured into a formal national registry system: charities had to be 'registered' to

47. Note that while the 1972 increase in the percentage of income taxable is often viewed as an incentive to increase giving, a more thorough view takes into account the effects of other changes to the *ITA* in 1972 that disincentivized giving. Most notably, the federal marginal tax rate for those in the highest income tax bracket fell from 60 per cent to 47 per cent. As noted above in Part II, individuals with higher income are most strongly affected by tax incentives for giving. In a deduction system for charitable giving, as was in place at the time, lowering the tax rate meant that deductions became less valuable. When viewed through that lens, it seems that the increase in the ceiling of claimable donations as a percentage of income in 1972 may be seen more so as a balancing of otherwise reduced incentives rather than the introduction of an added incentive. For commentary on the incentives behind the 1996 and 1997 changes, see Canada, Department of Finance, *Tax Measures: Supplementary Information* (Ottawa: Department of Finance, 1996); Canada, Department of Finance, *Tax Measures: Supplementary Information* (Ottawa: Department of Finance, 1997).

48. See comments by Michael H Wilson in Department of Finance, *Tax Reform 1987: The White Paper* (Ottawa: Department of Finance, 1987) at 32.

acquire privileged tax status.[50] Stringent financial requirements emerged, principally to prevent abuses of the charitable form as well to ensure that charities 'spent', rather than merely acquired and held, financial resources.[51]

Despite maturing regulation, incentive-centric measures were never paired with a statute-based definition of charities. Apart from the brief life of the *WCA* and its definition of 'war charities', statute law remained silent as to the specific scope of entities to which privileged taxation status attached. As regards the status of the common law conception, a comprehensive mid-1960s review of federal income tax law yielded merely a brief statement of satisfaction with the existing common law ordering.[52] Subsequent government studies focusing on tax and charities did not discuss the legal conception of charities.[53] An extremely detailed 1983 appraisal of charities law canvassed the question of whether the definition of charitable should be 'codified' but did not strongly urge statutory reform and, in any event, did not culminate in any changes related thereto.[54]

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50. See Canada, *Report of the Royal Commission on Taxation*, vol 4 (Ottawa: Privy Council Office, 1966) at 135 [*Carter Commission Report*]. This report set out several recommendations for change to charity law which influenced legislature in the years following its release. One of those recommendations (at 135) was to establish a supervisory body to grant tax-exempt status to charitable organizations.
51. See *e.g. An Act to amend the statute law relating to income tax*, SC 1976-1977 (2nd Sess), c 4, s 60(1).
52. See *Carter Commission Report*, *supra* note 50 at 132.
53. See Department of Finance, *The Tax Treatment of Charities* (Discussion Paper) (Ottawa: Department of Finance, 1975); Department of Finance, *Charities and the Canadian Tax System* (Discussion Paper) (Ottawa: Department of Finance, 1983).
54. See N Brooks, *Legal Framework*, *supra* note 10. See also Ontario Law Reform Commission, *Report on the Law of Charities*, vol 2 (Toronto: Queen's Printer, 1996) at 627-28. This more recent comprehensive report by the Ontario Law Reform Commission concluded that, in terms of provincial law, the Ontario legislature ought not enact a statutory definition of charity.

As it stands, the contemporary statutory framework incorporates the word 'charity' but does not describe the term. Access to concessions depends upon the common law and the meaning of charity as understood and extrapolated by the Courts.

IV. The Contemporary Framework and The Concept of 'Charity'

The fulcrum of history is consolidated in the contemporary framework. Section 149(1)(f) of the *ITA* exempts 'registered' charities from taxation on income.[55] 'Registered charities' are charitable organizations that are registered with the Minister of National Revenue.[56] Individuals who donate to 'registered charities' secure tax credits.[57] Charity means a charitable organization.[58] A charitable organization is an organization that is constituted and organized exclusively for charitable purposes and devotes all of its resources to charitable activities.[59] Charitable activities include public policy dialogues and development activities carried out in

55. *ITA*, *supra* note 1, s 149(1)(f).
56. *Ibid*, s 248.
57. *Ibid*, s 118. Note that corporate donors acquire deductions rather than credits: see *ibid*, s 110.1. Most corporations can deduct charitable 'contributions' under the rubric of ordinary business expense, whether sponsorship or advertising. In the context of this article, it is not particularly relevant which route the corporation chooses to go in terms of the fiscal dimensions. For more information on determining the benefits of sponsorship versus donation, see Terrance S Carter, "Donation or Sponsorship? Know the Rules, Reap the Rewards" (9 June 2011), online (pdf): *Imagine Canada* <www.imaginecanada.ca/sites/default/files/www/en/partnershipforum/carter_en_june2011.pdf> [perma.cc/BA3T-REBF]. For statistics on which route corporations typically choose in classifying their contributions to charities, see Brynn Clarke & Steven Ayer, "The Who, How, What and Why of Corporate Community Investment in Canada: A Summary of Findings from the Canada Survey of Business Contributions to Community" (Canada: Imagine Canada, 2011) at 3-4, online (pdf): *Imagine Canada-Sector Source* <sectorsource.ca/sites/default/files/bctc_summary_clarke_2011_eng.pdf> [perma.cc/U39S-DPH7].
58. *ITA*, *supra* note 1, s 149.1.
59. *Ibid*.

the furtherance of a charitable purpose.[60] An organization that devotes part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office is not constituted and operated exclusively for charitable purposes.[61]

The Minister of National Revenue has the power to confer and revoke registration status.[62] Decisions by the Minister, whether in respect to registration or revocation, can be appealed to the Federal Court of Appeal.[63] The Charities Directorate, a descendant of the *WCA* registration system, administers charities law.[64]

Consistent with history, the contemporary framework does not contain a substantive definition of charity. 'Registered charities' are exempt from taxation, and contributions to them secure tax privileges. The statutory matrix is intensely self-referential. The definitions of 'charity', 'charitable purpose', 'charitable activity', or 'charitable organization', refer only to each other, not to any specific definition. As stated at the outset, statute law confers the privileges but does not prescribe a vision of benevolence. It incorporates the word 'charity' but fails to delineate what this word means. It defers to the common law. Within a tax environment, such deference is curiously unusual. Tax law is notorious for its penchant to describe the meaning of particular words and to cast its own particular legal meaning onto the words and phrases that appear in the tax statute. It is somewhat unorthodox for tax statute to leave a significant piece, one upon which important concessions rely, to the common law. Yet from the early days of incentivized giving, that is the stance adopted by Parliament.

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60. *Ibid*.
61. *Ibid*, s 149.1(6.2).
62. *Ibid*, ss 168, 149.1.
63. *Ibid*, s 172(3). Note that this may change in the near future as a result of recommendation 2(b) of the *Report of the Consultation Panel on the Political Activities of Charities*; see *RCPPAC*, *supra* note 3.
64. See *Carter Commission Report*, *supra* note 50 at 135 (installation of a formal national regulatory agency was recommended by the Carter Commission Report).

V. The Common Law 'Definition' of Charity

With the unique exception of the *WCA* definition of 'war charities', the common law concept of charities is central to the receipt of tax privileges. It is acknowledged that "what is 'charitable' in a legal context is not easily articulated or understood".[65] The concept exists within a body of law but is extremely difficult to extract from that context or to synthesize its attributes. Moreover, it is tough to reconcile, without relying heavily on the extremely precise analysis applied, decisions that have admitted charities to registered status with those that have, or would have, denied the same.[66] This elusive quality might be sufficient reason to consider crystallizing a definition in statute.

A. Common Features of the Charitable Terrain

While the legal concept of charities defies simple articulation, certain common features of the terrain can be sketched. The definitional field usually covers some consideration of the 1891 decision of *Special Commissioners of Income Tax v Pemsel*,[67] covers some attention to differences between charitable purposes and charitable activities, and

65. See Bourgeois, *supra* note 8 at 393; see also Parachin, "Legal Privilege", *supra* note 15 at 38 (Parachin says that despite frequent reference to the common law definition, the common law does not define charity but rather provides a methodology for distinguishing between that which is charitable and that which is not).
66. See *e.g. Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10 at paras 1-126, Gonthier J dissenting [*Vancouver Society*]. Gonthier J's beautifully written dissent, which would have conferred charitable status in *Vancouver Society*, seems to present an equally compelling case as does the majority judgement presented by Iacobucci J. For further discussion and analysis of this case, see Charles Mitchell, "Charitable Status in the Supreme Court of Canada" (1999) 10:1 King's College Law Journal 248.
67. *Pemsel*, *supra* note 42.

encompasses some engagement with analogical reasoning.[68] These three overriding themes are frequently discussed and inform the common law idea of charities, but are by no means an exhaustive look at what the common law considers in assessing whether a non-profit organization meets the definition of charity.

Within the common law charities' narrative, *Pemsel* is the central rudder of the definitional story.[69] It is the case that is the most frequently cited and the most influential. *Pemsel,* a case that involved a religious community seeking to assert its claim to tax privileges, described the meaning of charity, as comprising four classes: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community that did not fall under classes.[70] The influence of *Pemsel* is clearly seen in Canada's 1917 halting steps into incentivized giving. The exemption of religious organizations and educational facilities and the deference to 'war charities', organizations concerned with the plight, or

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68. Two recent Supreme Court of Canada decisions tend to confirm the primacy of these themes, although they do not necessarily discount other ways of distilling the meaning of charity: see *Vancouver Society*, *supra* note 66; *Amateur Youth Soccer Association v Canada Revenue Agency*, 2007 SCC 42 [*AYSA*].

69. *Pemsel*, *supra* note 42. *Pemsel* is noted in *Dames Religieuses de Notre Dame de Charite du Bon Pasteur v Sunny Brae (Town) Assessors*, [1952] 2 SCR 76 at 84. By 1966, *Pemsel* was a central referent for Canadian charities law: see *Guaranty Trust Co of Canada v Minister of National Revenue*, [1967] SCR 133 at 141.

70. *Pemsel, ibid* at 583. Although Lord MacNaughten is credited with establishing these divisions, or heads of charity, they actually derive from an 1805 decision. See *Morice v Bishop of Durham,* [1805] EWHC Ch J80 (it was stated that "[t]here are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance, etc.; 2dly, the advancement of learning; 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility" at 951). See discussion in N Brooks, *Legal Framework*, *supra* note 10 at 15-17. Notably, too, although the *Pemsel* case involved taxation, Lord MacNaughten specifically spoke of charitable trusts.

poverty, of veterans and their families, seems to be a clear nod to the established *Pemsel* categories.[71]

Typically, the *Pemsel* classes are a launching point for, as well as a central reference point within any analysis. In beginning the analysis, it is classically accepted that religious institutions, educational institutions, and institutions that relieve poverty represent something of the essence of charity.[72] In forming a central reference for analysis, the purposes resident within the first three enumerated categories are assumed to create a public benefit.[73] An indicator of a 'charitable' purpose, or the charitable character of an enterprise, is whether the purpose is of some benefit to society.[74] From *Pemsel* onwards, the definitional terrain of charities has been dominated by the general acceptance of the idea that the specifically enumerated categories — the advancement of religion, the advancement of education and the relief of poverty — create public benefits. Equally, from these origins, the terrain accepts that the creation of a private benefit precludes the charitable designation. A central pillar of analysis, which modern judicial thought confirms, is that the concept of charity does not capture enterprises, however benevolent they may be, that confer private, as opposed to public, benefits.[75]

Partly influenced by *Pemsel*, and partly by the contemporary configuration of the tax statute, references to charitable 'activities', or distinctions between 'charitable purposes' and 'charitable activities', regularly feature in interpretative narrative. To qualify as a charity, an organization must operate for an 'exclusively charitable purpose', and the activities in which it engages must also be of a 'charitable' character in furtherance of that purpose.[76] It would not be sufficient to merely possess

71. See *IWTA*, *supra* note 33, s 5.
72. See Bourgeois, *supra* note 8 at 451.
73. See *AYSA*, *supra* note 68 at para 27; *Vancouver Society*, *supra* note 66 at para 42.
74. See generally, Gerald Fridman, "Charities and the Public Benefit" (1953) 31:5 The Canadian Bar Review 537; Patrick Selim Atiyah, "Public Benefit in Charities" (1958) 21:2 The Modern Law Review 138.
75. See *Vancouver Society*, *supra* note 66 at para 147.
76. See *ibid* at paras 152, 154, 199.

one of these attributes: both must be present.[77] A context in which this has proven acutely relevant is with regard to statutory limits imposed on a charity's engagement in political activities.[78] Despite a lucidly 'charitable purpose' such as the relief of poverty, an organization might not fit within the legal conception of charitable if the means of relieving poverty, the 'activities' in which it engages, are principally the pursuit of political change.[79] Its 'purpose' might be charitable, but its 'activities' might not be. In a recent restatement of this relationship between purposes and activities, the Supreme Court of Canada identified the primacy of the 'purpose'.[80] The activities must advance the charitable purpose of the organization, and are 'charitable' to the extent that they relate to that purpose.[81] Axiomatically, if the activities relate to, or advance, some other purpose, then they would not be 'charitable', and an organization would not quality for tax concessions.

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77. See *ibid* at para 152.
78. See generally *Canada Without Poverty v AG Canada*, 2018 ONSC 4147 [*Canada Without Poverty*]; see also the fall out surrounding that case: *RCPPAC*, *supra* note 3.
79. The statutory framework governing political activity recently changed in response to a successful *Charter*-based challenge: see *Canada Without Poverty*, *ibid* note 78; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15. See also Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue?" (2016) 91:3 Chicago-Kent Law Review 1047; *RCPPAC*, *supra* note 3; Bill C-86, *supra* note 4, s 16; Government of Canada, "Government Response to the Report of the Consultation Panel on the Political Activities of Charities" (7 March 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/whats-new/government-response-report-consultation-panel-politcal-activities.html> [https://perma.cc/6FV4-JZH9] ("[t]hese changes explicitly allow charities to fully engage without limitation in public policy dialogue and development activities, provided they are carried on in furtherance of a stated charitable purpose and do not support or oppose, either directly or indirectly, a political party or candidate for public office" at Recommendation 3).
80. See *Vancouver Society*, *supra* note 66 at para 152.
81. *Ibid*.

A third device resident within the common law is the adoption of an analogical approach.[82] In deciding whether an institution comes within the conception of charity, the Courts reason by analogy.[83] This approach generally looks to things which the common law has historically regarded as charitable and asks whether a particular purpose, by analogy, fits loosely within that order.[84] The analogical approach relates most directly to the fourth *Pemsel* category, 'other purposes beneficial to the community'. The advancement of religion, the advancement of education and the relief of poverty might be said to constitute purposes in which some public benefit is implicit.[85] Charitable institutions, in this respect, historically and ideally, contribute something of value to society. They create a public benefit or service some beneficial public purpose.

The fourth *Pemsel* category anticipates charity law's recognition of other kinds of public benefits not directly aligned with the three accepted classes. Analogy features prominently in this regard. Commonly, in asking whether some novel purposes ought to be acknowledged as charitable, the approach draws upon the preamble to the *Charitable Uses Act 1601* (often referred to as the *Statute of Elizabeth*).[86] Passed four centuries ago, the preamble to this British law delineated an understanding of charity that included alleviating the plight of widows and orphans, attending to poverty, enhancing education, advancing religion, and improving public

82. *Ibid* at para 177; *AYSA*, *supra* note 68 at para 27.
83. *Vancouver Society, supra* note 66 at para 177; *AYSA, ibid* at para 27.
84. See *e.g. Vancouver Regional FreeNet Association v Minister of National Revenue*, [1996] 3 FC 880 [*FreeNet*].
85. See *AYSA*, *supra* note 68 at para 27; *Vancouver Society*, *supra* note 66 at para 42.
86. *Charitable Uses Act 1601* (UK), 43 Eliz 1, c 4 [*Charitable Uses Act 1601*].

services.[87] In deciding whether some novel category of charity ought to be acknowledged, the Courts ask whether there is an affinity between some allegedly new notion of charity and the understanding identified in the 1601 preamble.[88] This approach is framed as an inquiry into that which the law has historically acknowledged as charitable, or whether a particular purpose, a new or unanticipated 'public benefit', shares in species some aspirational ties with matters listed in the preamble. Again, the Courts emphasize that the purpose must enhance public welfare rather than merely confer some private advantage.[89]

A definitional sphere not readily 'understood', the frequency of these interpretative themes reflects the fluctuating nature of the territory. Charity is a 'moving', rather than a static, concept.[90] A creature of the

87. As cited in *FreeNet*, *supra* note 84 at para 3. Rendered into modern English, the list of charitable purposes in the preamble to the *Charitable Uses Act 1601*, *ibid*, reads as follows:

> [t]he relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, causeways, churches, seabanks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes".

88. Normally institutions seeking to receive charitable recognition attempt to fit within the three more classic *Pemsel* categories. Reliance on the 'public benefit' category is typically offered as a last resort.

89. See *Vancouver Society*, *supra* note 66 at para 147.

90. See *Scottish Burial Reform and Cremation Society, Limited v Corporation of the City of Glasgow*, [1967] 3 All ER 215 (HL) at 223 [*Scottish Burial Reform*]; see also *Native Communications Society of BC v Minister National Revenue*, [1986] 3 FC 471 at 480 [*Native Communications*] (Stone J formally adopted the concept of the law of charity as a "moving subject", stated by Lord Wilberforce in *Scottish Burial Reform*, into Canadian jurisprudence).

common law, the concept naturally evolves.[91] To a considerable degree, the analogical tool acts as an architectural lynchpin of the evolving story. As a central feature of the definitional realm, analogy has served to extend the idea of charities onto novel areas, for instance, attaching the charitable label onto a Aboriginal news organization,[92] and, perhaps most ingeniously, attaching the designation to the provision of free internet services.[93]

Difficult to articulate, two final points about the common law conception of charities illustrate the general flavour of the discourse. First, although charity law has evolved through the common law, by no means has the door to 'registered' charitable status been completely opened. The courts describe their role, in the evolution of the conception of charity, as confined to incremental change.[94] Despite persuasive arguments, many attempts to 'analogize' have been unsuccessful.[95] And while both *AYSA* and *Vancouver Society* affirmed the relevance of *Pemsel*,[96] the distinction

91. A lucid example of that evolution is with respect to the advancement of education. At one point in time, this class was confined to formal education and formal educational institutions. Over the course of time, the norms relaxed to acknowledge that more informal educational projects could qualify as charitable: see *Vancouver Society*, *supra* note 66 at para 168.
92. See *Native Communications*, *supra* note 90. The Courts drew parallels between the *Charitable Uses Act 1601* preamble's preoccupation with marginalized groups and the plight of Aboriginal people. The decision was also informed by an Australian decision and the general order of the protective, or special, relationship between Canada and the native population.
93. See *FreeNet*, *supra* note 84. The Court identified an affinity between the *Charitable Uses Act 1601* preamble's recognition of public infrastructure, highways, and roads as charitable objects and the modern internet 'highway'.
94. See *R v Salituro*, [1991] 3 SCR 654 at 670 [*Salituro*]; *Vancouver Society*, *supra* note 66 at para 149.
95. See *Chan to Senate*, *supra* note 5 at 1-2 (Chan describes the poor record of appeals by charities and a perceived failure of the development of the legal definition of charity at the FCA).
96. *Vancouver Society, supra* note 66 at para 177; *AYSA*, *supra* note 68 at para 27.

between 'purposes' and 'activities', and the application of the analogical approach, in neither case was the conception of charities 'modified' to accommodate a new perspective on 'registered' charitable status.

Second, whatever the conception of charity is, or may be, within the legal discourse, an impressive range of institutions have managed to achieve 'registered' charitable status.[97] Everything from refugee, disaster relief and environmental organizations to criminal mediation, daycare and human rights organizations have been admitted to the ranks of 'registered charities'.[98] As difficult as it may be to capture the common law conception of charities, it cannot be said that the conception has completely constrained admission.[99]

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97. See generally Canada Revenue Agency, "Index of Guidance Products and Policies" (21 January 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/alphabetical-index-policies-guidance.html> [perma.cc/7KAE-ZJEY]. The Charities Directorate provides an extraordinary window into the breadth of organizations, or charitable purposes, captured, in its view, by the legal concepts.

98. Admission to the ranks of registered charities reflects, in part, the Charities Directorate's interpretation of the existing common law. The admission of these organizations as registered charities through the administrative decision-making of the Charities Directorate, guided by law, lends support to the belief that despite the complexities inherent in the common law conception of 'charity', that growth of that conception has not been completely halted.

99. This expansion of the list of registered charities may also speak of the ability of the Charities Directorate to have some tertiary influence on the conception of charity that secures access to tax privileges. See Karine Levasseur, "In the Name of Charity: Institutional Support for and Resistance to Redefining the Meaning of Charity in Canada" (2012) 55:2 Canadian Public Administration 181 ("[w]hile the Charities Directorate cannot change the *ITA*, it can issue policy statements and guides that modify the meaning of charity" at 193-97); see also Kathryn Chan, "The Co-optation of Charities by Threatened Welfare States" (2015) 40:2 Queen's Law Journal 561 at 582-85.

B. Troubles with the Common Law Terrain

There is no shortage of discontent with the legal concept of charities. Strikingly, the agency that administers the charities registration system, the Charities Directorate, acknowledges the confused state of the common law.[100] In a policy statement on the public benefit requirement in relationship to the *Pemsel* categories, the Directorate notes that "problems associated with the application of the test for public benefit in the context of the definition of charity are not insignificant".[101] Equally notable is the courts recognition that the status of the law is less than satisfactory. The very tillers of the definitional field describe the application of the common law scheme as a "daunting task … 'crying out for clarification through Canadian legislation'".[102] Plaintively, the courts have noted that "the [*ITA*] does not provide a useful definition of 'charity' or 'charitable' so that the courts of necessity are thrown back to an obscure and not always consistent corner of the law of England … I may be forgiven for expressing the wish that this is an area where some creative legislative intervention would not be out of order".[103]

Scholars, and advocates for the charitable sector admit the frustrating, if not mystifying, order of the common law conception. Bourgeois professes "the reality is that the law complicates what is or is not charity",[104] and, again, "what is 'charitable' in a legal context is not easily articulated or understood".[105] Advocates speak of their bafflement

100. See generally Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test* (Policy Statement) (Ottawa: Canada Revenue Agency, 10 March 2006), online: *Government of Canada* <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html> [https://perma.cc/88VV-JRWM].
101. *Ibid*.
102. See *Vancouver Society*, *supra* note 66 at 149; see also *Human Life International in Canada Inc v Minister of National Revenue*, [1998] 3 FC 202 at 214 [*Human Life Int*].
103. See *FreeNet*, *supra* note 84 at 1.
104. See Bourgeois, *supra* note 8 at 391-92.
105. *Ibid* at 393.

over the existent legal rules, of the unpredictability of those rules or of the failure of the legal conceptual matrix to adequately reflect modern social imperatives.[106] In a rebuke of the court's interpretive narrative, Chan points to its dismal 25 year record of repeated requests to redefine the charitable territory.[107] Although the sector has repeatedly sought to expand or modernize the charitable realm, it has been uniquely unsuccessful in persuading the courts to do so.

Regrettably, though the common law conception elicits hefty criticism, it is not entirely clear what specific, or broader, changes to the conception are being sought. Apart from perhaps recurrent protestations that the common law is unduly harnessed to a 1601 statute, or to the *Pemsel* decision of two hundred years hence, it is not at all obvious what shape of reform with respect to the definition might achieve some level of appeasement.[108] If the remedy to a dissatisfactory common law vision lies in statutory intervention, what does that vision anticipate? Does

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106. See *e.g. Chan to Senate*, *supra* note 5; Kathryn Chan, "The Function (or Malfunction) of Equity in the Charity Law of Canada's Federal Courts" (2016) 2:1 Canadian Journal of Comparative and Contemporary Law 33; Arthur BC Drache, "Hostage to History: The Canadian Struggle to Modernise the Meaning of Charity" (2002) 8:1 Third Sector Review 39.

107. See *Chan to Senate*, *supra* note 5 at 2. Among the cases making up this abysmal record of success, see *e.g. Human Life Int*, *supra* note 102; *Alliance for Life v Minister of National Revenue*, [1999] 3 FC 504; *Action by Christians for the Abolition of Torture (ACAT) v Canada*, 2002 FCA 499; *Fuaran Foundation v Canada Customs and Revenue Agency*, 2004 FCA 181; *Travel Just v Canada Revenue Agency*, 2006 FCA 343; *Hostelling International Canada v Minister of National Revenue*, 2008 FCA 396; *News to You Canada v Minister of National Revenue*, 2011 FCA 192.

108. Some identify pieces that might form part of a statutory regime: see *e.g.* Arthur BC Drache, "Charities, Public Benefit and the Canadian Income Tax System: A Proposal for Reform" (1996) Queensland University of Technology, Program on Nonprofit Corporations Working Paper No 86; see also Peter Broder, "The Legal Definition of Charity and the Canada Customs and Revenue Agency's Charitable Registration Process" (2002) 17:3 Philanthropist 3 at 32 (while Broder does not specifically identify the mechanism to change the definition, he does indicate certain categories that might be captured by a modern vision of charity).

it anticipate the mere codification of the common law or contemplate something different?

VI. The Modernization Narrative and the Tax Dimension

From 1917 onwards, the policy of promoting benevolence through the attachment of tax concessions has never been seriously challenged. There is no sustained objection to the general ordering that tax law ought to be used to underpin the charitable sector.[109] Whether it is the product of the common law, or the product of an entrenched statutory vision, the definition of charity is the portal to tax privileges. By virtue of that association, it is impossible to entertain the idea of any statutory vision without some attention to its fiscal dimensions. Statutory re-conceptualization does not occur in a financial vacuum. Having chosen to promote benevolence through tax concessions, any modification of the definitional portal necessarily imports consideration of any fiscal implications. However, forecasting these implications is a highly contingent exercise, dependent upon the particular ingredients of any modern statutory model as well as upon the response of the donative community to any new architecture.

One obvious avenue of reform might be mere codification of the existing common law definition. Codification would respond to the concerns about the lack of clarity. A listing of the kinds of purposes that the common law *has* recognized as 'charitable', or some other statutory framing of a vision of charity, would add some clarity. It would not import any tax-related concerns since it would not fundamentally alter the complexion of the sector. Codification ought, in terms of any fiscal dimensions, to be neutral. Moreover, codification might be revealing.

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109. Persuasive arguments, for example, can be made for eliminating the tax credit: see generally Neil Brooks, "The Tax Credit for Charitable Contributions: Giving Credit Where None is Due" in Bruce Chapman, Jim Phillips, & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press 2001) 457.

Arguably, some of that which passes as the 'modernizing' of charities law may be less a modification or alteration of the existing common law than a consolidation of the body of law. Britain's nascent charities law, for instance, has been enthusiastically applauded for embracing a modern expansive definition,[110] despite the fact that much of what they codified was already embraced by the UK Charity Commission.[111] Parts of that 'modern' definition are already part of the Canadian landscape.[112]

Alternatively, statutory reform could limit the scope of the common law portal. With respect to the definition of charities, the Courts have confined themselves to 'incremental' changes.[113] 'Incremental' tends to contemplate opening the doorway rather than any narrowing of its parameters. A statutory delineation could narrow the doorway. An increasingly secular modern society could conceivably choose to narrow the portal by eliminating *Pemsel*'s classic 'advancement of religion' class. Excising religious institutions from the remit of 'registered' charities could

110. See *e.g.* "The Charities Act: Charity Law Finally Enters the Modern Age" (22 November 2006), online: *Third Sector* <www.thirdsector.co.uk/charities-act-charity-law-finally-enters-modern-age/governance/article/620297> [perma.cc/E2YF-FVW7].

111. See *e.g.* Parachin, "Legal Privilege", *supra* note 15 (Parachin points out that despite Rothstein J stating in *AYSA*, *supra* note 68 at para 44 that reform to UK charity law as is relates to amateur sport was "brought about through statute", that reform should instead be viewed as a codification of actions of the UK Charity Commissioners three years prior: at 47, n 59).

112. See *Charities Act 2011* (UK), *supra* note 6, s 3 (this section lists descriptions of charitable purposes, including allowing registration for entities committed to art, animal welfare, or the protection of the environment; animal welfare organizations and environmental organizations already roam the charitable terrain in Canada); see also Austl *Charities Act 2013*, *supra* note 6, s 15(4) (includes elements of disaster relief as charitable purposes which may be considered modern, but is also seemingly embraced in Canada as evidenced by the numerous registered charities for such purposes; it would be illuminating, helpful, and instructive, to see the true breadth of the existing conception as it is reflected in the variety of already registered charities expressed in statute).

113. See *Salituro*, *supra* note 94 at 670; *Vancouver Society*, *supra* note 66 at para 149.

reduce the overall fiscal costs of the tax expenditure: there might be fewer tax creditable contributions to charities.[114] Interestingly, statutory models adopted elsewhere do not appear to have ventured into this territory, apparently somewhat reluctant to confine, rather than to expand, the conception of charities. The modern British device appears to anticipate the very opposite of any contraction by preserving any understanding of charitable purpose acknowledged under 'old' law.[115]

A statutory rendition could also significantly widen the entrance. A rendition that captured a significant segment of not-for-profit endeavours might have predictable immediate impacts on public revenues. Not-for-profits, as distinct from not-for-profits that are also registered charities, could, under a newly minted definition, qualify as charities with the attendant additional privileges of conferring tax benefits onto donors. In the *Amateur Youth Soccer Association v Canada Revenue Agency*[116] decision, the Supreme Court appeared uniquely attentive to this particular consequence in its refusal to recognize amateur athletics organizations as 'charitable'.[117] The Court specifically noted that amateur athletics constituted 21 per cent of the not-for-profit sector and that evolution of the common law concept to include such works would have significant

114. See Arthur C Brooks, *Who Really Cares: The Surprising Truth About Compassionate Conservatism: America's Charity Divide—Who Gives, Who Doesn't and Why it Matters* (New York: Basic Books, 2007) at 31-52 (Brooks determines that the religious factor is the most significant influence on charitable giving, notably to religious charities).

115. See *Charities Act 2011* (UK), *supra* note 6, s 3(m)(i); see also Chan, "UK's Raging PB Debate", *supra* note 7 at 16 (as Chan points out, the British may have merely recast the role of the common law; rather than preoccupied with the 'definition' of charity, the modern instrument seems to have tasked the Courts with the discernment of whether a charitable entity realizes a public benefit).

116. *AYSA*, supra note 68.

117. See *AYSA*, *ibid* at para 44.

revenue impacts.[118] Whether it captured a slice of existing not-for-profits or not, any statutory vision of charity more ample than the common law definition could increase fiscal costs.

Perhaps the most bedevilling aspect of any statutory reformulation of the common law conception involves predicting the response of the donative community. While charities enjoy tax-exempt status, the capacity to leverage tax benefits onto donors distinguishes them from other not-for-profits. A more expansive modern definition would create space for the formation of new charities, different entities arguably attentive to different *modern* charitable projects. How would the donative community respond to any such formation? Would the donative community react at all? Would they react by re-allocating their existing contributions by shifting contributions from one charity to another? Would donation levels augment, and overall contributions to the charitable sector increase? Statute-based incentivized giving has changed over time — rising from modest limits confined to war charities to thresholds of 75 per cent of net income.[119] As noted earlier, there is a general sense that the donative community responds to incentives. However, these changes reflect generic financial incentives, and apart from the historic intermittent privileging of war charities, they do not target the giving of resources to specific charitable enterprises. In terms of the fiscal dimension, while an expansive modern definition might

118. *Ibid*. The source of the 21 per cent figure is not clear. It seems likely that the source is a 2004 Statistic Canada study of the nonprofit community. See Statistics Canada, *Cornerstones of the Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations*, Catalogue No 61-533-XIE (Ottawa: Statistics Canada, 2004) at 13-14, tables 1.1-1.2, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/61-533-x/2004001/4200353-eng.pdf?st=qKPPQOHo> [perma.cc/RB5P-87RX]. This is notable because if this is the source relied upon by the government and cited by Rothstein J, the 21 per cent figure is misleading, as that study combined both registered and non-registered charities in its analysis. The fiscal risk of a change in definition may thus have been significantly overstated as 27 per cent of the non-profit sports and recreation organizations being discussed already had the registered charity status that the court was so worried about conferring.

cultivate a different order of charities, the impact of such a change on existent levels of giving remains unknown. A new portal might recast the charitable sector. Whether it would result in more private financial transfers into the sector is hard to predict.

VII. Conclusion

While the federal tax statute has long housed a vision of promoting charitable donations, the object of that vision has always resided principally within the common law. For nigh on a century, statute law has privileged charitable giving while refusing to articulate a clear vision as to what constitutes a charity. As the portal to tax concessions, the status of the common law conception clearly merits investigation and may warrant reform. If 'modernization' amounts to codification of the common law, at least the portal becomes clear. If it connotes something else, the tax terrain shifts. It may shrink or swell. And whether the definition shrinks or swells, a critical matter is how the donative community responds.

Tax Incentives for Cross-Border Giving in an Era of Philanthropic Globalization: A Comparative Perspective

Natalie Silver* and Renate Buijze**

The 21st century has ushered in an era of philanthropic globalization marked by a significant rise in international charitable giving. At the same time, cross-border philanthropy has raised legitimate fiscal and regulatory concerns for government. To understand how donor countries have responded to this changed global philanthropic landscape, we use comparative tax methodology to develop a spectrum of approaches to the tax treatment of cross-border giving and apply tax policy criteria to critically evaluate the divergent approaches of Australia and the Netherlands, located at opposing ends of the spectrum. Findings from the comparative analysis reveal that in the current global environment for philanthropy there is a strong case to be made for allowing tax deductible donations to cross borders.

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I. Introduction

Almost every member of the Organisation for Economic Co-operation and Development ("OECD") Development Assistance Committee ("DAC")[1] has tax incentives to encourage domestic philanthropy. These tax incentives, typically in the form of a tax deduction or tax credit, have

1. The DAC of the OECD is an international forum of the major countries that provide aid, online: *OECD* <www.oecd.org/dac/>.

the potential to lower the price of giving, increasing both the amount donated to nonprofit organizations[2] and the number of donors.[3] Until quite recently, these tax incentives generally did not extend to cross-border philanthropy[4] notwithstanding their significance for nonprofits engaged in international charitable activities. The transformation of the global philanthropic landscape in the 21st century, marked by a rise in both the amount of international giving and the form that giving takes,[5] has forced donor countries to consider the provision of tax incentives for cross-border donations. As national boundaries around philanthropy have started to blur, governments are struggling to maintain an appropriate balance between protecting the interests of the fiscal state (including the

2. The term 'nonprofit organization' ("NPO") will be used throughout this paper to refer to 'not-for-profit organization', 'non-governmental organization' ("NGO") and 'charities' (a subset of NPOs that have been acknowledged by the state as meeting either the common law or statutory definition of charity depending on the jurisdiction).
3. See *e.g.* John Simon, Harvey Dale & Laura Chisolm, "The Federal Tax Treatment of Charitable Organisations" in Walter Powell & Richard Steinberg, eds, *The Non Profit Sector: A Research Handbook*, 2d (New Haven: Yale University Press, 2006) 267 at 272; Joseph Cordes, "Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals" (2011) 64:4 National Tax Journal 1001 at 1003; Charles Clotfelter, *Federal Tax Policy and Charitable Giving* (Chicago: University of Chicago Press, 1985) at 281; Roger Colinvaux, Brian Galle & Eugene Steuerle, *Evaluating the Charitable Deduction and Proposed Reforms* (Washington: The Urban Institute, 2012) at 9.
4. Defined as a charitable gift from a donor in one jurisdiction to a recipient in another. This term will be used throughout this article interchangeably with 'international philanthropy' and 'international giving'.
5. In the two decades from 1997 to 2017, private philanthropic flows for development grew from approximately USD $7.1 billion to USD $40.9 billion. See "Grants by Private Agencies and NGOs" (2019), online: *OECD* <data.oecd.org/drf/grants-by-private-agencies-and-ngos.htm> DOI: <10.1787/a42ccf0e-en>. The Hudson Institute estimates that in 2014 private philanthropy from DAC donors to developing countries was as high as USD $63.7 billion. See Center for Global Prosperity, *The Index of Global Philanthropy and Remittances 2016* (Washington: Hudson Institute, 2016) at 6.

potential for international giving like other cross-border transactions to be misused for the purposes of terrorism and money laundering),[6] while enabling their citizens to effectively contribute to philanthropy's globalization.

The situation in the European Union is illustrative. For Member States, the fundamental freedoms of the Treaty on the Functioning of the EU ("TFEU") have caused a changed regional philanthropic environment by mandating non-discrimination of charities and their donors.[7] The European Court of Justice ("ECJ") has interpreted this principle of non-discrimination to require that Member States provide the same tax concessions to equivalent charities resident in other Member States that they provide to qualifying domestic charities.[8] In practice however, implementation by Member States differs due to domestic fiscal policy, with the result that "the fiscal environment for cross-border philanthropy, even within the EU, is still rather complex".[9] Despite

6. See Victoria Bjorkland, Jenni Reynoso & Abbey Hazlett, "Terrorism and Money Laundering: Illegal Purposes and Activities" (2004-2005) 25:2 Pace Law Review 233 at 233; Christopher Groves & Alana Lowe-Petraske, "The Practice of International Philanthropy" in Clive Cutbill, Alison Paines & Murray Hallam, eds, *International Charitable Giving* (Oxford: Oxford University Press, 2012) at 3, 4, 13-4; Douglas Rutzen, "Aid Barriers and the Rise of Philanthropic Protectionism" (2015) 17:1 International Journal of Not-for-Profit Law 5 at 18-19; Rebecca Vernon, "Closing the Door on Aid" (2009) 11:4 International Journal of Not-for-Profit Law 5 at 17-19.
7. "Consolidated Versions of the Treaty on the Functioning of the European Union" (1 March 2020), *EUR-Lex*, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016E/TXT-20200301> [TFEU].
8. See *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*, C–386/04, [2006] ECR I–8203 at I–8234 [*Centro di Musicologia*]; *Hein Persche v Finanzamt Lüdenscheid*, C–318/07, [2009] ECR at I–359 [*Hein Persche*]; *Missionswerk Werner Heukelbach eV v Belgium*, C–25/10, [2011] ECR at I–497 [*Missionswerk*]; *European Commission v Republic of Austria*, C–10/10, [2011] ECR at I–05389 [*Republic of Austria*].
9. Hanna Surmatz & Ludwig Forrest, "Boosting Cross-Border Philanthropy in Europe: Towards a Tax-Effective Environment" (Brussels: European Foundation Centre, 2017) at 4.

the current complexity of cross-border giving, the issue remains topical within the EU. It is expected that under the Romanian presidency of the EU, resolving the barriers to cross-border giving will be included on the political agenda.[10] As the philanthropic sector in Europe continues to strive for a tax-effective environment for 'European' cross-border donations,[11] changes in government policy affecting the tax treatment of international giving are taking place elsewhere.[12]

The transformation of the global philanthropic landscape has prompted tax scholars from around the world to examine this domestic tax issue from a comparative perspective to understand how countries have responded to the challenges and opportunities presented by

10. See European Economic and Social Committee, "European Philanthropy: An Untapped Potential (Exploratory Opinion at the Request of the Romanian Presidency)" (2019), online: *European Economic and Social Committee* <www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/european-philanthropy-untapped-potential-exploratory-opinion-request-romanian-presidency>.
11. See Surmatz & Forrest, *supra* note 9. See also European Foundation Centre and Donors and Foundations Networks in Europe, "European Philanthropy Manifesto" (Brussels: European Foundation Centre, 2019), online (pdf): *Philanthropy Advocacy* <philanthropyadvocacy.eu/wp-content/uploads/2019/03/20190321-Philanthropy-Manifesto_420x210_WEB.pdf>.
12. See *e.g.* Australia where the Australian Taxation Office recently issued a new public ruling reflecting a more permissive approach to the tax treatment of cross-border donations. Australian Taxation Office, Taxation Ruling TR 2019/6, "Income Tax: The 'in Australia' Requirement for Certain Deductible Gift Recipients and Income Tax Exempt Entities" (2019) online: <www.ato.gov.au/law/view/document?docid=TXR/TR20196/NAT/ATO/00001> [TR 2019/6].

the globalization of philanthropy.[13] This article builds on the existing scholarship by employing comparative tax methodology and utilizing a technique of actual comparison that can be used by policy-makers

13. See *e.g.* Ineke Koele, *International Taxation of Philanthropy: Removing Tax Obstacles for International Charities* (Amsterdam: International Bureau of Fiscal Documentation, 2007); Sigrid Hemels, "Are We In Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe" (2009) 37:8 Intertax 424; Theodore Georgopoulos, "Can Tax Authorities Scrutinise the Ideas of Foreign Charities? The ECJ's Persche Judgment and Lessons from US Tax Law" (2010) 16:4 European Law Journal 458; Charles Ostertag, "We're Starting to Share Well With Others: Cross-Border Giving Lessons from the Court of Justice of the European Union" (2011) 20:1 Tulane Journal of International and Comparative Law 255; Sabine Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Impact on Charity and Donor Taxation in Europe* (Alphen aan den Rijn: Kluwer Law International, 2011); David Moore & Douglas Rutzen, "Legal Framework for Global Philanthropy: Barriers and Opportunities" (2011) 13:1-2 International Journal of Not-for-Profit Law 5; Heike Jochum, "Cross-Border Charitable and Other Pro Bono Contributions: The Situation in Europe and the US" (2012) 40:11 Intertax 593; Sabine Heidenbauer et al, "Cross-Border Charitable Giving and its Tax Limitations" (2013) 67:11 Bulletin for International Taxation 611; Clive Cutbill, Alison Paines & Murray Hallam, eds, *International Charitable Giving* (Oxford: Oxford University Press, 2013); Thomas von Hippel, *Taxation of Cross-Border Philanthropy in Europe After Persche and Stauffer: From Landlock to Free Movement?* (Brussels: European Foundation Center, 2014); Lilian Faulhaber, "Charitable Giving, Tax Expenditures, and Direct Spending in the United States and the European Union" (2014) 39:1 Yale Journal of International Law 87; Miranda Stewart, "The Boundaries of Charities and Tax" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) 232; Myles McGregor-Lowndes, Julie-Anne Tarr & Natalie Silver, "The Fisc and the Frontier: Approaches to Cross-Border Philanthropy in Australia and the UK" (2015) 26:4, online: *The Philanthropist* < thephilanthropist.ca/2015/05/the-fisc-and-the-frontier-approaches-to-cross-border-charity-in-australia-and-the-uk/>; Renate Buijze, "Tax Incentives Crossing Borders: Considering the Example of Tax Incentives for Charitable Giving" in Sigrid Hemels & Kazuko Goto, eds, *Tax Incentives for the Creative Industries* (Singapore: Springer, 2017).

seeking to reform their tax treatment of cross-border donations. Applying comparative tax methodology to this discrete tax issue enables national tax laws and policies affecting cross-border giving to be considered beyond domestic tax policy-making concerns, to take into account the international realities of philanthropic globalization.

Part II of the article discusses comparative tax methodology and its application to the tax incentives for international giving. Part III adopts a functionalist approach to jurisdictional selection by examining 'comparable' jurisdictions that are all members of the OECD group of DAC donor countries. The results of this comparison are then used to develop a spectrum of approaches to the tax treatment of cross-border donations. At one end of the spectrum are countries that have employed domestic tax policy to place geographic barriers around charitable tax relief for donors; at the other end are countries that have adopted a more permissive approach to the provision of tax incentives for international giving. Part IV evaluates the two countries located at opposing ends of the spectrum — Australia and the Netherlands — using traditional tax policy considerations of equity, efficiency, simplicity, policy consistency and sustainability. Comparing these two divergent approaches utilizing a clear tax policy assessment framework points to an optimal approach for addressing this discrete tax issue. Part V offers concluding thoughts on how the comparative analysis can inform governments seeking to reform their tax incentives for cross-border philanthropy.

II. Comparative Tax Methodology And Its Application To The Tax Treatment Of Cross-Border Donations

Comparative tax methodology, or comparative tax law, is the "application of 'comparative law' methodologies to the study of tax laws".[14] Comparative tax law takes a country comparison beyond parallel descriptions of domestic tax laws in multiple jurisdictions. It provides a critical evaluation of those rules within the legal systems in which they

operate in order to develop an appropriate policy framework for reform.[15] In doing so, it provides new insights that can only be achieved by way of comparison, adding to the body of comparative tax knowledge.[16]

We employ a functional approach, which rests on the assumption that "the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results".[17] Because functionalists see the convergence of legal systems as desirable, their approach to jurisdictional selection is to examine 'comparable' jurisdictions, which are typically at a similar evolutionary stage and therefore likely to face similar problems.[18] This provides a functional equivalence, a 'similarity in difference' that facilitates the comparative analysis.[19] While other comparative approaches have been applied to tax law, the functional approach has been found to be particularly suited to comparative taxation because it is able to overcome the obstacles to comparing tax rules "posed by rapid legislative change, complexity of tax systems and the heterogeneity of local tax concepts [by looking] at the functions of tax rules in different domestic systems as they evolve over time".[20] The normative goal of the tax functionalist is the harmonization of tax laws for similarly situated jurisdictions.[21]

For the practical application of this approach, we adopt a comparative technique that incorporates Walter Kamba's three phases of comparative legal analysis.[22] In the first 'descriptive' phase, the "norms, concepts and institutions of the systems concerned" are described in their local context.[23] In the second 'identification' phase, the systems are compared in an effort to identify "divergences and resemblances between the legal systems or

15. See Carlo Garbarino, "An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research" (2009) 57:3 American Journal of Comparative Law 677 at 685.
16. See Reuven Avi-Yonah, Nicola Sartori & Omri Marian, "Some Theoretical Aspects of 'Comparative Taxation'" in Reuven Avi-Yonah, Nicola Sartori & Omri Marian, eds, *Global Perspectives on Income Tax Law* (Oxford: Oxford University Press, 2011) at 1.
22. See Walter Kamba, "Comparative Law: A Theoretical Framework" (1974) 23:3 International & Comparative Law Quarterly 485 at 511.
23. *Ibid*.

parts of the legal systems compared".[24] In the third 'explanatory' phase, the results of the analysis are critically evaluated and the divergences and resemblances explained.[25] The results from the descriptive and identification phases are used to develop a spectrum of approaches to the tax treatment of cross-border donations in order to understand where each country is located globally on this issue. We then take these findings to critically evaluate the divergent approaches of the countries that appear at opposing ends of the cross-border giving spectrum to determine which approach is optimal. In doing so, we employ tax policy criteria used to reform national tax laws, providing a clear assessment framework that overcomes the evaluation shortcomings that have been associated with equivalence functionalism.[26]

Comparative tax methodology was first used to address the tax treatment of cross-border donations by Anthony Infanti, an American tax and comparative law scholar, who used the rules governing the United States tax treatment of cross-border donations to test his own comparative tax framework of 'spontaneous tax coordination'.[27] Infanti argued that this topic was particularly suited to comparative tax methodology because it contained distinct legal rules that cross borders, implicating other countries and their international tax regimes.[28] As a critical legal scholar, Infanti acknowledged that his primary reason for choosing this topic was because "it was *not* a topic about which academics studying international tax normally write".[29] More than a decade later, the transformation of the global philanthropic landscape has prompted other tax scholars around

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24. *Ibid*.
25. *Ibid* at 511-12.
26. See Michaels, *supra* note 17 at 373-76 for a discussion of these limitations.
27. See Anthony Infanti, "Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the US International Tax Regime" (2002) 35:4 Vanderbilt Journal of Transnational Law 1105 [Infanti, "Spontaneous Tax Coordination"].
28. *Ibid* at 1120.
29. See Anthony Infanti, "A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity" (2005) 26:2 Whittier Law Review 707 at 796.

the world to address the comparative tax treatment of cross-border donations.[30]

Infanti's comparative tax framework involved "unilateral action on the part of [a country seeking to reform its tax system by] reviewing and evaluating the international tax rules adopted by other countries" in order to understand and accommodate legislative solutions and trends.[31] He defined tax coordination broadly as "the adaptation of one country's tax system to that of another"[32] in order to "imbue the framework with a great deal of flexibility and allow policy-makers to vary the desired level of coordination as necessary to accommodate domestic political, economic and social norms".[33] For the practical application of his framework Infanti followed Kamba's three phases of comparative legal analysis, emphasizing the descriptive phase where he compared a broad cross-section of countries representing "each of the eight families of income tax laws".[34] After identifying similarities and differences, Infanti briefly evaluated the findings "to determine the most 'appropriate' rule by balancing the benefits of the superior rule against all of the relevant theoretical and practical considerations that normally inform US international tax policy-making".[35]

Our comparative technique differs from Infanti's in three significant ways. First, rather than looking at a broad range of countries, we adopt a functional approach to jurisdictional selection by comparing OECD DAC donor countries at similar stages of legal development. Second, we create a spectrum of approaches to identify where each country is located in terms of the extent to which tax incentives for international giving are permitted or restricted. Third, we undertake an in-depth analysis of the two countries at opposing ends of the spectrum using tax policy considerations that inform policy-making across jurisdictions. Narrowing the analysis to the two extremes on the spectrum, rather than

30. See *supra* note 13.
31. See Infanti, "Spontaneous Tax Coordination", *supra* note 27 at 1136.
32. *Ibid* at 1128.
33. *Ibid* at 1142.
34. *Ibid* at 1159.
35. *Ibid* at 1226.

drawing from all of the countries in the initial comparison, achieves a comparative clarity that assists in ascertaining the optimal approach to the tax treatment of cross-border donations. Employing traditional tax policy considerations provides a clear assessment framework for evaluating the two divergent approaches.

III. Developing A Spectrum Of Approaches To The Tax Treatment Of Cross-Border Donations

We have undertaken a functional comparison of 11 jurisdictions based on our earlier comparative research to assess how these jurisdictions have responded to philanthropic globalization through the provision of tax incentives for international giving.[36] This comparative research examined the tax laws and policies governing cross-border philanthropy in the 'comparable' jurisdictions of Australia, Belgium, Canada, France, Germany, Japan, Luxembourg, the Netherlands, Spain, the United Kingdom and the US. These countries are all present members of the OECD DAC and as such are all considered developed nations with high income and the most significant providers of cross-border development

36. See Natalie Silver, *Beyond the Water's Edge: Re-thinking the Tax Treatment of Australian Cross-Border Donations* (DPhil Thesis, Queensland University of Technology, 2016); Renate Buijze, *Philanthropy for the Arts in the Era of Globalisation: International Tax Barriers for Charitable Giving* (DPhil Thesis, Erasmus University Rotterdam, 2017). Materials concerning the mentioned countries have been included up to June 7, 2017. Since then, the position of France on the spectrum has changed and moved more towards the permissive side of the spectrum, see Isabel Heuzé, "Legaat van een Inwoner van Frankrijk aan een Nederlandse 'ANBI': Vrijstelling van Franse Erfbelasting" ("Legacy from an Inhabitant of France to a Dutch 'ANBI': Exemption from French Inheritance Tax") (2018) 10 Fiscaal Tijdschrift Vermogen 6 (translation by the authors). As soon as the United Kingdom leaves the EU, it becomes a third country and it no longer has to comply with EU law. The UK then thus no longer has to grant the same tax benefits on donations to domestic Public Benefit Organizations ("PBOs") as on donations to comparable PBOs located in other EU Member States, which might influence its position on the spectrum.

aid.[37] They also share similarities in their approach to civil society regulation and are at a similar level of evolutionary legal development. We compared the country approaches thematically to identify similarities and differences. This analysis revealed that while there is policy consistency across these jurisdictions in encouraging domestic giving through the tax laws, this is not the case with cross-border giving.

The countries examined evidence a broad range of approaches to the provision of tax incentives for international philanthropy. At one end of the spectrum are countries that have used domestic tax policy to place geographic barriers around charitable tax concessions, including Australia and Japan, whereby tax incentives for charitable giving generally stop at a country's borders. At the other end are countries that have adopted a more permissive approach to the provision of tax incentives for international philanthropy, including Luxembourg and the Netherlands, allowing tax deductible donations to cross borders. These research findings are illustrated on a spectrum from most restrictive to least restrictive tax treatment tax treatment in Figure 1 below.

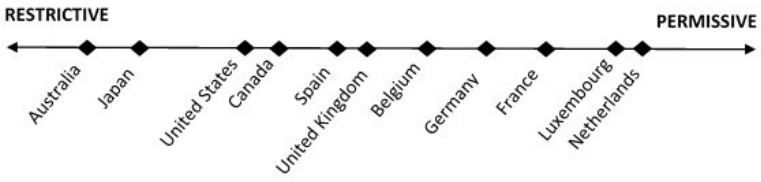

Figure 1: Spectrum of approaches to tax treatment of cross-border donations

It is notable that with the exception of Spain and the UK, all other EU Member States appear on the permissive end of the spectrum. This is a result of Member States amending their tax laws in response to a combination of infringement procedures by the European Commission and decisions by the ECJ. The European Commission aimed to achieve non-discrimination of charities and their donors within the EU, in compliance with the four fundamental freedoms stipulated in the TFEU.

37. "Development Assistance Committee (DAC)" (2019), online: *OECD* <www.oecd.org/dac/dacmembers.htm#members>. In addition to development aid, this article also includes other types of charitable giving for the public benefit.

In four landmark cases dealing with the tax treatment of charities, the ECJ developed a general non-discrimination principle according to which a Member State must grant the same beneficial tax treatment to an equivalent charity resident in another Member State as it provides to a domestic charity.[38] Both the ECJ case law and the infringement procedures by the European Commission reflect a permissive approach towards 'European' cross-border charity and philanthropy. While Member States retain the right to decide whether they want to provide tax incentives and under what conditions, a residency requirement is prohibited. The result is that once a Member State decides to provide favourable tax treatment to domestic charities and their donors it must also provide non-discriminatory tax treatment to comparable charities located in other Member States.[39]

The majority of Member States have amended their tax laws in accordance with the non-discrimination principle established by the ECJ. Of the Member States examined, only Spain's tax legislation does not conform with this principle.[40] This explains Spain's location towards the restrictive end of the spectrum. The UK has amended its tax legislation in accordance with the non-discrimination principle, however its approach is moderately restrictive as a result of tax legislation containing jurisdiction, registration and management requirements, which serve to limit access to UK charitable status and tax relief for non-UK charities.[41] It also provides that UK charities submit to a reasonableness determination by the UK tax authority, Her Majesty's Revenue and Customs, prior to sending charitable funds outside the UK. While other Member States have adopted more permissive approaches than Spain and the UK, the Netherlands is the only European jurisdiction examined that has extended the principle of non-discrimination to countries beyond the EU, which locates it at the most permissive end of the spectrum.

In contrast, Australia, Canada, Japan and the US all appear at the restrictive end of the spectrum because the tax legislation in these countries contain 'in country' residency requirements that requires a charity to be resident or established in the home country to access charitable tax concessions. The result is that in these jurisdictions there are no tax

incentives for donations made directly to foreign charities.[42] Canada, Japan and the US permit a tax deduction for cross-border donations made indirectly through domestic charities for their own charitable work abroad or by serving as a charitable intermediary, provided that the domestic charity maintains discretion and control over the funds and is not serving as a mere conduit for channeling the funds abroad. Australia appears at the most restrictive end of the spectrum because unlike Canada, Japan and the US, it generally does not permit a tax deduction for cross-border donations made indirectly through domestic charities.[43]

This analysis locates Australia and the Netherlands at opposing ends of the spectrum for the tax treatment of cross-border donations. The Australian Government responded to philanthropic globalization and domestic fiscal pressures by restricting tax incentives for cross-border giving, while the Netherlands adopted a permissive, internationalist approach by applying the same tax treatment to domestic and cross-border donations. Given their divergent approaches, these two countries provide an important basis for comparison.

IV. Evaluating The Divergent Approaches Using Tax Policy Considerations

This section provides a descriptive analysis of Australia and the Netherlands' legal regime governing the tax treatment of cross-border giving and identifies the similarities and differences between the two divergent approaches. These results are critically evaluated using tax policy considerations to determine the optimal approach for the provision of tax incentives for cross-border donations in a changed global philanthropic landscape.

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42. Although the US has tax treaties with three countries and Canada has one that all contain 'mutual recognition' provisions enabling cross-border reciprocity for charitable donations.
43. Other than exceptions for foreign aid organizations and certain environmental organizations.

A. Descriptive Country Comparison

The descriptive country comparison considers each jurisdiction's laws and policies governing the tax treatment of cross-border donations, taking into account the broader historical and cultural context in which their charitable tax regimes operate. Each country will be described under two main headings (i) tax incentives for cross-border donations and (ii) regulatory measures governing cross-border charitable activities. This facilitates the comparative analysis by providing a thematic basis for comparison, augmenting the functional equivalence of the two jurisdictions.

1. Australia

Since colonial times, Australia has relied on the English common law model of charity, with churches and citizens being the primary drivers of voluntary sector activities and organizations.[44] This colonial model of welfare provision combined private charity focused on domestic causes through the delivery of social services, with significant government subsidies to provide the basis for the new welfare state.[45] Australia adopted the definition of charity enunciated in the seminal English case *Commissioners for Special Purposes of Income Tax v Pemsel*,[46] which defines charities as nonprofit organizations with charitable purposes that are for

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44. See Wendy Scaife et al, "Giving in Australia: Philanthropic Potential Beginning to Be Realized" in Pamala Wiepking & Femida Handy, eds, *The Palgrave Handbook of Global Philanthropy* (London: Palgrave Macmillan, 2015) 488.
45. See *e.g.* John Murphy, "The Other Welfare State: Non-Government Agencies and the Mixed Economy of Welfare in Australia" (2006) 3:2 History Australia 44.1; Stephen Garton, *Out of Luck: Poor Australians and Social Welfare 1788-1988* (Crows Nest, NSW: Allen and Unwin, 1990); Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia*, 2d (Sydney: Allen and Unwin, 1987); Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprises in Australia* (Crows Nest, NSW: Allen and Unwin, 2001).
46. [1891] AC 531 (HL (Eng)).

the public benefit.[47] These colonial origins resulted in Australia adopting the English tradition of providing favourable tax treatment for domestic charities. A tax deduction for charitable gifts was enacted with the first Commonwealth legislation introducing personal income tax in 1915 and remains an important tax concession in Australia's federal income tax system.

i. Tax Incentives for Cross-Border Donations

The Australian Tax Office ("ATO") is responsible for administering and enforcing tax law for nonprofits. Organizations must be endorsed by the ATO to access charitable tax concessions, including income tax exemption and deductible gift recipient ("DGR") status. Having DGR status enables the organization to receive tax deductible donations. Australian residents can deduct from their taxable income the value of donations of AUD $2 or more made to a DGR.[48] Australia's tax legislation states that in order to obtain DGR status, the organization must be 'in Australia'.[49] The legislation does not provide a definition of 'in Australia'. Instead, the ATO has issued tax rulings and guidance on its meaning. For the past 50 years, the ATO adopted a strict interpretation of this 'in Australia' residency requirement, stipulating that a DGR must "be established, controlled, maintained and operated in Australia" and have "its benevolent purposes" in Australia.[50] In practical terms this meant that donations by Australian taxpayers made directly to a charity outside Australia were never tax deductible. Donations made to an Australian DGR to use the gift for its own programs outside Australia were also not tax deductible, unless such activities were relatively minor or incidental

47. *Charities Act 2013* (Cth), 2013/100 (Austl), s 5.
48. *Income Tax Assessment Act 1997* (Cth), 1997/38 (Austl), s 30-15 [*ITAA 1997*].
49. *Ibid*, s 30-125(1)(b)(iii).
50. Australian Taxation Office, Taxation Ruling TR 2003/5, "Income Tax and Fringe Benefits Tax: Public Benevolent Institutions" (4 June 2003) at para 129 [TR 2003/5]. For the origins of the ATO's 'in Australia' interpretation and a critique see Natalie Silver, Myles McGregor-Lowndes & Julie-Anne Tarr, "Delineating the Fiscal Borders of Australia's Non-Profit Tax Concessions" (2016) 14:3 eJournal of Tax Research 741.

to the organization's Australian operations,[51] or unless the organization obtained its DGR status pursuant to one of the limited exceptions to the 'in Australia' residency requirement.[52] While limited in number due to high entry barriers, organizations that have obtained DGR status pursuant to one of these exceptions have been used by Australian charities and their donors as giving intermediaries to channel tax deductible funds abroad.[53] These channelling arrangements, involving a servicing fee being paid to the intermediary DGR,[54] have provided a workaround for organizations and their donors, enabling them to circumvent the restrictive tax laws in order to engage in tax-effective cross-border charitable activities.[55]

Two significant judicial decisions in the last ten years have challenged the legislative efficacy of the geographic restrictions placed around gift deductibility and income tax exemption. In *Federal Commissioner of*

51. TR 2003/5, *ibid* at para 130.
52. The exceptions are overseas aid funds, developed country disaster relief funds, public funds on the Register of Environmental Organisations and DGRs listed by name in the tax law. See *ITAA 1997*, *supra* note 48, ss 30-55, 30-80, 30-85. For a detailed discussion of these exceptions, see Natalie Silver, Myles McGregor-Lowndes & Julie-Anne Tarr, "Should Tax Incentives for Charitable Giving Stop at Australia's Borders?" (2016) 38:1 Sydney Law Review 85 at 96-103.
53. The Australian Bureau of Statistics *Australian National Accounts: Non-Profit Institutions Satellite Account 2012–13* found that 'grants and other payments' made by Australian nonprofit organizations to 'non-resident organisations' (defined as any organization domiciled overseas, including foreign branches and subsidiaries of Australian organizations) amounted to more than AUD $1 billion, highlighting the widespread use of domestic nonprofits for cross-border giving, a significant component of which is likely to be intermediary giving. See Australian Bureau of Statistics, *Australian National Accounts: Non-Profit Institutions Satellite Account, 2012–13* Catalogue No 5256.0 (Canberra: ABS, 28 August 2015), online: *Australian Bureau of Statistics* <www.abs.gov.au/AusStats/ABS@.nsf/MF/5256.0> [perma.cc/95RM-3TS2], table 10.1.
54. This servicing fee is typically 7-10 per cent of the amount distributed. See Letter from Philanthropy Australia to Prime Minister Tony Abbott (21 April 2015) at 1.
55. For further discussion on the use of such workarounds, see Silver, McGregor-Lowndes & Tarr, *supra* note 52 at 95, 103.

Taxation v Word Investments Ltd,[56] the High Court of Australia found that it was permissible for a tax exempt entity to send funds abroad through a suitably qualified organization. This was affirmed in *Federal Commissioner of Taxation v The Hunger Project Australia*,[57] where the Federal Court of Australia determined that Hunger Project Australia, which operated primarily as a fundraising arm for a global network of entities that provided hunger relief was eligible to apply for income tax exemption and DGR status. Following these decisions, the ATO's longstanding restrictive position has shifted towards a more permissive approach to the tax treatment of cross-border donations, culminating in 2017 when the ATO withdrew its public ruling containing its strict interpretation of the 'in Australia' residency requirement.[58] In doing so, the ATO cited a statement by the Commissioner of the Australian Charities and Not-for-profits Commission ("ACNC") that an organization "is not precluded from being registered as a [public benevolent institution] subtype of charity if it has a main purpose of providing benevolent relief to people residing overseas".[59] In March 2018, the ATO announced it was developing a new public ruling on the 'in Australia' residency requirement for deductible gift recipients and income tax exempt entities.[60] This ruling was issued in December 2019.[61] As the nonprofit sector awaited this new ruling,

56. (2008) 236 CLR 204 (HCA) [*Word Investments*].
57. (2014) 221 FCR 302 (Austl) [*Hunger Project*].
58. Australian Taxation Office, Taxation Ruling TR 2003/5W, "Income Tax and Fringe Benefits Tax: Public Benevolent Institutions, Notice of Withdrawal" (17 May 2017) online: *Australian Taxation Office* <www.ato.gov.au/atolaw/view.htm?DocID=TXR%2FTR20035%2FNAT%2FATO%2F00001> [perma.cc/J5VX-LJKS].
59. Australian Charities and Not-for-profits Commissions, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03, (ACNC, 2016), s 5.8.
60. Australian Taxation Office, Advice Under Development – Income Tax Issues, [3911] "'In Australia' Requirement - Deductible Gift Recipients" (2018) online: *Australian Taxation Office* <www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---income-tax-issues/#BK_3911> [perma.cc/52YG-H4PV].
61. TR 2019/6, *supra* note 12.

Australian organizations and their donors took advantage of the legal vacuum created by establishing organizations with DGR status that were able to send funds and engage in charitable activities outside Australia.

ii. Regulatory Measures Governing Cross-Border Charitable Activities

The ACNC was established in 2012 as Australia's first national charity regulator.[62] Registration of charities with the ACNC is voluntary, but is required for charities to access tax concessions, including obtaining DGR status, from the ATO.[63] In order to register with the ACNC, an organization must meet the legal definition of charity, be in compliance with ACNC governance standards and have not been listed as an organization engaging in or supporting terrorist or other criminal activities.[64] The registration process enables the ACNC to assess compliance risks against its governance standards. Once registered, the ACNC has a number of tools for the ongoing regulation of charities. All registered charities must keep certain financial and operational records for seven years explaining the charity's financial position and activities.[65] The charity legislation also contains reporting requirements for registered charities (unless they are subject to an exception) through the submission of an annual information statement and financial reports, which requires some information on cross-border charitable activities.[66] Failure to submit an annual information statement results in penalties[67] and may result in revocation of registration.

While the ACNC's governance standards do not contain specific requirements for charities operating abroad, the charity legislation provides for external conduct standards to regulate registered charities

62. The ACNC is governed by the Australian *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/16.
63. *Ibid*, s 10-5.
64. *Ibid*, s 25-5.
65. *Ibid*, s 55-5.
66. *Ibid*, s 60-5.
67. *Ibid*, s 175-35.

sending funds or engaging in activities outside Australia.[68] Until recently these external conduct standards had not been developed. Instead the ACNC issued guidance to assist charities working abroad to minimize the risk of being used for raising and distributing funds for terrorist financing.[69] As part of a DGR reform package announced in December 2017, the Australian Government stated its intention to issue the external conduct standards "[t]o strengthen oversight of overseas activities".[70] The external conduct standards came into effect in July 2019.[71]

In addition to regulation by the ACNC, charities are also subject to audits from the ATO, which can revoke DGR and tax exempt status and impose penalties for non-compliance. International aid organizations are subject to further regulation through the Overseas Aid Gift Deduction Scheme administered by the Department of Foreign Affairs and Trade; and environmental organizations working abroad are also regulated through the Register for Environment Organisations, administered by the Department of the Environment.

2. The Netherlands

In the second half of the 19th century a differentiation of religious groups in the Netherlands took place, which led to Dutch society

68. *Ibid*, div 50.
69. "Protecting Your Charity Against the Risk of Terrorism Financing" (2015), online: *ACNC* <www.acnc.gov.au/ACNC/Manage/Protect/ProtectingTF/ACNC/Edu/ProtectTF.aspx>; "Checklist: Protecting your Charity Against the Risk of Terrorism Financing" (2014), online: *ACNC* <www.acnc.gov.au/for-charities/manage-your-charity/checklist-protecting-your-charity-against-risk-terrorism-financing>.
70. See Australian Treasury, Media Release, "Reforming Administration of Tax Deductible Gift Recipients", (5 December 2017) online: *Treasury Portfolio Ministers* <ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/reforming-administration-tax-deductible-gift-recipients>.
71. See *Australian Charities and Not-for-profits Commission Amendment 2018 (No 2)* (Cth), regs 2018, online: *Federal Register of Legislation* <www.legislation.gov.au/Details/F2018L01601> [perma.cc/L9S4-9GTP]; ACNC, "External Conduct Standards" (2019), online: *ACNC* <www.acnc.gov.au/tools/topic-guides/external-conduct-standards>.

being organized into social groups based on religious and political lines, known as 'pillarization'.[72] This fostered the growth and development of religiously and ideologically affiliated charitable organizations,[73] which had strong relationships with the national government.[74] In the second half of the 20th century, the pillarization weakened and Dutch citizens became involved with organizations that were not defined by religious or political affiliation.[75] The growth of the welfare state resulted in increased public funding for charitable activities, both domestic and international, which solidified the centrality of charitable organizations in Dutch social and economic life.[76] The concept of public benefit was first introduced in the Dutch tax legislation in 1917, when a tax exemption was introduced in the inheritance law.[77] In 1952 a tax deduction for charitable gifts was introduced in the Dutch personal income tax for gifts to organizations that contributed to the public good[78] and in 2012 specific categories of public benefit were enumerated in the tax laws, extending to charitable organizations located abroad.[79]

i. Tax Incentives for Cross-Border Donations

A tax deduction is available to Dutch taxpayers who donate to an *Algemeen Nut Beogende Instelling* [Public Benefit Pursuing Entity ("PBPE")], which has been registered as a charity under the *Wet Inkomstenbelasting* [*Income*

72. See Gabi Spitz, Roeland Muskens & Edith van Ewijk, *The Dutch and Development Cooperation: Ahead of the Crowd or Trailing Behind?* (Amsterdam: National Committee For International Cooperation and Sustainable Development, 2013) at 10.
73. See Ary Burger et al, "The Netherlands: Key Features of the Dutch Nonprofit Sector" in Lester M Salamon et al, eds, *Global Civil Society: Dimensions of the Nonprofit Sector* (Baltimore: Johns Hopkins Center for Civil Society Studies, 1999) 145 at 145-46.
74. See Spitz, Muskens & Van Ewijk, *supra* note 72 at 8.
75. *Ibid* at 10.
76. See Burger et al, *supra* note 73 at 146, 152.
77. Law of 20 January 1917, Dutch Official Gazette 189, concerning the *Successiewet 1859* [*Inheritance law 1859*] (translation by the authors).
78. Law of 26 June 1952, Dutch Official Gazette 376.
79. *Algemene Wet Inzake Rijksbelastingen* [*General State Taxes Act*] (The Netherlands) 1959, art 5b (translation by the authors) [*GSTA*].

Tax Act 2001 ("*ITA*")].[80] The *ITA* distinguishes between periodic and other gifts.[81] For periodic gifts, the donor commits to pay the same amount annually to a single PBPE over a period comprising at least five years and ultimately ending at the death of the taxpayer. These periodic gifts are fully deductible, up to 100 per cent of taxable gross income.[82] The remainder can be deducted in a subsequent year. Other gifts, defined as any gift that does not meet the requirements of a periodic gift, are tax deductible to the extent that the amount combined with other donations made during the taxable year exceeds a floor of EUR 60 and one per cent of taxable gross income. These gifts are capped at ten per cent of taxable gross income.[83]

To qualify as a Dutch charity, the organization must register with the Dutch tax authority, *Belastingdienst*.[84] Following the establishment of the non-discrimination principle by the ECJ, the Netherlands amended its tax legislation. In doing so, rather than limiting its charitable tax relief to European cross-border donations as mandated by the ECJ, the Netherlands went one step further by extending its tax relief to charities beyond Europe. The result is that charities in EU Member States or States designated by the Dutch Ministry of Finance[85] can register as a

80. *Wet Inkomstenbelasting 2001* [*Income Tax Act 2001*] (The Netherlands), arts 6.32-6.33 (translation by the authors).
81. *Ibid*, arts 6.34-6.35.
82. *Ibid*, arts 6.34, 6.38.
83. *Ibid*, art 6.39.
84. *GSTA*, *supra* note 79.
85. These include countries with which the Netherlands has an agreement to exchange information on income tax and gift and inheritance tax, which may be in the form of a bilateral tax treaty, an agreement on exchange of tax information, or the Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters. Even if a charity resides in a country that does not have an exchange of information agreement with the Netherlands, it can still register as a PBPE by agreeing to provide additional information to the Dutch tax authority. See *GSTA*, *supra* note 79; *Uitvoeringsregeling Algemene Wet Inzake Rijksbelastingen* [*Implementing Regulation General State Taxes Act*] (The Netherlands) 1994, art 1c (translation by the authors).

PBPE in the Netherlands. Upon receiving its Dutch charity status as a PBPE, the foreign charity is included in a list of charities that are eligible to receive tax deductible donations from Dutch taxpayers.[86] Once registered as a Dutch charity, there are no geographic restrictions on the charity's activities. Both resident and non-resident registered charities can undertake some or all of their activities outside the Netherlands. As of 1 January 2018, there were 236 foreign charities registered as PBPEs in the Netherlands.[87]

Until recently, PBPEs could be used by Dutch donors as giving intermediaries to obtain a tax deduction for donations to charities that were not registered as a PBPE in the Netherlands, such as foreign charities or newly established domestic charities that had not yet obtained PBPE status. However, following a decree by the Ministry of Finance in 2014[88] and a decision by the Dutch Supreme Court in 2016,[89] the use of PBPEs serving as giving intermediaries has been significantly restricted. These restrictions were created in response to the perception that giving intermediaries were being used to maximise gift deductibility. Instead of making partially deductible other gifts to different charities over five consecutive years, Dutch donors were making a fully deductible periodic gift to a giving intermediary. Each year the giving intermediary would pass the gift to a different charity, as directed by the donor. To prevent donors

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86. See "Zoek een ANBI" ["Find an ANBI"], online: *Belastingdienst* <www.belastingdienst.nl/rekenhulpen/giften/anbi_zoeken/> (translation by the authors).
87. "Kabinetsreactie Evaluaties Giftenaftrek en ANBI/SBBI-Regeling" ["Government Response to the Assessment of the Gift Deduction and ANBI/SBBI Regulation"] (2018), online: *Rijksoverheid* <www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kabinetsreactie-evaluaties-giftenaftrek-en-anbi-sbbi-regeling> [perma.cc/6JZZ-ACVP] (translation by the authors).
88. *Inkomstenbelating: Giften en Algemeen Nut Boegende Instellingen* [*Income Tax: Donations and Public Benefit Pursuing Entities*], Decree of 19 December 2014, nr BLKB2014/1415M, (2014) Staatcourant [Government Gazette], nr 36877 (translation by the authors) [Decree].
89. Supreme Court 14/06262 (22 April 2016) ECLI:NL:HR:2016:695 (The Netherlands) [Supreme Court 14/026262].

from converting their other gifts into periodic gifts, in 2014 the Ministry of Finance decreed that a PBPE that functions as a conduit organization will lose its charitable status.[90] Following this decree, the Dutch Supreme Court found that a facilitator of an online donation platform was not a PBPE on the basis that a PBPE should focus its activities on sufficiently defined aims that almost exclusively serve the public benefit.[91] As a result, opportunities for Dutch donors to use a giving intermediary to obtain a tax deduction (whether directed domestically or abroad) are restricted.

ii. Regulatory Measures Governing Cross-Border Charitable Activities

The Dutch tax legislation includes a number of registration requirements for any entity, domestic or foreign, seeking Dutch charity status. The main requirement is that at least 90 per cent of its activities are dedicated to pursuing the public benefit.[92] Since January 2014, PBPEs are required to publish information annually on their website and to report this website to the Dutch tax authority.[93] Foreign charities seeking Dutch charity status must submit an application form to the Dutch tax authority along with governing documents, tax status in the country of residence, financial statements and a list of board members.[94] The Dutch tax authority may revoke charitable status if it determines that an organization's activities are not being exercised in the public interest or

90. Decree, *supra* note 88.
91. Supreme Court 14/06262, *supra* note 89.
92. *GSTA*, *supra* note 79.
93. This includes a description of the organization's aims, policy plan, financial statements, reimbursement policy and annual report. See "Publishing ANBI Information on a Website", online: *Belastingdienst* <belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/business/other_subjects/public_benefit_organisations/publishing-anbi-information-on-a-website/> [perma.cc/4UXF-5RB2].
94. "Aanvraag ANBI-Beschikking – Buitenland" ["Application PBPE-status – Foreign Countries"], online: *Belastingdienst* <belastingdienst.nl/wps/wcm/connect/ bldcontentnl/themaoverstijgend/programmas_en_formulieren/aanvraag_anbi_buitenland> [perma.cc/MNQ6-TAP2] (translation by the authors).

other requirements are not met.[95]

Ongoing monitoring of a number of registered charities is also conducted by the Central Bureau for Fundraising ("CBF"), an independent accrediting and oversight agency, providing its member organizations with greater credibility.[96] Charities apply to the CBF for a 'seal of approval', which involves the CBF conducting an assessment of the organization's records and information against a number of criteria and subsequent annual assessments to ensure ongoing compliance.[97] While the CBF's seal of approval has no legal consequences, it nonetheless serves as an important charitable monitoring body given that the charities under its supervision account for approximately 85 per cent of all funds raised in the Netherlands including all international Non-Governmental Organizations ("NGOs").[98] The Dutch tax authorities and the CBF have signed an agreement on the incorporation of the PBPE requirements in the CBF's assessment.[99]

B. Identification of Similarities and Differences

Australia and the Netherlands offer contrasting approaches to the tax treatment of cross-border donations as a result of the particular local context in which each country's charitable tax regime operates. Australia's approach is based on the English common law definition of charity, codified in its charity laws, with regulation occurring primarily through its national charity regulator. The Netherlands has codified its tax laws, with regulation mainly undertaken by the Dutch tax authority. The

95. *GSTA*, *supra* note 79, s 7.

96. *Financial Action Tax Force*, "Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism – The Netherlands" (25 February 2011) at 262.

97. *Ibid* at 264.

98. *Ibid*.

99. CBF Toezichthouder Goede Doelen, "Goededoelensector en Belastingdienst Ondertekenen Convenant" [CBF Supervisor Charitable Organisations, "Charities and Tax Authorities Sign Agreement"] (29 June 2018), online: *CBF Nieuwsoverzicht* <www.cbf.nl/nieuwsbericht/goededoelensector-en-belastingdienst-ondertekenen-convenant> [perma.cc/XCZ2-QDWM] (translation by the authors).

differences in approaches undertaken by the two countries are further illuminated through the thematic bases for comparison.

1. Tax Incentives for Cross-Border Donations

The comparative analysis revealed that there is policy consistency across the two jurisdictions in encouraging domestic giving through the tax laws. Each country, however, has responded differently to concerns relating to the fiscal consequences of extending tax concessions to cross-border donations and the supervision of philanthropy outside their jurisdiction.

In Australia, the residency requirement does not permit a deduction for donations made directly to foreign charities, consistent with Australia's colonial origins of welfare provision combined with private charity that focused on domestic causes. This restrictive approach to charity was incorporated into Australia's tax laws, resulting in a narrow concept of public benefit limited to organizations 'in Australia'. The ATO's longstanding interpretation of the 'in Australia' residency requirement has not permitted a tax deduction for donations to domestic charities that are spent abroad, unless such activities are relatively minor or incidental to their Australian operations or unless the organization obtained its DGR status pursuant to one of the exceptions to the 'in Australia' requirement. In contrast, since 2008 the Netherlands, in line with the EU treaties, has provided equal tax treatment of domestic and foreign charities that register with the Dutch tax authority. This allows Dutch donors to claim a deduction for donations made directly to foreign charities, provided they have registered as PBPEs. The Netherlands has incorporated this permissive approach into its tax laws, extending the concept of public benefit to charitable activities carried out abroad. As a result, domestic charities are able to use tax deductible donations for their international charitable activities.

The Australian tax laws applying to cross-border giving and (until recently) their restrictive interpretation by the ATO, have provided strong incentives for charities and donors wishing to obtain charitable tax relief to direct their charitable activities and funds domestically. This restrictive approach also revealed the limited options available to Australian donors who wished to engage in tax effective cross-border giving, as well as the

difficulties Australian charities reliant on these donations experienced in operating abroad. As a consequence, organizations and their donors have been making tax deductible donations indirectly, through domestic giving intermediaries as workarounds of the tax laws. In contrast, in the Netherlands both the Dutch Government and the courts have indicated they are limiting the use of domestic giving intermediaries. This does not affect the ability of Dutch donors to make tax effective donations abroad, as they can still obtain a tax deduction on a cross-border donation made directly to a foreign charity provided it is recognized as a PBPE, or to a domestic charity that operates internationally. However, it has implications for foreign charities that have not registered with the Dutch tax authority as a PBPE, as Dutch donors can no longer use a giving intermediary to make tax deductible donations to such charities.

2. Regulatory Measures Governing Cross-Border Charitable Activities

Both countries have tools to regulate international giving for donations made to foreign charities, responding to the need for government oversight of cross-border giving. Australia has registration and reporting requirements for charities generally, including compliance with the ACNC's governance standards and provision of annual information statements. To date these regulatory requirements have not been particularly focused on international charitable activities, although that is likely to change with the recent introduction of the ACNC's external conduct standards. In the Netherlands there are also registration and reporting requirements applying to both domestic and foreign charities. These processes enable the Dutch tax authority to have a measure of control over foreign charities and the funds entrusted to them. While this regulation may increase the administrative burdens and costs for foreign charities potentially creating disincentives for registration,[100] it appears to be a more targeted regulatory tool for government to monitor international charitable activities.

100. See Hemels, *supra* note 13 at 431.

C. Evaluation

To evaluate which of the two divergent approaches to the tax treatment of international giving is more optimal, we employ five tax policy criteria: efficiency, equity, simplicity, policy consistency and sustainability. Across jurisdictions there is general consensus that a country's "tax laws should be fair, economically efficient and simple to comply with and administer".[101] Additional concerns of sustainability and policy consistency are often used to evaluate tax laws and systems.[102] An optimal approach to the tax treatment of cross-border donations would seek to maintain a delicate balance between these oft-competing policy considerations.

1. Efficiency

Treasury, or economic, efficiency is concerned with whether the tax deduction is a cost effective way to subsidize charitable organizations by measuring the extent to which the deduction delivers social benefits (in the form of donations) that exceed the costs of the lost tax revenue.[103] On a granular level, treasury efficiency is concerned with whether a dollar of forgone taxes induces at least an extra dollar of donations. If each dollar of forgone revenue purchases less than one dollar of giving, arguably the subsidy should be removed and replaced with direct spending.[104] The extent to which the tax deduction succeeds in encouraging giving depends on how responsive donors are to price incentives, measured by

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101. See Michael Graetz, "Paint-By-Numbers Tax Lawmaking" (1995) 95:3 Columbia Law Review 609 at 609.
102. See *e.g.* UK, HC Treasury Committee, *Principles of Tax Policy: Eighth Report of Session 2010-11*, vol 1 (15 March 2011) [Treasury Committee]; Austl, Commonwealth, Australia's Future Tax System Review Panel, *Australia's Future Tax System: Report to the Treasurer* (Canberra: Australian Government Treasury, 2009) [Australia's Future Tax System Review].
103. See Rob Reich, "Toward a Political Theory of Philanthropy" in Patricia Illingworth, Thomas Pogge & Leif Wenar, eds, *Giving Well: The Ethics of Philanthropy* (Oxford: Oxford University Press, 2011) 177 at 182-83.
104. See Colinvaux, Galle & Steuerle, *supra* note 3 at 8 (noting that transaction costs, such as fundraising and the costs of grants and direct expenditures would also have to be taken into account).

economists as the price elasticity of giving. For taxpayers for whom giving is price elastic, lowering the price of giving through tax incentives can potentially increase the amount donated and the number of individuals donating.[105] Conversely, low price elasticities suggest that tax incentives are an inefficient means of funding nonprofit organizations. Since the 1970s, the effects of tax incentives on charitable contributions have been studied extensively. A review of these studies in the US suggests that giving is price elastic, at least among individuals with high incomes.[106] These findings suggest that the gift deduction is an efficient way to subsidize charitable organizations. The higher top marginal tax rates in Australia and the Netherlands compared to the US implies that the gift deduction would have a larger impact on giving in these countries, particularly for wealthy taxpayers.[107]

While there have been no studies estimating price elasticities of cross-border philanthropy, a comparative study of private charitable giving to developing countries conducted by the Center for Global Development concluded that "[c]itizens in countries with stronger targeted income

105. See Simon, Dale & Chisolm, *supra* note 3.

106. See John List, "The Market for Charitable Giving" (2011) 25:2 Journal of Economic Perspectives 157. See also John Peloza & Piers Steel, "The Price Elasticities of Charitable Contributions: A Meta-Analysis" (2005) 24:2 Journal of Public Policy & Marketing 260, which shows a price elasticity of giving between -1.11 and -1.44.

107. See Austl, Commonwealth, Productivity Commission, *Contribution of the Not-for-Profit Sector* (Canberra: Australian Government Productivity Commission, 2010) at 174; Myles McGregor-Lowndes & Marie Crittall, "An Examination of Tax Deductible Donations Made By Individual Australian Taxpayers in 2012–13" (2015) Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology Working Paper No 66 at 7, 61. In the 2019 Dutch Tax Plan it was announced that from 2020 the tax rate against which donations can be deducted in the Netherlands will reduce gradually, from the highest tax bracket to 37.05 per cent in 2023. See *Belastingplan 2019* [Dutch Tax Plan 2019] (Dutch Ministry of Finance, 18 September 2018).

tax incentives appear to give more private charity to poor countries".[108] This finding indicates a high price elasticity for taxpayers who give to developing countries, suggesting that the gift deduction may also be a cost-effective way to subsidize international charitable activities. Whether or not this increases treasury efficiency, however, depends on the larger social aims of the deduction and the reach of the social benefits it delivers. In an era of philanthropic globalization, an optimal approach to the tax treatment of cross-border donations would take a broad perspective of treasury efficiency. If this view is adopted, the permissive approach of the Netherlands means that the social benefits the deduction delivers extends globally. As a result, the deduction for cross-border donations could be considered treasury efficient in its cost-effective delivery of support abroad. In contrast, in Australia where traditionally "the fiscal state generally does not recognise or facilitate [the] growth in global charity",[109] the social benefits of the deduction have been largely confined to beneficiaries within Australia's borders. While this may be treasury efficient in the narrower sense of limiting the consequences for national revenue, it is not cost effective for the increasing amount of Australian donations being directed abroad.[110]

2. Equity

Equity is concerned with the concepts of "similar treatment of people similarly situated" (horizontal equity) and "fairness of the distribution of taxes at different levels of income, consumption, or wealth" (vertical equity).[111] The gift deduction is particularly problematic with respect to

108. See David Roodman & Scott Standley, "Tax Policies to Promote Private Charitable Giving in DAC Countries" (2006) Center for Global Development Working Paper No 82 at 35.
109. See Stewart, *supra* note 13 at 244.
110. The most recent data shows that almost 20 per cent of total donations are directed internationally, representing AUD $2.1 billion. See Myles McGregor-Lowndes et al, *Giving Australia 2016: Individual Giving and Volunteering* (The Australian Centre for Nonprofit Studies, Centre for Social Impact Swinburne and Centre for Corporate Public Affairs 2017) at 32.
111. Graetz, *supra* note 101 at 610.

vertical equity and is subject to 'powerful criticisms' that relate to the fair treatment of donors.[112] This is due to its 'upside down effect' in a system of progressive taxation, whereby the government's contribution is tied to a donor's marginal tax rate.[113] The result of this system is that the wealthier the donor, the less a charitable gift costs. Given that wealthy taxpayers have the resources to make larger donations than lower income taxpayers, they are already able to allocate more of the tax subsidy. The upside-down effect of the deduction compounds this inequity.[114] With evidence of a high price elasticity for wealthy taxpayers, when cross-border donations are introduced into the analysis the question becomes whether income has a significant effect on the likelihood of giving abroad. Empirical studies from around the world profiling donors who engage in cross-border philanthropy suggest that this is not the case.[115] Instead the characteristics most strongly related to private international giving are

112. Reich, *supra* note 103 at 182.

113. See Richard Krever, "Tax Deductions for Charitable Donations: A Tax Expenditure Analysis" in Richard Krever and Gretchen Kewley, eds, *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Wellington: Comparative Public Policy Research Unit, Monash University, 1991) at 19-20; Mark Gergen, "The Case for a Charitable Contributions Deduction" (1988) 74:8 Virginia Law Review 1391 at 1405.

114. Krever, *ibid* at 20. The Dutch Government's recent announcement of a reduction in the tax rate against which gifts may be deducted will resolve the upside-down effect of the charitable tax deduction in the Netherlands. See Dutch Tax Plan 2019, *supra* note 107.

115. See *e.g.* Daniela Casale & Anna Baumann, "Who Gives to International Causes? A Sociodemographic Analysis of US Donors" (2015) 44:1 Nonprofit and Voluntary Sector Quarterly 98 at 117; John Micklewright & Sylke Schnepf, "Who Gives Charitable Donations for Overseas Development?" (2009) 38:2 Journal of Social Policy 317 at 335; Suja Rajan, George Pink & William Dow, "Sociodemographic and Personality Characteristics of Canadian Donors Contributing to International Charity" (2009) 38:3 Nonprofit and Voluntary Sector Quarterly 413 at 435-36; and Pamala Wiepking, "Democrats Support International Relief and the Upper Class Donates to Art? How Opportunity, Incentives and Confidence Affect Donations to Different Types of Charitable Organisations" (2010) 39:6 Social Science Research 1073 at 1081.

higher education, being religious and being foreign-born.[116] As a result of these findings, permitting a deduction for cross-border charitable gifts would have a neutral effect on vertical inequity.

For domestic donations, the gift deduction has not been subject to criticism on horizontal equity grounds because taxpayers in the same tax bracket are treated similarly. When international giving is introduced into the analysis, at first glance it appears that horizontal equity is maintained because taxpayers in a particular tax bracket are subject to the same tax treatment whether they give domestically or internationally. However, it is arguable that the unequal tax treatment of domestic and cross-border donations does have an impact on taxpayers in the same tax brackets if the gift deduction is only available for donors in that bracket who choose to give domestically, but not for those who choose to give abroad. An optimal approach to the tax treatment of cross-border donations would ensure that horizontal equity is maintained by providing equal tax treatment for domestic and international gifts. The approach taken in the Netherlands conforms to this horizontal equity ideal. First, the Netherlands permits foreign charities to register with the Dutch tax authority, such that donations made by Dutch taxpayers in the same tax bracket to these foreign charities will be treated the same as donations made to domestic charities. That is, the Dutch tax authority does not distinguish between domestic and foreign PBPEs for tax purposes. Second, the Netherlands allows donations to domestic charities that operate abroad to be tax deductible for Dutch taxpayers in the same tax bracket whether or not the funds are directed to beneficiaries in the Netherlands. Third, the Netherlands limits the use of charitable giving intermediaries, for both domestically-targeted and internationally-targeted donations. In contrast, the 'in Australia' residency requirement for DGRs decreases horizontal equity domestically with respect to cross-border donations because taxpayers at the highest tax rate of 49 per cent who give to organizations engaged in domestic charitable activities each pay 51 cents after tax for each dollar donated, while those who donate

116. See Casale & Baumann, *ibid*; Micklewright & Schnepf, *ibid*; Rajan, Pink & Dow, *ibid*.

to organizations operating abroad that do not fall under an 'in Australia' exception each pay a dollar.

Equity considerations can also be considered from a broader, global perspective. When the global impact of permitting the deduction for cross-border donations is taken into account it may reduce inequities associated with the deduction, provided these donations flow from wealthier countries to poorer countries as 'private' foreign aid. The vast majority of private international giving is channeled to developing countries through relief and development NGOs.[117] As charitable funds are redistributed from developed to developing countries they have the potential to influence the inequitable global allocation of resources.[118] The Netherlands' permissive approach to cross-border giving promotes this redistributive effect of the gift deduction. In contrast, the Australian approach, while acknowledging the redistributive effect of private giving to international relief and development organizations through the international aid exception to the 'in Australia' residency requirement, has placed significant barriers to entry for organizations seeking to qualify for DGR status under this exception. The result is that Australia has not been able to utilize the gift deduction as a tool for reducing global inequities to the same extent as the Netherlands.

3. Simplicity

Tax rules should aim to be simple in the sense that they are clear in their objectives, able to be understood by taxpayers and capable of efficient implementation by administrators.[119] An optimal approach to the tax treatment of cross-border donations would reduce complexity by ensuring

117. See Roodman & Standley, *supra* note 108 at 5-6, (noting that 70 per cent of DAC private aid goes to 'Part I' countries, which includes most economies typically categorized as 'developing countries', nearly all of whom fall below the World Bank's threshold for 'high-income country' and are generally considered to be the poorest recipients).
118. See David Pozen, "Remapping the Charitable Deduction" (2006) 39:2 Connecticut Law Review 531 at 583 [Pozen, "Remapping Charitable Deduction"].
119. See Treasury Committee, *supra* note 102 at 28.

that the laws and procedures applying to cross-border giving are clear and unambiguous.[120] Complexity is further reduced by providing certainty for foreign charities and their donors and by providing the government with a cost effective means of ensuring that the tax expenditure is being used for its intended purposes.

In Australia, the complex legislative architecture governing the tax treatment of cross-border donations is far from clear. The meaning of 'in Australia' was never stated in the tax legislation and required interpretation by the ATO. The ATO's longstanding restrictive interpretation of the 'in Australia' residency requirement combined with the special exceptions contained in the legislation has produced considerable complexity for organizations and their donors seeking to engage in cross-border charitable activities. Ambiguities also exist as to whether donations to an Australian DGR that re-donates the funds to a charitable organization operating outside Australia are tax deductible.[121] As a result, Australian charities and their donors have used workarounds to circumvent the tax laws to facilitate tax-effective cross-border giving. Ironically, this legal circumvention has made monitoring cross-border donations more difficult for the Australian authorities operating within a regulatory regime with overlapping supervisory functions. The result is a complicated and costly system for organizations operating abroad and their donors, who are faced with legal and regulatory requirements that on the one hand are quite restrictive, while on the other are able to be bypassed for a price.

In the Netherlands, the tax treatment of cross-border donations is less ambiguous and there is greater procedural clarity governing international philanthropy. This is reflected in the ability of foreign charities to register as a PBPE, after which they are subject to the same legal and regulatory requirements as Dutch charities. Centralized regulation for registered PBPEs with the Dutch tax authorities simplifies oversight and monitoring. Because registration as a PBPE means that there are

120. See Harvey Dale, "Foreign Charities" (1995) 48:3 The Tax Lawyer 655 at 696.

121. *Word Investments*, *supra* note 56; *Hunger Project*, *supra* note 57.

no geographic restrictions on the charity's activities, both domestic and foreign registered charities can undertake some or all of their activities outside the Netherlands. This legal and procedural clarity provides relative certainty for Dutch donors seeking a tax deduction for gifts directed abroad through these registered domestic and foreign charities. In doing so, it alleviates the need for workarounds when Dutch taxpayers donate to a registered Dutch charity which operates abroad or to a foreign charity that is registered as a PBPE. While there has previously been some uncertainty concerning the ability of a Dutch donor to make a tax deductible donation to a foreign charity that is not registered as a PBPE through a domestic charity serving as a giving intermediary, the recent government decree and Supreme Court of the Netherlands decision on this issue have clearly restricted the use of giving intermediaries to send tax deductible donations abroad.[122]

4. Policy Consistency

Tax rules should be consistent with broader government policy objectives. This is "particularly relevant when assessing the role of tax expenditures, since the justification for many of them lies in other economic and social policy objectives".[123] Determining whether the gift deduction is consistent with broader government policy objectives involves considering the policy reasons for the existing state of affairs.[124] The policy underlying the gift deduction is to encourage philanthropic giving to provide support for the production and delivery of public goods and services. By attracting philanthropic funding, nonprofits are able to produce and deliver more of these public goods and services, generating external benefits to the

122. Decree, *supra* note 88; Supreme Court 14/06262, *supra* note 89.
123. See Australia's Future Tax System Review, *supra* note 102 at 206, 728.
124. See Myles McGregor-Lowndes, Matthew Turnour & Elizabeth Turnour, "Not-for-Profit Income Tax Exemption: Is There a Hole in the Bucket, Dear Henry?" (2011) 26:4 Australian Tax Forum 601 at 626.

wider society in which they operate.[125]

This raises the question of whether public goods should be for the benefit of the domestic population or extend to the wider international community. The concept of public benefit found in the common law is informative. In the UK and Australia, the courts have upheld trusts covering a wide range of charitable purposes to be carried out abroad, provided that they do not contravene policy in the home jurisdiction.[126] The Charity Commission of England and Wales has taken the position that "[a] purpose may be charitable even if all its potential beneficiaries are outside England and Wales".[127] In Australia, the Inquiry into the Definition of Charities and Related Organisations found that "public benefit is a universal concept and cannot be contained within the boundaries of any country".[128] The universal concept of public benefit developed in charity law suggests that the 'public' who should 'benefit'

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125. See Burton Weisbrod, "Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy" in Edmund Phelps, ed, *Altruism, Morality and Economic Theory* (New York: Russell Sage Foundation, 1975) at 171-95.

126. In the UK, see *e.g. Re Vagliano*, (1905) 75 LJ Ch 119 (Eng); Re *Redish*, (1909) 26 TLR 42 (Ch (Eng)); *Re Robinson*, [1931] 2 Ch 122 (Eng); *Re Jacobs*, (1970) 114 SJ 515 (Ch (Eng)); *Re Niyazi's Will Trusts*, [1978] 1 WLR 910 (Ch (Eng)); *Human Dignity Trust v The Charity Commission for England and Wales*, [2014] UKFTT 2013_0013 (GRC). In Australia, see *e.g. Re Pieper*, [1951] VLR 42 (SC (Austl)); *Kytherian Association of Queensland v Sklavos*, (1958) 101 CLR 56 (HCA); *Re Lowin* [1967] 2 NSWR 140 (CA (Austl)); *Re Stone* (1970) 91 WN (NSW) 704 (SC (Austl)); *McGrath v Cohen* [1978] 1 NSWLR 621 (SC (Austl)); *Lander v Whitbread*, [1982] 2 NSWLR 530 (SC (Austl)); *Goldwyn v Mazal*, [2003] NSWSC 427 (Austl).

127. UK, Charity Commission of England and Wales, *Analysis of the Law Relating to Public Benefit* (September 2013), online (pdf): *Gov.uk* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment _data/file/589796/Public_benefit_analysis_of_the_law.pdf> at para 74.

128. See Ian Sheppard, Robert Fitzgerald & David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Canberra: Commonwealth of Australia, 2001) 257.

from charity extends beyond national borders.[129] It follows that an optimal approach to the tax treatment of cross-border donations that is consistent with the policy objective of encouraging philanthropic giving to provide support for the production and delivery of public goods would be permissive. The Netherlands satisfies this public benefit policy objective by permitting indirect support of the charitable purposes enumerated in the tax legislation through the tax deduction regardless of where the purpose is fulfilled geographically. This approach is also consistent with broader supranational agreements between EU Member States concerning the free movement of goods, citizens, services and capital and the recent opinion of the European Economic and Social Committee.[130]

Tax deductibility for cross-border donations also implicates support for foreign policy objectives, such as development aid and disaster relief. Because governments can influence the level of private philanthropy through domestic tax policy, a policy promoting private cross-border giving can be considered support for these foreign policy objectives.[131] Studies have shown that private international giving to developing countries and official government aid are complements rather than substitutes.[132] Indeed, one legal scholar has described the charitable deduction in the US as "the most significant foreign aid tax

129. See Pozen, "Remapping Charitable Deduction", *supra* note 118 at 531, 568; Stewart, *supra* note 13 at 251; Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) 55-56; Gino Evan Dal Pont, *Law of Charity* (Chatswood, NSW: LexisNexis Butterworths, 2010) at 75-76.

130. See TFEU, *supra* note 7; "Consolidated Version of the Treaty on European Union" (1 March 2020), *EUR-Lex*, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016M/TXT-20200301>; European Economic and Social Committee, *supra* note 10.

131. See Roodman & Standley, *supra* note 108 at 10, 35.

132. *Ibid* at 35 (noting that private international giving and government aid have a "strong positive relationship"); Rajan, Pink & Dow, *supra* note 115 at 415 (noting that empirical studies show that government aid does not crowd out private donations).

expenditure".[133] Similarly, tax deductibility for cross-border donations can also serve as a complementary measure to direct government subsidies to tackle transnational policy objectives, such as environmental protection and the prevention of terrorism.[134]

5. Sustainability

Tax rules should be considered in light of revenue sustainability, in the sense that they need to be affordable over the long term.[135] Governments are concerned with protecting the public purse from unintended consequences of the charitable tax concessions.[136] An optimal approach to the tax treatment of cross-border donations would ensure that countries minimize the costs to the public purse of taxpayer subsidized funds being sent abroad, while ensuring the tax expenditure is used for its intended purpose.

Australia and the Netherlands both have a charitable funding system in which donations by individuals will trigger a consequent government contribution indirectly to the donor in the form of a tax deduction. The fiscal consequences of the tax deduction are measured in each country's tax expenditure statement. Table 1 below shows the revenue impact of the charitable tax deduction in each jurisdiction. This data is obtained from the line item in each country's tax expenditure statement on tax concessions for charitable donations, with the caveat that international

133. See David Pozen, "Tax Expenditures as Foreign Aid" (2007) 116:5 Yale Law Journal 869 at 874.
134. See Pozen, "Remapping Charitable Deduction", *supra* note 118 at 580.
135. See Australia's Future Tax System Review, *supra* note 102 at 727.
136. See Susan Phillips & Steven Rathgeb Smith, "Between Governance and Regulation: Evolving Government-Third Sector Relationships", in Susan Phillips & Steven Rathgeb Smith, eds, *Governance and Regulation in the Third Sector: International Perspectives* (London: Routledge, 2011).

comparability of tax expenditure estimates has significant limitations.[137]

Data **Country**	Country estimates (billion)	Country estimates (USD billion 2017)[5]	Country estimates (USD 2017) per inhabitant[6]
Netherlands[1]	EUR 0.36[3]	0.41	24
Australia[2]	AUD 1.20[4]	0.94	38

Table 1: Revenue impact of charitable tax incentives

Table 1 Notes

1. *Persoonsgebonden Aftrek - Giftenaftrek Inkomstenbelasting* [Personal Allowances – Deduction of Charitable Donations] (translation by the authors).
2 Deduction for gifts to DGRs.
3 Estimation for the calendar year 2017. Source: Tweede Kamer der Staten-Generaal [House of Representatives of the Dutch Parliament], "*Fiscale Regelingen*" ["Fiscal Arrangements"], *Nota over de Toestand van's Rijks Financiën: Vergaderjaar 2017–18* [*Notes on the Government' Finances: Year 2017-18*] 34 775, No 2 (19 September 2017) at table 6.3.1 (translation by the authors).
4 For the fiscal year 2016-17. Source: Australian Treasury, *Tax Expenditures Statement 2017* (January 2018) at 43, item A57.
5 USD comparison of the first column based on 2017 exchange rates.
6 USD comparison of the second column based on 2017 population. While Table 1 does not disaggregate tax expenditures for cross-border giving, it is notable that the responsiveness of the Netherlands towards international philanthropy —providing equal tax treatment for domestic and cross-border donations — appears to have had limited revenue impact. This is surprising given that the Netherlands currently has some of the highest marginal income tax rates in the world. This

137. See OECD, Tax Policy Studies, *Choosing a Broad Base – Low Rate Approach to Taxation*, No 19 (2010) at 115 ("Tax expenditure definitions differ across countries due to differences in the definition of their benchmark tax systems. Factors that have an impact on the choice between a broad base and use of tax expenditures include own country's preferences regarding income redistribution, the strength of its tax administration and its revenue requirements. Most, if not all, of these factors differ across countries, making international comparison more difficult").

> finding indicates that there are factors other than tax incentives that also influence individual philanthropic behaviour, including the level of government support provided to nonprofits; the extent of regulation of the nonprofit sector; and culture, particularly religion and fundraising professionalism.[138] It also suggests that fears of fiscal consequences from allowing a deduction for cross-border gifts cannot be substantiated solely by tax incentives. To more accurately measure the impact of this permissive approach on the public purse, further empirical research on the taxes foregone as a result of tax incentives for cross-border donations would be necessary.

Any calculation of the cost to the public purse of the deduction for cross-border gifts also needs to consider the return in the form of benefits that the government receives for the public funds expended. If a global view of the impact of the deduction is taken "there is a plausible case to be made that net social welfare will be greater in a tax system with more generous international deductions".[139] Consistent with a broad concept of public benefit, cross-border gifts that fund organizations involved in the production of global public goods such as scientific innovations, conflict resolution and artistic collaborations and in the development of solutions for global challenges such as climate change and infectious diseases, can provide benefits to citizens in the donor country. As a result, a permissive approach that further supports the provision of global public goods is likely to result in government savings that may not be immediately apparent, but that will have a significant impact on revenue sustainability in the long term.

V. Conclusion

The development of a spectrum of approaches to the tax treatment of cross-border donations reveals that the current legal and regulatory environment in which cross-border giving operates around the world emphasizes government regulation combined with a desire from donors to engage in tax-effective international philanthropy. Adopting a policy

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138. See Pamala Wiepking & Famida Handy, "Explanations for Cross-National Differences in Philanthropy" in Pamala Wiepking & Famida Handy, eds, *The Palgrave Handbook for Global Philanthropy* (London: Palgrave Macmillan, 2015) at 9.
139. See Pozen, "Remapping Charitable Deduction", *supra* note 118 at 580.

framework for reforming the tax and regulatory regime governing cross-border giving requires an approach that is responsive to this changed philanthropic landscape. An evaluation of the divergent approaches of Australia and the Netherlands reaches an unequivocal conclusion; the permissive approach of the Netherlands is optimal in an era of philanthropic globalization when measured against each of the tax policy considerations.

The Netherlands has responded to case law of the ECJ and a changed regional philanthropic landscape by delivering an 'equivalency ideal'[140] whereby cross-border donations are subject to the same tax treatment as domestic donations, achieving horizontal equity. This approach also promotes economic efficiency in the broad sense as a cost-effective way to subsidize international charitable activities and ultimately contributes to a reduction in global inequities due to the redistributive effect on the global allocation of resources. The Netherlands' approach also reduces complexity with legislative clarity and straightforward registration procedures. This permissive approach complements Dutch foreign policy objectives by enhancing the Netherlands' delivery of international aid. It is also consistent with broader regional agreements. The Dutch tax expenditure statement when compared with Australia's shows that the impact of this approach on revenue sustainability appears to be minimal, particularly when the benefits to Dutch citizens and the wider global community of investing in the production of global public goods are considered.

In contrast to the Dutch approach, the legislative architecture in Australia has created a particularly complex legal and regulatory regime for cross-border charity. The Australian Government's longstanding approach has been to prioritize fiscal consequences over the need to balance other tax policy considerations, resulting in the reduced capacity of the traditional normative concerns of taxation to influence policy-making with respect to the tax treatment of cross-border donations. Ironically, instead of ensuring that the benefits of these charitable tax subsidies remain in Australia, the Government's restrictive approach has

140. *Ibid* at 594.

enabled largely unregulated tax deductible cross-border giving to take place through giving intermediaries.

The Australian Government's recently announced reform proposals to simplify the regulatory regime governing international charity and the ATO's new tax ruling on the 'in Australia' residency requirement reflect a shift to a more permissive approach to tax incentives for cross-border philanthropy. This represents an acknowledgment by the Australian Government that its longstanding restrictive approach is not working in a changed environment for international giving, reinforcing the findings of the comparative analysis. The convergence of the Australian approach towards the Dutch position on the spectrum signifies that Australia is now moving towards a more optimal policy response to this issue. Policy-makers in other jurisdictions may also recognize that their current legal regime governing cross-border philanthropy is not adequately addressing the challenges posed by a changed global philanthropic landscape. The comparative analysis undertaken in this article illuminates the path forward for reform.

Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*

Kathryn Chan*

In Canada Without Poverty v Canada (AG), *the Ontario Superior Court of Justice struck down provisions of the federal* Income Tax Act *that limited the political activities of charitable organizations, on the ground that the provisions violated the freedom of expression of the registered charity before the court. This paper addresses the decision's complex legacy, reflecting on the promise and the perils of charity law's increasing encounters with public law. I address some of the difficult questions raised by the decision: (1) What types of associations are rights-holders under the* Canadian Charter of Rights and Freedoms*? (2) What are the constitutional limitations on the government's ability to set the outer bounds of the registered charity regime? (3) What is the rationale for limiting the political advocacy of charities? While* Canada Without Poverty *has generated significant improvements to the registered charity regime, I argue, the Ontario Superior Court of Justice missed an important opportunity to draw constitutional law and charity law into closer conversation.*

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I. Introduction

In the summer of 2018, the longstanding rules governing the political activities of registered charities came to an abrupt and rather undignified end. In *Canada Without Poverty v Canada (AG)*,[1] Morgan J of the Ontario Superior Court of Justice held that paragraphs 149.1(6.2)(a) and (b) of the *Income Tax Act*[2] ("*ITA*"), which functioned to prohibit charitable organizations from devoting more than 10% of their resources to non-partisan political activities, unjustifiably violated the freedom of expression of the anti-poverty organization before the court. "What is political?", mused Morgan J in the opening paragraph of his judgment, briefly considering the answers of political philosophers before declaring the restrictive provisions of no force and effect.

The Canadian charitable sector reacted swiftly and positively to the

decision.[3] The Government of Canada also responded swiftly, pledging to appeal the decision but also to amend the *ITA* in the manner the decision envisaged.[4] By December 2018, Parliament had enacted those amendments. Registered charities in Canada may now carry out unlimited public policy dialogue and development activities that further a charitable purpose.[5]

The Attorney General of Canada ultimately chose not to appeal *Canada Without Poverty*.[6] The decision thus stands, having produced a happier charitable sector but also considerable legal uncertainty. The statutory amendments to which *Canada Without Poverty* gave rise have improved the registered charity regime in a number of respects. They have increased the regime's coherence by aligning its definitional provisions more closely with the common law tradition upon which they are based.[7] The amendments have also reduced the chilling fear that many registered charities had of falling on the wrong side of the *ITA*'s murky "charity-politics" divide, freeing up charitable resources and encouraging charities' participation in the development of public policy.[8] However, the legacy of *Canada Without Poverty* may be more complex than this happy news suggests. The decision imposes significant constitutional limitations on government in its design of the registered charity regime. Certain elements of Morgan J's reasoning may have far-reaching implications, and are worthy of further reflection. Certain elements of Morgan J's decision may have far-reaching implications and are worthy of further reflection.

I begin this comment by examining the legal context within which *Canada Without Poverty* arose. I explain the difference between not-for-profit status, charitable status and registered charity status, and outline the traditional limitations on the political activities of registered charities in Canada (Part II). I then summarize *Canada Without Poverty v Canada (AG)* (Part II). I reflect on several elements of the decision, including the characterization of Canada Without Poverty ("CWP") as a constitutional rights-holder, the treatment of its freedom of expression claim, and the rejection of the government's attempts to justify the *ITA*'s limits on the political activities of registered charities (Part III). Finally, I consider the promise and perils of charity law's increasing encounters with public law.

I argue that, in failing to consider what *charity law* has to say about the relationship between charity and politics, the Ontario Superior Court of Justice missed an important opportunity to draw constitutional law and charity law into closer conversation.

II. The Context of *Canada Without Poverty v Canada (AG)*

A. Consequences and Conditions of Registered Charity Status

The applicant in *Canada Without Poverty* was an incorporated not-for-profit organization that was also a charity and a registered charity. While these terms are often used interchangeably, each refers to a distinct legal status.[9] We begin by distinguishing the charity, the registered charity, the not-for-profit organization, and the "non-profit organization" defined in paragraph 149(1)(l) of the *ITA*, and by identifying the legal privileges and burdens that are associated with each.

Charity is for the common law "a concept of purpose".[10] A substantial part of the common law of charities is devoted to identifying criteria by which decision-makers may determine whether or not a purpose is charitable at law.[11] The principal criteria are well known. First, in order

9. This confusion is not unique to Canada: see Jennifer L Beard "Charities, Election Campaigning and the *Australian Constitution*" (2019) 43:2 Melbourne Law Review (advance) 1 at 3 [Beard, "Election Campaigning"].

10. *Incorporated Council of Law Reporting for the State of Queensland v Federal Commissioner of Taxation*, [1971] HCA 44, citing *Stratton v Simpson*, (1970) 44 ALJR 487 (HCA). ("Charity is for law a concept of purpose. A charitable institution is an instrument designed for carrying a charitable purpose into effect".) See also Jennifer L Beard, "Charity Law and Freedom of Political Communication: The Australian Experience" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018) at 256 [Beard, "Charity Law"].

11. Matthew Harding, *Charity Law and the Liberal State* (Cambridge, UK: Cambridge University Press, 2014) at 6-7.

to be charitable, a purpose must fall within one of four broad categories of charitable purposes that were articulated by the House of Lords in *Commissioners for Special Purposes of Income Tax v Pemsel* in 1891.[12] The four "heads of charity", as these categories are commonly known, are the relief of poverty, the advancement of education, the advancement of religion and "other purposes beneficial to the community, not falling under any of the preceding heads".[13] Second, to be charitable, a purpose must also benefit the community or a substantial segment of the community within the meaning of the public benefit doctrine.[14] Third, to be charitable in certain jurisdictions (including Canada and the United Kingdom), a purpose must not be "political".

The corollary of the common law's conceiving of charity in terms of purposes is that the term "charity" is not descriptive of a corporate form or legal person.[15] Historically the term was used primarily to describe charitable trusts: the equitable obligations binding certain persons (called trustees) to deal with segregated funds for identified charitable purposes.[16] Today, the term "charity" may equally describe a not-for-profit corporation, an unincorporated association, or a voluntary gift that is created for charitable purposes. The specific consequences that the common law attaches to charitable status will depend on which form the charity takes. However, the common privileges and burdens of charitable status are well known. They include exemption from various rules against the perpetual duration of trust property, the subjection of charity trustees and directors to a stringent level of judicial supervision, and the special protection of charity property by the courts and by the Crown.

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12. [1891] AC 531 (HL (Eng)) [*Pemsel*].
13. *Ibid* at 583. The Supreme Court of Canada has taken the position that *Pemsel* is now the starting point: see *Vancouver Society of Immigrant & Visible Minority Women v MNR*, [1999] 1 SCR 10 at para 144 [*Vancouver Society*].
14. See *e.g. Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 at 307 (HL (Eng)) [*Oppenheim*]. The public benefit doctrine is the subject of chapter three of *Oppenheim*.
15. Beard, "Election Campaigning", supra note 9 at 4.
16. David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees*, 19d (London, UK: LexisNexis, 2018).

In a Canadian context, the "charity" must also be distinguished from the "registered charity". While a legal person, equitable obligation, or transfer of property may be a charity by virtue of the purposes to which it is devoted, an entity may only become a *registered* charity by successfully applying to the Minister of National Revenue for registered charity status in prescribed form.[17] The *ITA* recognizes three types of registered charities: the charitable organization, the public foundation, and the private foundation.[18] Foundations fund other charities, generally speaking, while charitable organizations carry out charitable activities themselves.

Charitable status and registered charity status are linked in Canada. This is because the Minister of National Revenue and her delegates at the Canada Revenue Agency ("CRA") Charities Directorate, as well as Canada's federal courts, have long relied on the common law definition of charity to give meaning to the registered charity provisions. The Supreme Court of Canada confirmed the propriety of this approach in *Vancouver Society of Immigrant & Visible Minority Women v MNR*,[19] 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 [the court] in applying that definition".[20]

However, the relationship between the *ITA* and the common law authorities has always been somewhat strained. This is because, unlike most statutes governing charities, the *ITA* defines charitable organizations by reference to their *activities*. The common law, as we have seen, defines charities by reference to their primary purposes. It requires that any activities that charities undertake be ancillary to, and in furtherance of,

17. *ITA*, *supra* note 2, s 248(1), "registered charity" (*organisme de bienfaisance enregistré*).
18. *Ibid*.
19. *Vancouver Society*, *supra* note 13.
20. *Ibid* at para 143, citing *Positive Action Against Pornography v MNR*, [1988] 2 FC 340 at para 347. This despite the fact that the common law tradition defined charity by reference to purposes, while the *ITA* definitions relied heavily on the concept of "charitable activities". See *ITA*, *supra* note 2, s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*).

those purposes, but it does not require charities to engage in activities that are "charitable" in themselves.[21] Until 2018, by contrast, the *ITA* definition of a charitable organization did not even refer to charitable purposes.[22] Instead, the *ITA* defined a "charitable organization" (œuvre de bienfaisance) as (1) an organization (whether or not incorporated) that (2) was not-for-profit,[23] and (3) devoted all of its resources to charitable activities carried on by the organization itself.[24] In 1999, the Supreme Court of Canada clarified that the *ITA* required a charitable organization to have charitable purposes that "define the scope of the activities engaged in by the organization".[25] However, the *ITA*'s reference to charitable activities has historically muddied the relationship between the common law and the registered charity regime, and caused the frequent elision, in the Canadian case law, of two concepts that the common law treats differently.[26]

Finally, the charity and the registered charity must be distinguished from the not-for-profit organization and the paragraph 149(1)(l) non-profit organization. As a matter of private law, a not-for-profit organization is an association (whether incorporated or not) that is constituted for a purpose other than profit. It is very common for an

21. Joyce Chia & Miranda Stewart, "Doing Business To Do Good: Should We Tax the Business Profits of Not-for-Profits" (2012) 33 *Adelaide Law Review* 335 at 349.
22. In December 2018, following *Canada Without Poverty v AG*, Parliament amended s 149.1(1) to require that a charitable organization "be constituted and operated exclusively for charitable purposes": see *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures*, SC 2018, c 27.
23. "Not-for-profits" do make profits, but no part of that profit can be distributed for the personal benefit of any proprietor, member, trustee or settlor thereof.
24. *ITA*, supra note 2, s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*). Section 149.1(1) defines a "charitable foundation" (*fondation de bienfaisance*) as (1) a corporation or trust that (2) is not-for-profit, (3) is constituted and operated exclusively for charitable purposes, and (4) is not a charitable organization.
25. *Vancouver Society* supra note 13 at para 159.
26. *Ibid* at para 153.

organization (like CWP) to be at once a not-for-profit organization, a charity, and a registered charity. As a matter of Canadian tax law, however, an organization may not be both a registered charity and a "non-profit organization". This is because paragraph 149(1)(l) of the *ITA* defines a non-profit organization as (1) a club, society or association, that (2) is organized and operated exclusively for a non-profit purpose, and (3) in the opinion of the Minister, is not a charity within the meaning assigned by subsection 149.1(1).[27]

To be a registered charity, then, is to enjoy a particular tax status, which has consequences distinct from those that flow from either common law charitable status or non-profit status under the *ITA*. Like non-profit organizations, registered charities are exempted from most forms of federal income tax.[28] Unlike non-profit organizations, however, registered charities are among the short list of designated "qualified donees" that are entitled to issue valuable tax receipts to corporate and individual donors.[29] In *Vancouver Society*, the Supreme Court of Canada stated that this latter benefit, which is "designed to encourage the funding of activities which are generally regarded as being of special benefit to society", is often a "major determinant" of an organization's success.[30]

B. The Political Advocacy Rules

The common law in Canada prohibits charities from pursuing political purposes. The prohibition is generally traced back to a 1917 decision of the English House of Lords, in which Lord Parker suggested that trusts for the attainment of political objects had "always" been held invalid, because "the Court has not means of judging whether a proposed change in the law will or will not be for the public benefit".[31] The doctrine received

27. *ITA*, *supra* note 2, s 149(1)(l).
28. *ITA*, *supra* note 2, s 149(1)(f). Other exempted entities include non-profit organizations, labour organizations, low-cost housing corporations for the aged and municipal authorities.
29. *ITA*, *supra* note 2, ss 110.1, 118.1. Registered charities are subject to onerous reporting requirements.
30. *Vancouver Society*, *supra* note 13 at para 128.
31. *Bowman v Secular Society Ltd*, [1917] AC 406 (HL (Eng)) at 442.

a comprehensive treatment in the 1981 case of *McGovern v Attorney-General*,[32] where the English High Court held that charities cannot have as a principal purpose to further the interests of a particular political party, or to procure changes in domestic or foreign law, or to procure reversals of government policy or of particular government decisions. Later case law has established that charities also cannot promote the maintenance of an existing law or government policy.[33] However, the common law doctrine is concerned with primary purposes, not activities or incidental purposes. Charities are permitted to carry out political activities, at common law, to pursue charitable purposes.

Because the common law of charities has historically functioned as the default legislative dictionary for the registered charity regime, the political purposes doctrine has always limited the *purposes* for which registered charities in Canada may be constituted. Because the *ITA* historically defined a charitable organization by reference to charitable activities, however, the revenue agency also took the Act to limit the political *activities* of registered charities. Between 1978 and 1985, both the CRA and the courts adopted a very restrictive view of registered charities' ability to engage in political activities.[34] Charities protested these interpretations in large numbers, complaining that regulatory overreach hindered and "chilled" charities' efforts to advocate on behalf of the communities they served. Government responded to the protests by withdrawing its original "Political Objects and Activities" guidance, and, eventually, adding subsection 149.1(6.2) to the *ITA*.[35] The new

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32. [1982] 1 Ch 321 (Eng) at para 340 [*McGovern*].
33. *Re Hopkinson* [1949] 1 All ER 346 (Ch). See the discussion in Hubert Picarda, *The Law and Practice Relating to Charities*, 4d (West Sussex: Bloomsbury Professional, 2010) at 240.
34. For a detailed account of this period, see Samuel Singer, "Charity Law Reform in Canada: Moving from Patchwork to Substantive Reform" 57:3 Alberta Law Review 1 [forthcoming in spring 2020] [Singer, "Charity Law Reform"].
35. *An Act to Amend the Income Tax Act and related statutes and to amend the Canada Pension Plan, the Unemployment Insurance Act, 1971, the Financial Administration Act and the Petroleum and Gas Revenue Tax Act*, SC 1986, c 6, s 85(2).

subsection provided as follows:

> (6.2) For the purposes of the definition "charitable organization" in subsection 149.1(1), where an organization devotes substantially all of its resources to charitable activities carried on by it and
>
> (*a*) it devotes part of its resources to political activities,
>
> (*b*) those political activities are ancillary and incidental to its charitable activities, and
>
> (*c*) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,
>
> the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

The historical record suggests that government intended subsection 149.1(6.2) as a relieving provision.[36] From the perspective of the common law position, however, subsection 149.1(6.2) was a *limiting* provision, which restricted the ability of registered charities to pursue charitable objects by engaging with the political process. Under the new provision, a charitable organization that wanted to further its objects through political activities could do so only where (1) the organization devoted "substantially all" its resources to charitable activities;[37] (2) the organization's political activities were "ancillary and incidental" to its charitable activities; and (3) the organization did not carry out partisan political activities.[38] As the CRA generally interprets "substantially all" to

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36. Singer, "Charity Law Reform", *supra* note 34 at 16.
37. The CRA interpreted "substantially all" to mean 90 per cent or more of a charity's (financial, physical or human) resources, with a lower threshold applied to charities with modest resources: see Canada Revenue Agency, "Policy Statement CPS-022, Political Activities" (September 2003), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html#toc14> [perma.cc/H799-9EWP] [CRA Policy Statement].
38. See Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 405-6.

mean "more than 90%",[39] the provisions came to be known as "the 10% rule".

The *ITA* contained little further guidance on the difference between "political" and "charitable" activities. However, the legislative records indicate that the government's intention in enacting subsection 149.1(6.2) was to create an operational distinction between "direct" and "indirect" political activity.[40] "Direct" political activity was understood to entail the presentation of information and views *directly to government*, while "indirect" political activity entailed efforts *to influence public opinion* on matters of public policy. "Direct" political activity would be treated as charitable activity and thus be subject to no limits, while "indirect" political activity would be treated as political activity that was subject to the 10% rule.[41] This interpretation of subsection 149.1(6.2) was eventually concretized in CRA Policy CPS-022.[42]

Subsection 149.1(6.2) was the subject of a great deal of criticism during the 32 years between its enactment and the Ontario Superior Court decision that struck it down.[43] Commentators decried the provision's inconsistency with the common law treatment of political activity, and its failure to clearly define what was "political" and what

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39. Canada Revenue Agency, *CRA Views: Meaning of Substantially All*, Technical Interpretation 2002-0137767, (15 May 2002), online: *Tax Interpretations* <www.taxinterpretations.com/cra/severed-letters/2002-0137767>.
40. *Canada Without Poverty*, *supra* note 1 (Factum of the Applicant at paras 17-8 [Factum of the Applicant, *CWP*]) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2018/04/Factum-of-the-Applicant-CWP.pdf> [perma.cc/NNV2-YQ8Y]. See also *Canada Without Poverty*, *supra* note 1 at paras 6, 7.
41. Background Statement of the Honourable Perrin Beatty, Minister of National Revenue Regarding Political Activities of Charitable Organizations (29 May 1985) at 2, *Canada Without Poverty*, *supra* note 1 (Application Record at 882).
42. CRA Policy Statement, *supra* note 37.
43. *Canada Without Poverty*, *supra* note 1.

was not.[44] Despite these criticisms, subsection 149.1(6.2) and CPS-022 remained cornerstones of the registered charity regime. Their influence on the charitable sector increased in 2012, when the government of Prime Minister Stephen Harper initiated an expanded "political activities" audit program and provided CRA with eight million dollars to carry it out. Registered charities began complaining of "witch hunts" against organizations that were opposed to the government's policies.[45]

In 2015, Liberal leader Justin Trudeau won the federal election and formed a majority government. Having campaigned on a promise of improving relations between the charitable sector and the federal government, Prime Minister Trudeau quickly identified political activities reform as a top priority of his government.[46] In accordance with the Prime Minister's direction, the Minister of National Revenue soon announced the appointment of an expert panel "to review the rules governing the political activities of charities".[47] That panel submitted its report in March 2017, recommending that the *ITA* be amended to "explicitly allow charities to fully engage without limitation, in non-partisan public policy dialogue and development provided that it is

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44. Some of this criticism is described in Singer, "Charity Law Reform", *supra* note 34. See also Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 408-9.
45. See Shawn McCarthy, "Group's Charitable Status Being Audited", *The Globe and Mail* (8 May 2012), online: <www.theglobeandmail.com>; Broadbent Institute, "Stephen Harper's CRA: Selective Audits, "Political" Activity, and Right-Leaning Charities" (20 October 2014), online: *Broadbent Institute* <www.broadbentinstitute.ca/stephen_harper_s_cra>.
46. Mandate Letter from Prime Minister Trudeau to Minister Lebouthillier, Minister of National Revenue (12 November 2015), online: <www.pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-national-revenue-mandate-letter >.
47. *Canada Without Poverty*, *supra* note 1 (Affidavit of Zachary Euler (sworn 16 February 2017) at para 46), cited in Factum of the Applicant, *CWP*, *supra* note 40 at para 11.

subordinate to and furthers their charitable purposes".[48] No legislative reform had yet occurred, however, when *Canada Without Poverty* was heard in 2018.

III. The Decision in *Canada Without Poverty v Canada (AG)*

A. Facts and Issues

CWP is a not-for-profit corporation that has operated as a registered charity in Canada for 45 years.[49] Its primary corporate object is "to relieve poverty in Canada by" a number of means, including undertaking and disseminating research into factors that contribute to poverty, and "providing information to government officials, and the public to increase knowledge of poverty related issues and how to more effectively relieve poverty".[50] CWP also has as a corporate object "to uphold and ensure compliance with international human rights law as it relates to the relief of poverty".[51] CWP describes itself as having consistently "engaged with political processes" in order to promote legal changes that would alleviate poverty in Canada.[52] In recent years, "it has placed its resources and efforts behind civic engagement and public dialogue, with the ambition of bringing about legislative and policy change for the effective relief of

48. Marlene Deboisbriand et al, "Report of the Consultation Panel on the Political Activities of Charities" (31 March 2017), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html> [perma.cc/U2B4-B27A] [*Report on Political Activities of Charities*].
49. *Canada Without Poverty*, *supra* note 1 (Affidavit of Leilani Farha at para 4) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2016/09/CWP-v.-AG-Farha-Affidavit.pdf> [perma.cc/FP38-5LNV].
50. *Canada Without Poverty*, *supra* note 1 at para 14.
51. *Ibid*.
52. *Ibid* (Amended Notice of Application at para 3) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2016/10/Amended-Notice-of-Application.pdf>.

poverty".[53]

In 2014, CWP became a subject of Prime Minister Harper's enhanced political activities audits. The CRA issued an audit report on CWP in January 2015, in which it concluded that most of CWP's activities were restricted "political activities", as they involved communications to the public about law reform or other policy issues related to poverty relief.[54] The Charities Directorate gave notice to CWP that it intended to revoke its charitable registration. In response, CWP filed a Notice of Application in the Ontario Superior Court of Justice, seeking a declaration that subsection 149.1(6.2) of the *ITA* violated sections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[55] The Charities Directorate agreed not to proceed with revocation until a court had ruled on the constitutional challenge.[56]

B. The Decision

Justice Morgan heard argument on the constitutional challenge to subsection 149.1(6.2) on April 23, 2018. As the proceeding was brought by application, the evidence was given by affidavit.[57] No interveners participated. The written submissions of the parties built upon Supreme Court of Canada authority that prescribes different tests for the adjudication of positive and negative freedom of expression claims.[58] CWP took the position that it was asserting a negative section 2(b) right. In its submission, subsection 149.1(6.2) constituted a restriction "within

53. *Canada Without Poverty*, *supra* note 1 at para 18.
54. Factum of the Applicant, *CWP*, *supra* note 40 at para 36; *Canada Without Poverty*, *supra* note 1 at para 19.
55. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
56. Factum of the Applicant, *CWP*, *supra* note 40 at para 34.
57. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.05(3)(g.1) and 39.01(1).
58. Factum of the Applicant, *CWP*, *supra* note 40 at paras 44-46; *Canada Without Poverty*, *supra* note 1 (Attorney General, Respondent's Memorandum of Fact and Law at paras 46-50 [Respondent's Memorandum, *CWP*]) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2018/04/Respondents-Factum.pdf> [perma.cc/5XGU-UEEN].

an existing statutory platform," which aimed to "restrict the public dissemination of any materials whose content includes recommendation for changes to laws and policies".[59] This restriction violated section 2(b) of the *Charter*, and could not be justified under section 1. For its part, the Attorney General of Canada characterized CWP's claim as a positive "demand for financial support from the state".[60] If subsection 149.1(6.2) did violate section 2(b) (which the Attorney General denied), it was a limit that was justifiable in a free and democratic society.[61]

The Ontario Superior Court of Justice ultimately agreed with CWP's position on the constitutional invalidity of subsection 149.1(6.2) and CRA's 10% rule in application of that statutory provision.[62] However, Morgan J's reasons for judgment depart significantly both from the written arguments of the parties and the established legal framework for adjudicating allegedly "positive" freedom of expression claims. I summarize the key findings and holdings from *Canada Without Poverty* here and discuss them in more detail below.

Justice Morgan preceded his legal analysis with a detailed discussion of CWP's purposes and activities. He highlighted CWP's commitment to co-engagement with poverty constituencies, and situated that commitment within the broader context of shifting national and global approaches to poverty relief.[63] Morgan J drew attention to CWP's submissions on the incoherence of the ITA's treatment of political activities, and noted the conclusion of the Consultation Panel on the Political Activities of Charities that subsection 149.1(6.2) was outmoded and required legislative change.[64]

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59. Factum of the Applicant, *CWP*, *ibid* at paras 49-51.
60. Respondent's Memorandum, *CWP*, *supra* note 58 at paras 1, 47.
61. *Ibid* at para 51.
62. *Canada Without Poverty*, *supra* note 1 at para 42.
63. *Ibid* at para 17, citing the House of Commons Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*, 40th Parliament, 3rd Session (November 2010) at 175.
64. *Ibid* at para 26, citing the *Report on Political Activities of Charities*, *supra* note 48 at 5.

Justice Morgan then addressed the parties' constitutional arguments. He made two important factual findings: first, that there was "no way to pursue the Applicant's charitable purposes…while restricting its politically expressive activity to 10% of its resources as required by CRA", and, second, that the Applicant could not function — "or [would have] difficulty in functioning — in the absence of registered charity status".[65] Then, relying on a combination of section 2(a), 2(b), and 2(d) authorities, he concluded that subsection 149.1(6.2) of the *ITA* violated CWP's freedom of expression:

> [46] In *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, at para 97, the Supreme Court reasoned that, "For a stateimposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice." The evidence of the Applicant is uncontroverted that this test is met with respect to the analogous state-imposed cost or burden on its rights under s. 2(b).
>
> [47] The Applicant, a registered charity, has a right to effective freedom of expression – i.e. the ability to engage in unimpaired public policy advocacy toward its charitable purpose. The burden imposed by the impugned section of the *ITA* and by the policy measure adopted by CRA in administering that section runs counter to that right.
>
> [48] The Applicant is therefore in a position that is akin to that of the agricultural workers in *Dunmore*. The shortcomings of a legislative regime undermine or burden the exercise of a *Charter* right. This burden prevents or impairs the right holder from taking advantage of a state-supplied platform that it could otherwise freely access were it not for its insistence on exercising that right. The Applicant's right to freedom of expression under s. 2(b) of the *Charter* is thereby infringed.[66]

Having accepted that subsection 149.1(6.2) and the accompanying policy measure limited a *Charter*-protected right, Morgan J turned to the question of whether the provisions were reasonable and justified under section 1 of the *Charter*.[67] Contrary to the written submissions of both parties, he found that the government had failed to demonstrate a "pressing and substantial objective" for the burden it had placed on the pursuit of public policy advocacy. Since government was unable to justify

65. *Ibid* at paras 42-43.
66. *Ibid* at paras 46-48.
67. *Ibid* at para 49.

the identified limitation, the Court declared that, pursuant to section 52(1) of the *Constitution Act, 1982* and effective immediately, paragraphs 149.1(6.2)(a) and (b) of the *ITA* were of no force and effect.[68]

IV. Reflections on *Canada Without Poverty v Canada (AG)*

A. Reflection One: The Registered Charity as Rights Holder

A first element of *Canada Without Poverty* that merits reflection is the decision's depiction of "the registered charity" as the holder of a right under the *Charter*. In most *Charter* cases, there is no question that the "person" who has challenged a law enjoys the rights they claim and is entitled to assert those rights. However, the law on the status of corporations and unincorporated associations as rights-holders is complex and in large part unsettled. In this context, Morgan J's conclusion that CWP enjoyed freedom of expression raises a number of challenging questions. Upon what basis was CWP recognized as a constitutional person entitled to section 2(b) protection, and to what other non-human entities would such *Charter* protection extend?

The constitutional personhood question is a question about "who or what is entitled to claim the protection of any given constitutional right".[69] Because it arises only rarely in *Charter* litigation, it is a question with which the courts have comparatively little expertise.[70] In Canada, as in the United States, issues of constitutional personhood have been

68. *Ibid* at para 72.
69. Zoe Robinson, "Constitutional Personhood" (2016) 84:3 George Washington Law Review 605 at 606. See also *R v Cook*, [1998] 2 SCR 597, where L'Heureux-Dubé J notes the crucial first step of determining whether a *Charter* claimant "is indeed the holder of a right under the Canadian constitution" at para 85.
70. Martha Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39:1 McGill Law Journal 58 at 85.

addressed on a right-by-right and claimant-by-claimant basis.[71] The courts have applied a purposive analysis, assessing whether the right asserted could meaningfully apply to a claimant based on "the language of the right in combination with the nature of the specific interests embodied therein".[72]

The case law on the constitutional personhood of corporations and unincorporated associations is particularly complex. The Supreme Court of Canada has held that a corporation enjoys the right to be tried within a reasonable time under the *Charter*,[73] but does not enjoy the right against self-incrimination,[74] nor the right to life, liberty and security of the person.[75] It has not yet determined whether corporations enjoy freedom of conscience and religion. The Court has protected commercial expression in a number of high-profile cases brought by for-profit corporations, leading commentators to conclude that corporations enjoy section 2(b) protection under the *Charter*.[76] Unions, student federations, and domestic and foreign non-profit corporations have also had their expressive activities protected by various levels of court. However, the Supreme Court of Canada has never specifically discussed the grounds

71. *Ibid* at 86; Robinson, *supra* note 69 at 607. See also Susanna K Ripken, "Citizens United, Corporate Personhood and Corporate Power: The Tension Between Constitutional Law and Corporate Law" (2012) 6 University of St. Thomas Journal of Law & Public Policy 285 at 301.
72. Shaffer, *supra* note 70 at 86, citing *R v CIP Inc*, [1992] 1 SCR 843 at para 852 [*CIP Inc*].
73. *CIP Inc*, *ibid*.
74. *R v Amway*, [1989] 1 SCR 21.
75. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].
76. See Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 Supreme Court Law Review (2d) 429 at 449; Peter W Hogg, *Constitutional Law of Canada: 2003 Student Edition* (Scarborough, Ont: Carswell, 2003); Guy Régimbald & Dwight G Newman, *The Law of the Canadian Constitution*, 2d (Toronto, Ontario: LexisNexis Canada Inc, 2017).

for recognizing these associations as rights-holders,[77] and certain passages in the case law frame freedom of expression as a freedom of individuals.[78]

Given the general lack of clarity surrounding the constitutional personhood of associations, it is unclear upon what basis Morgan J recognized CWP as a rights-holder in *Canada Without Poverty*. A straightforward reading of the judgment suggests that CWP enjoyed freedom of expression by virtue of being a "charity" or a "registered charity". The difficulty with this analysis, as we have seen, is that neither term denotes legal personhood. The term "registered charity" describes a special *taxation* status, while the term "charity" describes a variety of associations and equitable obligations that are "designed for carrying a charitable purpose into effect".[79] Given that the Court has never specifically attributed constitutional personhood to a non-person, one would expect it to articulate compelling reasons before granting "charities" or "registered charities" *Charter* rights against government.[80]

The second possibility is that CWP enjoyed freedom of expression by virtue of being a legal (corporate) person. There is, as we have seen, implicit jurisprudential support for this view. However, it has a number of potential implications that are worth thinking through.

First, if CWP is a rights-holder by virtue of its corporate personhood rather than its charitable status, it follows that some, but not all, charities enjoy freedom of expression and possibly other *Charter* rights. This state

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77. In adjudicating section 2(b) claims by corporations, the Court has focused not on the identity of the rights claimants, but on the importance of commercial and media speech: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326; *Irwin Toy*, *supra* note 75. For further discussion, see Howard Kislowicz, "Business Corporations as Religious Freedom Claimants in Canada" (2017) 51:2:3 Revue Juridique Themis de l'Université de Montreal 337.

78. *RWDSU*, *Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 33-37.

79. Beard, "Charity Law", *supra* note 10 at 252; see also Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at 29.

80. Shaffer makes this argument with the extension of *Charter* rights to the foetus: see Shaffer, *supra* note 70 at 87.

of affairs would, at the very least, create incentives for charities to organize themselves in certain ways. The charitable sector has historically been relatively "organizational-form agnostic",[81] with the *ITA* stipulating only that an unincorporated association may not operate as a public or private foundation. However, if only incorporated charities have *Charter* rights, the corporate form may become even more dominant than it already is. Student associations will be encouraged to incorporate to protect their political expression, and religious organizations will be encouraged to incorporate in order to benefit from religious freedom protections

Second, if CWP is a rights-holder by virtue of its corporate personhood rather than its charitable status, it follows that any rights it enjoys may be equally enjoyed by (non-charitable) not-for-profit corporations and by business corporations. Since *Canada Without Poverty* has arguably expanded the circumstances in which government is required to act in order to respect the freedom of expression of a rights claimant, the possibility of an expansive category of rights-holders merits further thought. My own sense is that the benevolent, non-profit nature of charitable corporations tends to dispel any discomfort that courts may feel about extending constitutional rights to non-human persons.[82] Indeed, I suspect that part of the reason *Canada Without Poverty* generated so little criticism is that CWP is an established charity that commands great respect for its poverty-reduction work. The exceptional features of charitable corporations — particularly their non-profit character and their devotion to the public benefit — may indeed provide valid reasons to give them more rights.[83] However, if we do not identify and justify

81. The term is Evelyn Brody's. See Evelyn Brody, "The Twilight of Organizational Form for Charity: Musings on Norm Silber, A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector" (2002) 30:4 Hofstra Law Review 1261.

82. See *Burwell v Hobby Lobby Stores Inc*, 573 US 682 at 708 (2014) [*Burwell v Hobby Lobby*], noting that the religious freedom rights of non-profit corporations are uncontroversial.

83. See Beard, "Charity Law", *supra* note 10 ("[t]he fact that charities by definition produce public benefit provides a further reason to give the charitable sector as much freedom of speech as is required to engage in vigorous public debate regarding charitable purposes" at 256).

non-profit exceptionalism when it influences legal decision-making, we may find tobacco companies successfully seeking the same protections as CWP.

The experience of the First Amendment jurisprudence is instructive in this regard. In recent years, the Supreme Court of the United States has controversially extended religious freedom and free speech rights to business corporations.[84] *Citizens United v Federal Election Commission* and *Burwell v Hobby Lobby* did not emerge from a vacuum. Both cases are traceable to earlier, less controversial cases in which the Court accorded First Amendment rights to non-profits and charities.[85] At the point at which business corporations come before the courts to claim similar rights, however, "non-profit exceptionalism" proved singularly unsuccessful in halting the expansion of the pool of rights-holders.[86] In *Hobby Lobby*, for example, government urged the Court to 'hold the line' where it stood at that time: non-profit corporations would enjoy free-exercise rights as "persons" under the relevant statute, while for-profit corporations would not.[87] The majority of the Court rejected this argument, reasoning that it was not uncommon for for-profit corporations to also pursue altruistic and religious objectives,[88] and that no known understanding of the term "person" "include[d] natural persons and nonprofit corporations, but not for-profit corporations".[89]

It is not difficult to imagine a scenario in which a Canadian business corporation might rely on *Canada Without Poverty* to claim a constitutional right to take advantage of a state-supplied platform

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84. See *Burwell v Hobby Lobby*, *supra* note 82; *Citizens United v Federal Election Commission*, 556 US 310 (2010) [*Citizens United*].
85. See Richard Schragger & Micah Schwartzman, "Some Realism About Corporate Rights" in Micah Schwartzman, Chad Flanders & Zoe Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016) at 347.
86. See *Citizens United*, *supra* note 84, where the majority of the United States Supreme Court declined to limit its ruling to the constitutional protection of non-profit corporate political speech.
87. *Burwell v Hobby Lobby*, *supra* note 82 at 709.
88. *Ibid* at 712.
89. *Ibid* at 684.

for political speech. One potential source of conflict is paragraph 20(1)(cc) of the *ITA*, which presently allows taxpayers to deduct unlimited lobbying expenses for lobbying related to the taxpayer's business.[90] This provision effectively allows business deductions for activities that would have prohibited for registered charities under former subsection 149(6.2).[91] While paragraph 20(1)(cc) has been in place for many years, it is not inconceivable that it could be amended or repealed: lobbying expenses are not deductible in the US,[92] and the original Canadian provision was the subject of critique.[93] If Parliament decided to limit the lobbying deduction to individual taxpayers, business corporations might argue that they, like charitable corporations, have a constitutional right "to engage in unimpaired public policy advocacy" that furthers their income-producing mandate.[94]

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90. *ITA*, *supra* note 2, para 20(1)(cc). The expenses must be incurred for the purpose of producing income. See also subsections 19, 19.01, and 19.1, which allow taxpayers to deduct advertising expenses for the purpose of gaining or producing income from the business or property.
91. Richard Bridge, "The Law of Advocacy By Charitable Organizations: The Case For Change" (2000) at 16, online (pdf): *Library and Archives Canada* <epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf> [perma.cc/39KR-XRK9].
92. "Publication 529 (2018), Miscellaneous Deductions" online: *Internal Revenue Service* <www.irs.gov/publications/p529> [https://perma.cc/YCN7-FXEU#en_US_2018_publink10004488].
93. When the provision was originally introduced by the Pearson government in 1965 as subsection 11(aa) of the *ITA*, *supra* note 2, the opposition raised concerns of abuse, since the provision would benefit lawyers and other professionals that lobbied governments: see *House of Commons Debates*, 26-3, Volume 3 (15 June 1965) at 2429. I thank Roark Lewis for bringing this point to my attention.
94. Such a challenge would have an American precedent. In *Cammarano v United States*, 358 US 498 (1959), the United States Supreme Court rejected a First Amendment challenge to a Treasury Regulation that denied business expense deductions for lobbying activities.

B. Reflection Two: The "Megaphone v Muzzle" Debate

A second element of *Canada Without Poverty* that merits reflection is the central holding that subsection 149.1(6.2) of the *ITA* violated CWP's freedom of expression by preventing it from taking advantage of a state-supplied platform for political speech. There is no doubt that non-partisan public policy advocacy, the type of expression that disqualified CWP from registered charity status, is *Charter*-protected expression. The question the Ontario Superior Court had to consider was whether subsection 149.1(6.2) represented a (constitutionally acceptable) governmental decision not to support a particular speaker or a (constitutionally unacceptable) attempt to suppress political speech.[95] Justice Morgan arrived at the latter conclusion, but did so without explicitly applying the negative rights/positive rights framework articulated by the Supreme Court of Canada in its section 2(b) jurisprudence.[96] *Canada Without Poverty* thus raises questions both about the usefulness of that framework, and about its application to the registered charity regime.

1. The Positive Rights/Negative Rights Distinction

The Supreme Court of Canada jurisprudence on freedom of expression purports to draw a sharp distinction between negative rights and positive rights claims. The Court has defined a "negative" freedom of expression claim as a claim to "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement".[97] A positive rights claim, on the other hand, is a claim

95. For an early discussion of this distinction, see Richard Moon, *The Constitutional Protection of Freedom of Expression*, 2d (Toronto: University of Toronto Press, 2000) at 176.

96. *Canada Without Poverty*, *supra* note 1.

97. *Baier v Alberta*, 2007 SCC 31 at para 35 [*Baier*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*GVTA*], (clarifying that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression at para 35).

"that government must legislate or otherwise act to support or enable an expressive activity".[98]

The Supreme Court of Canada has historically taken a generous approach to negative section 2(b) claims. So low is the bar for establishing an infringement of a "negative" section 2(b) freedom, in fact, that commentators have criticized the Court's over-reliance on the section 1 justification analysis in these cases.[99] The Court has taken a less generous approach to positive rights claims. In particular, the Court has held that section 2(b) does not generally impose a positive obligation on government "to facilitate expression by providing individuals with a particular *means* of expression".[100] A long line of "statutory platform" cases establish that where the government chooses to establish a specific means or statutory platform for expression, it is generally under no constitutional obligation to extend that platform to everyone.[101]

The Supreme Court of Canada has been reluctant to recognize positive rights under any branch of section 2. However, the case law leaves open the possibility that in "exceptional" cases, positive government action may be required in order to make a fundamental freedom meaningful.[102] A majority of the Court identified such an exception in *Dunmore v Ontario (AG)*,[103] striking down labour legislation that excluded agricultural workers from a protective labour rights regime on the basis that it violated associational rights guaranteed under section 2(d).[104] The Court recognized in *Dunmore* that underinclusive legislation "may, in unique

98. *Baier*, *ibid* at para 34.
99. *GVTA*, *supra* note 97 at para 27. See also Michael Plaxton & Carissima Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010) 52 Supreme Court Law Review (2d) 65.
100. *GVTA*, *ibid* at para 29. See also *Baier*, *supra* note 97 at para 20; *Haig v Canada*, [1993] 2 SCR 995 [*Haig*] ("[t]he freedom of expression contained in s 2(b) prohibits gags, but does not compel the distribution of megaphones" at para 72).
101. *Haig*, *ibid* at para 83.
102. *Ibid* at paras 79-80; *Baier*, *supra* note 97 at para 26.
103. 2001 SCC 94 [*Dunmore*].
104. *Ibid*.

contexts, substantially impact the exercise of a constitutional freedom".[105] In concluding that the total exclusion of agricultural workers from the Act substantially interfered with the freedom of association of those workers, the majority relied upon three factors: (1) that the claim was grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant had demonstrated that exclusion from a statutory regime had the effect of a substantial interference with section 2(b) freedom of expression, or had the purpose of infringing freedom of expression; and (3) that the government was responsible for the inability to exercise the fundamental freedom.[106]

In *Baier v Alberta*,[107] the Court incorporated the *Dunmore* factors into a framework for determining positive section 2(b) claims.[108] The claimants in *Baier* alleged that an Alberta statute that prohibited school employees from running for election as school trustees infringed their right to free expression. The Court articulated the following approach for cases where government alleges that a positive rights claim is being advanced:

> [f]irst [the court] must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered... If a "positive rights" claimant cannot satisfy the *Dunmore* criteria…then the s. 2(b) claim will fail.[109]

The Court found that since the claimants in *Baier* wanted the government to enable expressive activity by "legislat[ing] their inclusion into the platform of school trusteeship", their claim was a positive one.[110] This claim did not meet the first two *Dunmore* criteria, in large part because there were alternative ways for the claimants to express themselves on

105. *Dunmore*, *supra* note 103 at para 22.
106. *Ibid* at paras 24-26; *Baier*, *supra* note 97 at para 30.
107. *Baier*, *supra* note 97.
108. *Ibid* at paras 43-45.
109. *Ibid* at para 30.
110. *Ibid* at para 43.

matters relating to the education system.[111] Their claim was therefore dismissed.

Recent case law illustrates that distinguishing between a negative and positive rights claim is not always straightforward.[112] In *Greater Vancouver Transportation Authority v Canadian Federation of Students*,[113] the Supreme Court of Canada addressed the constitutional validity of government advertising policy that permitted commercial but not political advertising on public transit vehicles.[114] The Canadian Federation of Students, which wished to buy advertising space on buses for its "Rock the Vote" campaign, characterized the policy as state interference with the content of their expression. The respondent transit authorities, on the other hand, characterized the policy as an under-inclusive platform for expression.[115] At stake was whether the claim should be resolved using the *Dunmore/Baier* framework, or a less demanding negative rights analysis that the Court had established for expression in a public place.[116]

The majority of the Court agreed with the claimants' characterization of the right. As Plaxton and Mathen observe, the majority offered two related reasons for distinguishing the Federation's "negative" freedom of expression claim from the "positive" rights claim in *Baier*.[117] First, the transit policies in *GVTA* "were not 'underinclusive' in the required sense".[118] The legislative regimes in *Dunmore* and *Baier*, the majority noted, had restricted a statutory platform to a particular class of persons. The transit policies, by contrast, did not prevent any person from using the advertising service as a means of expression, but only restricted the

111. *Ibid* at para 46.
112. See also Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (London, UK: Bloomsbury, 2015) at 185 (Where the state is extensively involved in a domain of activity, what might originally be conceived as negative may take on positive dimensions).
113. *GVTA*, *supra* note 97.
114. *Ibid* at para 1.
115. *Ibid* at para 26.
116. *Montreal (City) v 2952-1366 Québec Inc*, 2005 SCC 62.
117. Plaxton & Mathen, *supra* note 99 at 91.
118. *Ibid*.

content of their advertisements.[119] Second, in order to be characterized as a positive rights claim, a claimant must be requesting "that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded".[120] Since the claimants were seeking to express themselves "by means of an existing platform they are entitled to use",[121] the majority held, their claim was better characterized as a negative rights claim.

2. Did CWP Make a Positive or a Negative Freedom of Expression Claim?

It is unclear from *Canada Without Poverty* whether Morgan J understood CWP's claim to be a negative or a positive rights claim. While both parties framed their written submissions in a manner consistent with the dichotomous *Baier/GVTA* framework, the court did not explicitly adopt either a "negative" or "positive" characterization of CWP's claimed right. Instead, in determining that CWP's freedom of expression had been violated, Morgan J applied part of the established test for an infringement of religious freedom to CWP's "analogous" claim.[122] It is difficult to rationalize this part of Morgan J's opinion, which would certainly have been in issue had the government appealed. *Canada Without Poverty* nevertheless provides a standpoint from which to reflect on the instability of the negative/positive rights distinction, and to consider section 2(b)'s broader application to the registered charity regime.

The Supreme Court of Canada's dichotomous section 2(b) framework relies heavily on the notion that it is possible to distinguish

119. *GVTA*, *supra* note 97 at paras 31-32.

120. *Ibid* at para 35.

121. *Ibid*.

122. As we have seen above, Morgan J characterized subsection 149.1(6.2) as a "state-imposed burden" analogous to the legislated day of rest that was found to violate the religious freedom of Sabbatarian observers in *R v Edward Books and Art Ltd*, [1986] 2 SCR 713: see paras 44 and 46. Two paragraphs later, Morgan J characterized CWP's position as akin to that of the agricultural workers in *Dunmore*, *supra* note 103, suggesting that its claim was a positive rights claim.

statutory regimes that *restrict expressive content* from statutory regimes that *exclude persons (who may express restricted content)*. *Canada Without Poverty* exposes the formalism and malleability of that distinction even more sharply than did *GVTA*. Essentially, there were two plausible interpretations of former subsection 149.1(6.2) vying for dominance in *Canada Without Poverty*. The first was that subsection 149.1(6.2) *excluded a class of taxpayers* defined, in part, by their ability to engage in political expression, from an advantageous statutory platform. If subsection 149.1(6.2) was characterized as such a "category of persons" restriction, CWP's claim would be treated as a positive rights claim. The second interpretation was that subsection 149.1(6.2) *restricted the political expression of a class of taxpayers* within a statutory platform that they were (otherwise) entitled to use. If subsection 149.1(6.2) was characterized as such a "content" restriction, CWP's claim would be treated as a negative rights claim. Neither interpretation was implausible; but the adoption of one or the other would dramatically alter the rights claimant's chance of success. One may speculate that Morgan J chose not to apply the *GVTA/Baier* framework because he recognized the problematic nature of this approach.

While subsection 149.1(6.2) could plausibly be characterized as either a "content" or "category of persons" restriction, however, several contextual factors support a "positive right" characterization of CWP's section 2(b) claim. First, unlike the transit policies in *GVTA*, the registered charity regime restricts its statutory platform to a particular class of taxpayers — corporations or trusts or unincorporated associations that have been accorded registered charity status by the Minister of National Revenue. As Morgan J recognized at the outset of his judgment, subsection 149.1(6.2) was (and is) framed as a set of *criteria* or "*definitional guidelines*" for determining what persons may benefit from that selective statutory

platform.[123] Second, it is clear from the submissions and the judgment that CWP was not asserting a right to engage in political expression *per se*, but rather a right to engage in political expression *as a registered charity*.[124] Because 'engaging in political expression as a registered charity' is not an expressive activity that one can pursue without government enablement in Canada, the better view is that CWP was advancing a positive freedom of expression claim.

Engaging in (limited) political activity as a registered charity is a form of expressive activity that is enabled and supported by government in Canada. The enablement consists principally of the Minister of National Revenue's sole authority to confer registered charity status on an applicant. The support consists principally of the two tax advantages that were identified in Part II: the exemption of registered charities from federal income tax, and the granting of receipting privileges that help registered charities to attract corporate and individual donors. There is an extensive tax literature debating whether these supportive tax rules are better characterized as subsidies for charities, or as proper measures of the

123. See *Canada Without Poverty*, *supra* note 1 at para 5 ("In order to maintain [the fiscal advantages of registered charity status], a charity must remain within the definitional guidelines set out in s 149.1(6.2)" at para 5). It is true, as Richard Moon notes, *supra* note 95, that selective subsidy programs such as the registered charity regime may shift from being regarded as (constitutional) support for speech to being regarded as (unconstitutional) suppression of speech where the allocation criteria are irrelevant to the program's legitimate objectives. However, it is not clear that the definitional guidelines in subsection 149.1(6.2) were irrelevant in that way: see Moon, *supra* note 95 at 176-78.

124. See *e.g.* Factum of the Applicant, *CWP*, *supra* note 40 ("The fact that CWP could theoretically enjoy freedom of expression by relinquishing the benefit of charitable status does not mean its 2(b) rights have not been violated" at para 55).

tax base.[125] This literature does not appear to have been brought to the attention of the court. However, the dominant view in Canada is that the charitable donation tax credit serves as a form of public subsidy for the quasi-public goods and services that registered charities provide.[126] This view is embraced by the Government of Canada itself, which (unlike the US government) treats all of the tax-favourable measures available to charities as non-structural tax expenditures that support the social objective of "[supporting] the important work of the charitable sector in meeting the needs of Canadians".[127]

The characterization of CWP's claim as a positive rights claim is consistent with case law from the Federal Court, which has characterized registered charity status as "public funding through tax exemptions for the

125. See *e.g.* Evelyn Brody, "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption" (1998) 23 Journal of Corporation Law 585; Roger Colinvaux, "Rationale and Changing the Charitable Deduction" (2013) 138 Tax Notes 1453. In Canada, see Neil Brooks, "The Role of the Voluntary Sector in a Modern Welfare State" in Jim Phillips, Bruce Chapman, & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2001) 166 at 171; David G Duff, "Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and Canadian Experience" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) 199.

126. See *Alliance for Life v MNR*, [1999] 3 FC 504 ("[i]n the Canadian context the activities of a registered charity are, in effect, subsidized out of the public purse in that donations are deductible for income tax purposes" at para 26).

127. "Report on Federal Tax Expenditures – Concepts, Estimates and Evaluations 2020: Part 4" (2020) online: *Government of Canada* <www.canada.ca/en/department-finance/services/publications/federal-tax-expenditures/2020/part-4.html#_Toc473794482> [https://perma.cc/A6UK-DHXP].

propagation of opinions".[128] It is also consistent with Supreme Court of the United States authority addressing the relationship between the First Amendment and charitable tax status under the Internal Revenue Code ("IRC").[129] US tax law, like Canadian tax law, distinguishes between two major categories of not-for-profit organizations. IRC section 501(c)(4) organizations can engage in substantial lobbying to advance their exempt purposes, but cannot issue tax deductible donation receipts to donors, while section 501(c)(3) organizations may issue donation receipts, but are not permitted to engage in substantial lobbying. In *Regan v Taxation with Representation*,[130] a non-profit corporation was denied section 501(c)(3) status because a substantial part of the corporation's activities consisted of attempting to influence legislation. The corporation challenged the IRC's prohibition against substantial lobbying by section 501(c)(3) organizations on free speech grounds, arguing that the prohibition imposed an "unconstitutional condition" on the receipt of tax-deductible contributions. The Supreme Court unanimously dismissed the First Amendment argument. Tax exemptions and tax deductibility, the Court wrote, were both "form[s] of subsidy that [are] administered through the tax system".[131] Congress was not required to grant such a subsidy to a person that wished to exercise a constitutional right to political speech.[132]

3. The Strength and Scope of CWP's Positive Rights Claim

Assuming I am correct that CWP's successful claim in *Canada Without Poverty* is better understood as a "positive" free expression claim, the decision has substantially extended the range of "exceptional" cases in which positive government action is required in order to make a

128. See also *Human Life International in Canada Inc v MNR,* [1998] 3 FC 202 ("[t]he guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held" at para 18).
131. *Ibid* at 544.
132. *Ibid* at 545.

fundamental freedom meaningful. Two aspects of this extension merit comment. First, in comparing CWP's position to that of the agricultural workers in *Dunmore*, Morgan J neglected the broader statutory context in which non-profit organizations operate in Canada. Second, whether or not the *Dunmore* analogy was plausible, the extension of section 2(b) rights to CWP has cleared the way for other constitutional challenges to the registered charity regime, including challenges to the *ITA*'s prohibition on partisan political activity by registered charities.

The first point concerns Morgan J's suggestion that CWP's position was comparable to that of the agricultural workers who were totally excluded from Ontario's protective labour regime. In applying the *Dunmore* criteria to persons making positive section 2 claims, the courts have focused heavily on whether there were "alternative spaces available" to the rights claimant in the social distribution of communicative or associative power.[133] Thus, in concluding that the associative claim of the agricultural workers in *Dunmore* was grounded in a fundamental freedom rather than in access to a particular statutory regime, the Supreme Court of Canada relied heavily on the fact that the workers were "substantially incapable of exercising their fundamental freedom to organize without the protective regime".[134] This lack of an alternative space in which to organize distinguished the agricultural workers from RCMP officers for whom access to a similar protective regime "would serve to enhance rather than safeguard their exercise of a fundamental freedom".[135]

In concluding that CWP was in a position "akin to that of the agricultural workers in *Dunmore*", Morgan J implied that CWP likewise lacked an alternative space in which to express itself politically.[136] This conclusion appears to be linked to the court's factual finding that there

133. See Moon, *supra* note 95, at 38 (arguing that the assessment of a specific limit (time, place and manner) on an individual's opportunity to participate in public communication depends, in large part, on the existence of alternative spaces available to the individual in the distribution of communicative power).
134. *Dunmore*, *supra* note 103, at para 35.
135. *Baier*, *supra* note 97 at para 28.
136. *Canada Without Poverty*, *supra* note 1 at para 48.

was "no way to pursue the Applicant's charitable purposes…while restricting its politically expressive activity to 10% of its resources as required by CRA".[137] From the perspective of CWP *qua* registered charity, these statements may have been accurate. However, from the perspective of CWP *qua* corporation or *qua* association of individuals pursuing a particular altruistic mission, there were, arguably, other potential solutions. At the time of CWP's audit, for example, it was common practice for individuals running advocacy-minded organizations to get around subsection 149.1(6.2) of the *ITA* by creating families of organizations with both a registered charity and a paragraph 149(1)(l) non-profit.[138] Only by framing CWP's section 2(b) right as the *right of a not-for-profit corporation with registered charity tax status* is it possible to conclude that it lacked an alternative space in which to express itself.

The second point is that the extension of section 2(b) rights to CWP has opened the door for future constitutional challenges to the registered charity regime. CWP was careful not to assert in argument that government is constitutionally obliged to confer charitable status on any particular purpose or activity,[139] and the reasons in *Canada Without Poverty* appear to assume that government could change the legal definition of charity without violating the Constitution. However, if it is unconstitutional for the state to decline support to the political expression of entities whose broader objects the state decides to include within the legal definition of charity, it is unclear why it should be constitutional for the state to decline support to the political (and religious and other) expression of entities whose broader objects the state excludes from the legal definition of charity.[140] In either case, government is treating certain

137. *Ibid* at para 42.
138. Robert B Hayhoe & Nicole K D'Aoust, "Policy Forum: Using Dual Structures for Political Activities – Charities and Non-Profits in the Same Family of Organizations" (2017) 65:2 Canadian Tax Journal 357.
139. Factum of the Applicant, *CWP*, *supra* note 40 at para 9.
140. There is an argument that agitation for legislative and political change should itself be a charitable purpose, whether or not that agitation supports another charitable purpose: see Beard, "Charity Law", *supra* note 10 at 261.

entities more advantageously than others in the marketplace of ideas.

The future challenges to the registered charity regime may include a challenge to (new) subsection 149.1(6.2)'s continuing prohibition on partisan political activity by registered charities. CWP specifically did not take issue with this restriction.[141] As a result, the *ITA* continues to prohibit a registered charity from devoting any part of its resources to "the direct or indirect support of, or opposition to, any political party or candidate for public office".[142] However, like non-partisan policy advocacy, partisan political activity is political speech, which the Supreme Court of Canada has described as "the single most important and protected type of expression". If (the old) paragraphs 149.1(6.2)(a) and (b) burdened the former expressive activity, it follows that (the new) 149.1(6.2) burdens the latter activity, and would have to be justified under section one of the *Charter*.[143]

C. Reflection Three: Justifying the Registered Charity Regime

In striking down subsection 149.1(6.2) of the *ITA* as an unjustified violation of CWP's freedom of expression, Morgan J held that the Attorney General had failed to establish a pressing and substantial objective for limiting a *Charter* right.[144] This holding also merits reflection. Principally, it suggests that if government is going to defend its choices regarding the outer boundaries of the registered charity regime against future constitutional challenges, it needs to do a better job of articulating the purposes of those boundaries.

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141. *Canada Without Poverty*, *supra* note 1 at para 9; Factum of the Applicant, *CWP*, *supra* note 40 at para 9.
142. *ITA*, *supra* note 2, ss 149.1(6.1), (6.2).
143. For a similar argument, see Beard, "Charity Law", *supra* note 10 at 267. That is not to say such a violation could not be justified. See Beard, "Charity Law", *supra* note 10, identifying as a legitimate purpose "maintaining the independence of charitable purposes from party politics to preserve the coherence of the sector as a distinctive social force within our democracy" at 270-71.
144. *Canada Without Poverty*, *supra* note 1 at para 64.

If a statutory provision is found to infringe a *Charter* right, a court must next determine whether the infringement is demonstrably justified in a free and democratic society. In order to meet the test established under section one of the *Charter*, (1) the law's objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom";[145] (2) the law must be rationally connected to the objective; (3) the law must impair the right no more than is necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the persons to whom it applies.[146] In order for a statutory objective to be sufficiently important to justify limiting a *Charter* right, it must be consistent with the values of a free and democratic society, and must relate to "pressing and substantial" concerns.

The identification of the objective of a challenged law is thus a task of considerable importance. A law's objective may be defined at varying levels of generality, but should at minimum "supply a reason for infringing the *Charter* right".[147] In some cases, the language of an impugned provision may provide sufficient evidence of the law's objective.[148] In others, the court may look for evidence of the law's objective in expert reports, previous case law, or parliamentary debates.[149] The courts have generally accorded a high degree of deference to governmental articulations of the 'pressing and substantial' objectives of the laws they pass.[150] Ultimately, however, the onus of justifying a *Charter* infringement rests on government: if the Crown makes no submissions on the law's objectives, or offers only vague explanations of what the provisions aim to achieve, its justificatory

145. *R v Oakes*, [1986] 1 SCR 103 at para 73 [*Oakes*], citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 352.
146. *Oakes*, *ibid*; see also Hogg, *supra* note 76 at s 38.8(b).
147. Hogg, *ibid* at s 38.9(a).
148. *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 57 [*Frank*]; *R v Morales*, [1992] 3 SCR 711.
149. *Frank*, *ibid* at para 58.
150. Errol P Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?" in Errol P Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5d (Markham, Ont: LexisNexis Canada, 2014) 293. See also Hogg, *supra* note 76 at s 38.9(c).

arguments are likely to fail.[151]

The Attorney General of Canada struggled to identify the objective of subsection 149.1(6.2) of the *ITA* in *Canada Without Poverty*. Its written submission essentially repeated the text of the law, identifying the objective of the subsection as being to "[permit] registered charities to conduct limited non-partisan political activities, while maintaining the common law prohibition on political purposes".[152] Justice Morgan rejected this "permissive" characterization of the law's objective.[153] In his view, the objective of subsection 149.1(6.2) was to "*limit* political expression — i.e. to keep it to a small percentage of the organization's time, effort and resources".[154] Since the Attorney had provided no further reason for limiting political speech acts done in furtherance of accepted charitable purposes, the Court concluded, it had failed to establish a pressing and substantial objective and its attempts at justification were doomed.[155]

In the wake of *Canada Without Poverty*, government would be well-advised to start identifying why it has chosen to set certain outer boundaries to the registered charity regime. While the limits on non-partisan political activity have been repealed for now, the regime contains other limiting provisions that are now vulnerable to constitutional challenge. One of these, as we have seen, is subsection 149.1(6.2)'s continuing prohibition on partisan political activity by registered charities. Another is the subsection 149.1(1) definition of a "charitable organization", which continues to incorporate into the *ITA* the common law prohibition against political purposes. The Supreme Court of

151. *Vriend v Alberta*, [1998] 1 SCR 493 at paras 110-5. It seems likely that this principle would apply in a similar form under either the *Oakes* test: see *Oakes*, *supra* note 145 or the *Doré* test: see *Doré v Barreau du Québec*, 2012 SCC 12 at para 55.

152. Respondent's Memorandum, *CWP*, *supra* note 58 at paras 57, 62. Interestingly, the Applicant framed the objective of subsection 149.1(6.2) in similar terms: see Factum of the Applicant, *CWP*, *supra* note 40 at para 62.

153. *Canada Without Poverty*, *supra* note 1 at paras 55-56.

154. *Ibid* at para 57.

155. *Ibid* at paras 57-64.

Canada has repeatedly held that political expression is at the core of the expression guaranteed by the *Charter*, and that its value will not easily be outweighed by a governmental objective.[156] If government wants to defend the remaining limits on political advocacy by registered charities, therefore, it will need to identify what purposes those limits serve.

While the legislative record is thin, there are a number of possible rationales for an income tax provision that limits the political advocacy of charities. First, government might establish such a statutory limit in order to effectuate a tax policy decision that certain benevolent activities are deserving of extraordinary fiscal support. More specifically, in a context of limited resources, government might exclude political activities from charitable tax status in order to earmark the highest levels of fiscal support for 'traditional' charitable activities such as feeding the hungry and teaching the young. It is unclear, however, whether a court would accept this objective or consider it sufficiently important to warrant overriding a constitutionally protected freedom. There is no consensus that organizations that feed the hungry are more valuable than organizations that seek to change welfare laws, and budgetary considerations are not generally sufficient for justifying a limit on a *Charter* right.[157] Moreover, municipalities and amateur athletic associations receive the same tax support as registered charities in Canada,[158] which undermines the argument that the *ITA* prioritizes eleemosynary support.

A more pressing reason why government might limit the political advocacy of registered charities is to protect a distinctive and autonomous

156. *Harper v Canada (Attorney General)*, 2004 SCC 33 ("[p]olitical speech…is the single most important and protected types of expression" at para 11). See also *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at paras 88, 91-95; Moon, *supra* note 95 at 35.

157. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 64. See also Lorraine E Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Supreme Court Law Review 469 at 486.

158. *ITA*, *supra* note 2, s 149.1(1), "qualified donee".

role for the charitable sector within Canada's free and democratic society.[159] There are good reasons, as jurists have previously argued, to distinguish charities from government. Charitable activity has a voluntary character that differentiates it from government activity, and allows charities to respond to social problems in a unique and valuable way.[160] However, the coherence and autonomy of the 'voluntary' sector has proven difficult to maintain. The distinction between government and charity may become blurred where government funds and controls charitable projects.[161] It may also become blurred where charities seek to achieve beneficial outcomes, "not directly by means of their own voluntary activity, but by attempting to persuade government to use its coercive powers in a particular way."[162] By limiting the ability of registered charities to engage in political or partisan advocacy, it is arguable that the *ITA* serves the pressing and substantial objective of distinguishing charities from government, and protecting their unique role as voluntary providers of public goods.

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159. In the Australian context, Jennifer Beard identifies "maintaining the independence of charitable purposes from party politics to preserve the coherence of the sector as a distinctive social force within our democracy" as a legitimate government purpose, see Beard, "Charity Law", *supra* note 10 at 270-71.
160. The classic statement of this view is generally attributed to Lord Beveridge: William H Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (London, UK: Allen & Unwin, 1948). See also Matthew Harding, "Distinguishing Government from Charity in Australian Law" (2009) 31:4 *Sydney Law Review* 559; Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 398; Darryn Jensen, "The Boundary between Not-for-Profits and Government" in Matthew Harding, ed, *Research Handbook on Not-for-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 153; Chan, *supra* note 79 at ch 6.
161. Chan, *ibid*; Jensen, *ibid*.
162. Jensen, *ibid* at 167.

V. Conclusion: The Perils and Promise of Charity Law's Encounter with Public Law

Canada Without Poverty has already established itself as a significant and influential decision. With one bold superior court application, an anti-poverty charity has accomplished what forty years of charity law reform advocacy could not. Registered charities may now participate robustly in public policy dialogue, free from the tyrannical ambiguity of former subsection 149.1(6.2) of the *ITA*. At the same time, *Canada Without Poverty* leaves many questions unanswered. What types of associations are rights-holders under the *Charter*? What are the constitutional limitations on government's ability to set the outer bounds of the registered charity regime? And what is the rationale for limiting the political advocacy of charities?

Charity law, and the lawyers and judges that apply it, will need to increase their engagement with public law in order to grapple with these questions. They are difficult and pressing questions, and it seems highly unlikely that they will disappear from view. It was not charity lawyers who argued *Canada Without Poverty*, after all, but litigators who recognized the significant public law dimensions of subsection 149.1(6.2) and of the CRA's political activities audits.[163] In the wake of *Canada Without Poverty*, it is probable that we will see other public lawyers testing the outer bounds of the sector against the constitutional jurisprudence on freedom of expression, freedom of conscience and religion, freedom of association and equality rights.

If charity law needs to learn from public law, however, public law (and the lawyers and judges that apply it) would also benefit from a deeper engagement with the charity law tradition. We need go no further than *Canada Without Poverty* to illustrate this point. We have seen that the question Morgan J posed in the opening paragraph of his judgment — *"what is political?"* — is one that charity law has grappled with for over 100 years. However, the Ontario Superior Court of Justice largely

163. CWP was represented by David Porter, Geoff Hall, and Anu Koshal, all members of McCarthy Tetreault's Litigation Group in Toronto.

ignored the body of charitable trust cases addressing the relationship between charity and politics. As a result, it failed to note that the principal rationale that charity law offers for denying charitable status to political purposes is a *constitutional law* rationale — namely, that the courts must remain neutral on the public benefit of a change in the law in order not to usurp the function of the legislature.[164]

In a judgment that engaged more deeply with the charity law tradition, Morgan J might have identified the parallels between charity law's treatment of political advocacy and Canadian constitutional law principles, and considered whether the relationship between the two bodies of law was coherent. The High Court of Australia took up a similar challenge in *Aid/Watch Incorporated v Commissioner of Taxation*,[165] considering whether the common law prohibition on political purposes was consistent with the nation's constitutional structure. In its groundbreaking 2010 decision, a majority of the High Court held that agitating for legislative and political change was an "indispensable incident" of Australia's system of representative government, and that an entity's participation in those processes was "for the public benefit" within the meaning of the law of charities, irrespective of the merits of the legislative policy being pursued.[166]

I am hopeful that a Canadian court will consider similar arguments in a future case. Until we grapple more deeply with the relationship between charity law and constitutional law, we will live with the dissonance that follows from *Canada Without Poverty*. On the one hand, Canadian charity law does not recognize that seeking to change the law is, itself, for the public benefit. On the other hand, it appears now to be constitutionally impermissible for the Parliament of Canada to exclude corporations from a favourable tax status on the basis that they pursue their purposes through political advocacy, unless there is a pressing and substantial reason for the exclusion. In this way, Canadian constitutional law suggests that seeking to change the law does benefit the public in a constitutionally indispensable way.

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164. *McGovern*, *supra* note 32 at para 506.
165. [2010] HCA 42.
166. *Ibid* at 555-56; See Beard, "Charity Law", *supra* note 10 at 262 for a discussion.

Charitable Un-educational Objects

Gino E Dal Pont*

Judges appear to have stipulated a 'merits' test when it comes to public benefit underscoring education as a charitable object. The same is not evident in, say, objects directed to relieving poverty or advancing religion. At the same time, courts have progressively broadened the concept of 'education' for the purposes of charity law. This may present a tension between what is 'educational' and what is 'beneficial' in the charity sphere. Lacking more than a perfunctory coverage of this issue in the literature, it is appropriate to probe the rationales and parameters of the 'merits' test, with a view to developing an understanding of how education intersects with charity law. This is pursued by reference to three primary scenarios where contention has focused: (1) where the object is allegedly irrational or nonsensical; (2) where a donor has sought to establish a perpetual display of his or her possessions; and (3) bequests of funds for publication of (usually the donor's) work.

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I. Context

The concept of 'charity' has challenged common law judges for hundreds of years. It has been judicially described as a "difficult and very artificial branch of the law",[1] one "full … of anomalies"[2] and an area in which "many fine distinctions have been made".[3] And Lord Evershed, Master of the Rolls, once remarked that "[a]ll those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate".[4] Propelling these difficulties, distinctions, refinements and contradictions is the insistence at general law that an object is either charitable, or it is not; there is, in this regard, no legally recognised and effective intermediate (partially charitable) category. Charity law has, to this end, so occupied the judicial thought because, in the words of Oliver Wendell Holmes, "where to draw the line … [is] pretty much everything worth arguing in the law".[5]

Complicating this line-drawing exercise are various characteristics of the concept of 'charity' espoused by the law, sometimes verging on the paradoxical. For instance, while it is acknowledged that 'charity' must reflect time and place, judges not infrequently refer to the *Statute of Charitable Uses* from 1601.[6] Also, whereas the law attributes a legal meaning to 'charity', this mostly functions to reduce its precision

6. (UK), 43 Eliz I, c 4 (also known as the Statute of Elizabeth I) [*Statute of Charitable Uses*].

compared to its dictionary meaning.[7] The legal meaning is not confined to relieving poverty, but encompasses the 'advancement' of other objects,[8] the 'protection'[9] and 'preservation'[10] of others, and the 'beautification' of others again.[11] At law, therefore, 'charity' not only has a broader object base than conveyed in ordinary parlance, but a corresponding more expansive panoply of methods for achievement.

There are other peculiarities too. 'Charity' is often assumed to coexist with altruism, but the motive for pursuing an object is not determinative of its status as charitable.[12] Historically charitable objects have been treated as exclusive of governmental ones, but the convergence between the second and third sectors in the modern welfare state have muddied any such distinction.[13] At the same time, governmental expectations that charities become increasingly self-supporting have prompted some confluence between charity and business.[14] Perhaps it should prove unsurprising, therefore, that the historically strict charity-politics divide, to some degree or another, has witnessed dilution in the primary common law jurisdictions.[15]

Charitable objects have traditionally been facilitated through the vehicle of a (charitable) trust — which is capable of coexisting with other legal structures[16] — and in this sense represents the principal qualification to courts' traditional refusal to enforce purpose trusts. There emerges a paradox here too: as while the beneficiary of a purpose trust is the purpose itself — in turn explaining judicial remarks such as that "[a] charitable trust does not have a beneficiary"[17] — individuals nonetheless benefit from the performance of charitable objects (sometimes termed 'ultimate beneficiaries').

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7. See Gino E Dal Pont, "Charity Law: 'no magic in words'?" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) ch 4.
8. Principally education and religion.
9. Such as the protection of the public from natural disasters.
10. Such as the preservation of flora.
11. Such as the beautification of a locality via a public park.

There is then the core notion that charitable objects must serve what was historically termed a "public use".[18] Indeed, the 'public' element underscoring charitable objects is primarily what informs their favourable treatment by the law (including the benign construction of charitable bequests). There is nonetheless again some paradox; identifying the 'public' has not only largely been approached from the perspective of who is *not* the public,[19] but from other than a quantitative standpoint. This in turn dictates that merely because thousands may benefit from an object may not substantiate its 'public' character, just as the fact that few may benefit may not prove conclusive against it.

The notion of a 'public use' has translated to an inquiry into 'public benefit'. What marks a charitable object, accordingly, is whether it enures for the 'benefit' of the 'public'. It is not difficult to imagine the challenges for judges in distinguishing — in a binary fashion — what is, from what is not, a benefit to the public. This not only assumes the ability to conceptualise the relevant public, but that of making an assessment of 'benefit' thereto. That judges are not necessarily well positioned to make the latter assessment explains the tendency to proceed on an assumption that an ostensibly charitable object — that is, one that falls within accepted categories (or 'heads') of charity, namely the relief of poverty, the advancement of religion and the advancement of education — exhibits the requisite benefit.[20]

Making this assumption when it comes to relieving poverty is defensible; indeed, to argue that relieving poverty is not beneficial to the public presents a practically insurmountable hurdle. But the increasingly secular nature of Western societies may raise questions over whether all religious objects should be assumed to benefit the public.[21] Yet aside from such objects that are clearly illegal or contrary to public policy — which charity would never have countenanced to commence with —

18. *Jones v Williams*, (1767) 27 ER 422 (Ch (Eng)) at 422, Lord Camden LC.
19. Following the leading case of *Oppenheim*, *supra* note 1.
20. See Dal Pont, *Law of Charity*, *supra* note 12 at 66–67.
21. See, to this end, the comments in Kirby J's dissenting judgment in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd*, [2008] HCA 55.

the freedom of religious belief and practice endemic to these societies has largely disinclined judges, without some statutory mandate,[22] from probing 'benefit' in this context, at least not so far as this can translate to an inquiry surrounding the merit of that belief or practice.[23]

II. Targeting Merit Under Education Head

The same cannot necessarily be said vis-à-vis the advancement of education 'head' of charity. It may be accepted that there may be any number of compelling reasons why public benefit from education is assumed: speaking in general terms, vocational or professional education prepares a person for the workforce; education of schoolchildren assists in the development of young minds; education in general terms may provide a catalyst for problem-solving; education has been positively linked with good citizenry, reduced crime and enlightened attitudes; the list could go on. It is understandable, therefore, why the law has long been inclined to foster its advancement under, *inter alia*, the charitable umbrella.[24]

The foregoing is not to say, however, that every form of education will, simply by virtue of evincing a tendency to educate, benefit the public. As

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22. *Cf. Charities Act 2011* (UK), c 25, s 4(2); *Charities and Trustee Investment (Scotland) Act 2005* (Scot), ASP 10, s 8(1) (which oust any presumption that a charitable object is beneficial to the public).
23. What may appear an outlier in this context is the House of Lords' decision in *Gilmour v Coats*, [1949] AC 426 (HL (Eng)), which struck down a trust to apply income for a community of cloistered Catholic Carmelite nuns, who devoted their lives solely to prayer, contemplation, penance and intercessory prayer within their convent, on the ground that it lacked provable public benefit, viewing the efficacy of intercessory prayer as "outside the region of proof as it is understood in our mundane tribunals" at 453 per Lord du Parcq. However, the decision targeted not the merit of the activities in question but whether they could be proven, to a legal standard, to benefit the public. Other courts have proven less prescriptive in this regard: see *e.g. Re Howley*, [1940] IR 109 (IHC); *Crowther v Brophy*, [1992] 2 VR 97 (VSC (Austl)).
24. Indeed, several of the purposes listed in the preamble to the *Statute of Charitable Uses*, *supra* note 6, target education.

foreshadowed above vis-à-vis religion, subject matter of education that is illegal[25] or otherwise contrary to public policy[26] misaligns with the 'benefit' element. The fact that the law has declared an object illegal or against public policy, after all, reflects a prevailing judgment concerning (a lack of) public benefit, which charity law can hardly override.

Otherwise, courts have not been stringent in approaching the concept of 'education' for the purposes of charity law. This has revealed few, if any, topics incapable of being the subject matter of education.[27] It has, perhaps more significantly, broadened the manner(s) in which education may be advanced. These are hardly confined to formal course instruction and, as elaborated in Part IV of this article, in the context of artistic appreciation can comprise what is little more than observation.

The very breadth of education, and the avenue(s) for its advancement, cannot other than influence (and possibly broaden) questions of 'benefit', especially to the extent that, as noted above, this is essentially presumed

25. For instance, the example given by Harman LJ in *Re Pinion*, [1965] 1 Ch 85 (CA (Eng)) [*Re Pinion*] that a school for pickpockets or prostitutes "would obviously fail" even though it may be educational (at 105).

26. Public policy can, however, shift with time and place: see *e.g. Manners v Philadelphia Library Company*, 93 Pa 165 (1880) (where the Supreme Court of Pennsylvania remarked that "if the primary object of the trusts of the will is to disseminate infidel views, or to attack the popular religion of the country, it would be the duty of a court of equity to declare such trusts to be against public policy and therefore void" (at 174); this would no longer be so in modern pluralist society).

27. Sargent v Cornish, 54 NH 18 (Super Ct 1878) (describing as charitable purposes "[n]ot merely the means of instruction in grammar, or mathematics, or the arts and sciences, but all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, purify the heart, elevate the affections, and to inculcate generous and patriotic sentiments, and to form the manners and habits of rising generations, and so fit them for usefulness in their future stations" (at 22)); Lloyd v Federal Commissioner of Taxation, [1955] HCA 71, Kitto J (describing education as "unquestionably much wider than mere book-learning, and wider than any category of subjects which might be thought to comprise general education as distinguished from education in specialized subjects concerned primarily with particular occupations" (at 11)).

from what is ostensibly educational.[28] It accordingly invites inquiry, upon which the remainder of the article focuses — which has to date been the subject of relatively little investigation in the literature[29] — into whether, assuming that the object is not illegal or contrary to public policy, it may nonetheless fall outside the parameters of charity by reason of lacking educational 'merit'. The prevailing judicial opinion suggests that it can, despite varying judicial sensitivities in this regard.

A lack of merit can, to this end, feed into concerns surrounding public 'benefit' of the object in question. An apparently educational object that is not meritorious, it is reasoned, will not benefit the public, or at least not a sufficient section thereof. An alternative justification is that what lacks educational merit may actually not be 'educational' in the first place, or not foster the 'advancement' of education. While such an approach may, at least in form, obviate the frequently amorphous curial inquiry into 'benefit' by focusing on the character of the object itself rather than the scope of (any) benefit it may engender, it is rarely

28. *Cf. Re Hopkins' Will Trusts*, [1965] Ch 669 (ChD (Eng)), Wilberforce J (opining that the "somewhat ossificatory classification" to which the *Statute of Charitable Uses* "is unsatisfactory because the frontiers of 'educational purposes' … have been extended and are not easy to trace with precision" at 678).

29. It is relegated to only two or three pages in standard charity texts: see *e.g.* Hubert Picarda, *The Law and Practice Relating to Charities*, 4d (West Sussex: Bloomsbury Professional, 2010) at 69-72; William Henderson and Jonathan Fowles, *Tudor on Charities*, 10d (London: Sweet & Maxwell, 2015) at 38-39, 155-56; Dal Pont, *Law of Charity*, *supra* note 12 at 196-98. Dedicated monographs on public benefit in charity law do not probe the point either: see Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) at 34, 78 (described in terms of the 'rule against meritless purposes'); Mary Synge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Oxford: Hart Publishing, 2015) (not specifically probed). It also falls outside the remit of Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014); Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016). From an American perspective it is addressed, again without great elaboration, in Mary Kay Lundwall, "Inconsistency and Uncertainty in the Charitable Purposes Doctrine" (1995) 41:3 Wayne Law Review 1341 at 1362-65.

approached discretely in the case law.

Whatever the correct approach to analysing the question, it is arguable that, against a backdrop where educational objects are construed broadly and a presumption as to benefit is widely acknowledged, denial of charitable status by reference to (lack of) 'merit' should not be a course lightly pursued. Where it surfaces as a potential issue, courts are thus unsurprisingly inclined to consult expert evidence. After all, judges are rarely well positioned to make informed assessments of educational merit. Nor, it should be noted, is this determination left to the vagaries of the donor's belief in making the relevant disposition. Just as altruism is at law no prerequisite for charity, nor does an apparent belief in the 'charitability' of an object dictate the legal outcome (although it appears that it can be used to bolster a judicial characterisation to that end).[30] The point saw elaboration in the following remarks by Justice Russell in *Re Hummeltenberg*:

> [s]o far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of

30. See *e.g. Re Shaw's Will Trusts*, [1952] Ch 163 (ChD (Eng)) [*Re Shaw's*] (involving the bequest of the residuary estate for: (1) "'[t]he making of grants contributions and payments to any foundation corporate body institution association or fund … having for its object the bringing of the masterpieces of fine art within the reach of the people of Ireland of all classes in their own country'" (at 166) and (2) "'[t]he teaching promotion and encouragement in Ireland of self control, elocution, oratory, deportment, the arts of personal contact, of social intercourse, and the other arts of public, private, professional and business life'" (at 166); Vaisey J, being inclined to view this disposition as charitable under the educational head, was bolstered therein by a finding that "the dominant, and indeed the exclusive intention of the testatrix, was the betterment of those who required education by giving them facilities of education in the various directions and for the various purposes which she indicated in her will" (at 170)).

> poodles to dance might be a mild example.[31]

Three primary scenarios have driven inquiries of this kind: (1) where the object is irrational or nonsensical; (2) where the donor has sought to establish a perpetual display of his or her possessions; and (3) where the donor has bequeathed funds for the purpose of publishing or otherwise disseminating his or her work. Each of these scenarios is addressed separately below (in Parts III, IV and V respectively), but ultimately target the core inquiry into how educational merit should feature in the charity equation.

III. Irrational or Nonsensical

In *Re Collier (deceased)*, the High Court of New Zealand asked rhetorically: "[h]ow can there be a public benefit in the propagation of sheer nonsense"?[32] *Prima facie*, it is difficult to argue with the upshot of this question — after all, why should the law foster, through the (privileged) avenue of charity, what is evidently nonsensical — even though it could equally have been approached from the perspective of sheer nonsense lacking the requisite tendency toward education.

Justice Hammond in *Collier* referred to "some minimal standard" in this context, which he considered marked a difference between New Zealand and United States law.[33] According to his Honour, American courts do not substitute their subjective assessment for that of the testator, save in a case of clear irrationality, an approach he considered overlooks the fundamental premise of charity law: that a public benefit must be conferred.[34] While there are dicta in American judgments to this

31. [1923] 1 Ch 237 (ChD (Eng)) at 242 [*Hummeltenberg*].
32. [1998] 1 NZLR 81 (NZHC) at 92, Hammond J [*Collier*].
33. *Ibid* at 91-92.
34. *Ibid* at 92.

effect,[35] they hardly represent a uniform approach.[36] The only American case authority Hammond J cited was a 1961 decision of the Supreme Court of Iowa in *Eckles v Lounsberry*, involving a residuary bequest to the Iowa State Public School Fund to be used "to promote instruction in vocal music and proper development of the lungs of children attending kindergarten, first and second grades".[37] The Court had little difficulty in discerning a valid educational object in this disposition, characterising it as "just as valid as if the estate were to be used to promote instruction in what are frequently referred to as the '3 rs'",[38] and distinguishing it from a trust for the purpose of "teaching some irrational belief".[39] The latter, illustrated by reference to teaching that the earth is flat, would not represent a valid charitable object, in the court's opinion.

The question in cases of this kind ultimately centres upon distinguishing 'sense' from 'nonsense' (which, as an aside, courts in cases involving religious beliefs have conveniently sidestepped).[40] This is not always amenable to a binary determination, as questions of 'sense' or otherwise not infrequently move along a continuum. Moreover, given the diversity of beliefs within modern liberal society, one person's 'sense' may well prove another's 'nonsense'. The thousands who in the modern world subscribe to 'flat earth' theories represent a case in point. And, perhaps more controversially, that the majority of scientists utilise evolutionary

35. See *e.g. Fidelity Title and Trust Company v Clyde*, 121 A (2d) 625 (Supp Ct Err Conn 1956) at 629; *Re Hermann Trust*, 312 A (2d) 16 (Sup Ct Pa 1973) [*Re Hermann*] ("It is difficult to conceive of a subject less appropriate for judicial review than the quality of an artistic work" at 21).
36. See *e.g. Medical Society of South Carolina v South Carolina National Bank*, 14 SE (2d) 577 (Sup Ct SC 1941) [*Medical Society*].
37. 111 NW (2d) 638 (Sup Ct Iowa) at 640 [*Eckles*].
38. *Ibid* at 642. The "3rs" refers to reading, writing and arithmetic.
39. *Ibid*.
40. Exemplified in the famous case of *Thornton v Howe*, (1862) 54 ER 1042 (Rolls Ct (Eng)) at 1043 (where a gift for distributing the religious works of Joanna Southcote, a person the court described as "a foolish, ignorant woman" (at 1043), was nonetheless held to be charitable), discussed in Pauline Ridge, "Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of Thornton v Howe" (2010) 31 Journal of Legal History 177.

theory to explain the origins and development of life on earth has not prevented the promulgation of 'creation science'. In these, and many other belief systems, those inhabiting one side of the fence may view those inhabiting the other as promulgating nonsense.

How can courts, therefore, address diametrically opposed views through the lens of the educational head of charity? This explains why, as foreshadowed earlier, judges resort to expert evidence to clothe the inquiry with a semblance of objectivity. At the same time, it should not be assumed that, even on this 'objective' approach, legal outcomes should be determined by majority or prevailing expert opinion. Merely because a subject of an ostensibly educational inquiry sits outside the mainstream understanding of the day does not always, with the posterity of hindsight, mark it as nonsense or illogical. Debate prompted by the expression of minority views arguably goes to test accepted understandings, which aligns nicely with advancement of education. This in turn elucidates why judges, even with the benefit of expert opinion, are loathe to deny charitable status to objects punctuated by marginal perspectives or even demonstrated misunderstandings.

Eckles, mentioned above, provides a case in point when it comes to apparent donor misconception. The testator in that case was driven by a belief that instruction in vocal music would foster the "proper development of the lungs of children" and, in a subsequent clause, considered this would result "in said children becoming … more healthy persons".[41] Expert medical evidence indicated that teaching vocal music would not increase physical health or development of the lungs, and possibly might have a harmful effect on the voices of young children. Yet this did not dissuade the court from siding with charity, remarking that merely because the testator "may have been mistaken in his belief as to the effect of teaching vocal music on development of the lungs of children is insufficient basis for holding the gift invalid".[42] It appears that the evident focus of the bequest — namely to educate young children in music, *as distinct from the testator's belief in its health benefits* — influenced

41. *Eckles*, *supra* note 37 at 640.
42. *Ibid* at 645.

the court in so ruling,[43] and in this regard arguably made the case reasonably straightforward.

A recent New Zealand decision exemplifies the judicial reticence to deny charitable status by reason of an object being an outlier in the scientific realm. Justice Ellis in *Re Foundation for Anti-Aging Research*[44] upheld as charitable a foundation with the aim of funding research into cryonics.[45] Having cited from the judgment of Hammond J in *Collier*, her Honour saw the "minimal standard" as designed only to exclude the "nonsensical", namely "areas of research and study that are demonstrably devoid of merit".[46] While the concept of merit may raise more difficult, subjective issues of 'taste' where, say, literature or art is the focus of an educational advancement analysis — a point elaborated in Part IV — Ellis J perceived such difficulties as much less likely to surface in matters of science. At the same time, though, she countenanced the prospect of some areas of research whose objects "are so at odds with provable reality that purported scientific pursuit of them can be dismissed as nonsensical or an exercise in certain futility"[47] Curiously, her Honour cited attempting to prove that the earth is flat as one such endeavour.

The New Zealand Charities Registration Board (the "Board") sought to justify its refusal to register the foundation by reason that, *inter alia*, the subject matter of the proposed research was not a "useful" subject of study, for reasons including that: cryonics research is not an "accepted academic discipline"; not all cryonic research facilities and providers consider that cryonics research is "current science"; and a lack in the mainstream scientific community as to the feasibility and benefit of

43. Indeed, earlier in the judgment the court observed that if the testator was mistaken in the belief that instruction in vocal music would tend to proper development of the lungs, this should not invalidate the disposition: *ibid* at 643.
44. [2016] NZHC 2328 [*Anti-Aging Research*].
45. 'Cryonics' targets the use of extreme cold temperature with a view to preserving human life with the object of restoring good health when, it is hoped, technology enables this.
46. *Anti-Aging Research*, *supra* note 44 at para 58.
47. *Ibid*.

the research.[48] It appears that 'useful' in this context was intended as synonymous with 'meritorious'.

Justice Ellis found this unpersuasive, reasoning in the first instance that, "as the oft-cited decision in *Re Hopkins' Will Trusts* makes clear, research into matters that might be regarded by 'mainstream' academics as being on the fringe are not excluded".[49] *Re Hopkins' Will Trusts* did not, however, involve any scientific paradigm but instead a bequest to fund inquiry into finding allegedly lost "'Bacon-Shakespeare manuscripts'".[50] That the expert opinion (on behalf of the next-of-kin) of two mainstream academics marked this inquiry as futile did not sway Wilberforce J against upholding the gift. While accepting that "the discovery of any manuscript … is unlikely", the same applied to "many discoveries before they are made", such as the Codex Sinaiticus, the Tomb of Tutankhamen, or the Dead Sea Scrolls.[51] On the facts, his Lordship did not consider that the "degree of improbability has been reached which justifies the court in placing an initial interdict on the testatrix's benefaction".[52] That "[t]he discovery of such manuscripts, or of one such manuscript, would be of the highest value to history and to literature"[53] no doubt motivated this finding. It was also influenced by the "not very specific"[54] nature of the academic opinion. One can thus perhaps appreciate why Wilberforce J expressed tenderness to the object of the bequest.

Following on from the above, Ellis J in *Anti-Aging Research* went on to remark that "the existence of scientific or academic controversy in a particular area is far from determinative"[55] of the question. Nor, her Honour added, "is an acknowledgement that the goals of the research might only be achieved in the relatively distant future".[56] By way of example,

48. *Ibid* at para 51.
49. *Ibid* at para 59.
50. *Re Hopkins' Will Trusts*, [1965] Ch 669 (ChD (Eng)) at 670 [*Hopkins*].
51. *Anti-Aging Research*, *supra* note 44 at para 59.
52. *Hopkins*, *supra* note 50 at 678.
53. *Ibid* at 679.
54. *Ibid* at 677.
55. *Anti-Aging Research*, *supra* note 44 at para 59.
56. *Ibid*.

the Board had registered the Mars Society New Zealand Charitable Trust, with the object of encouraging and inspiring space science and research leading to New Zealand's participation in the exploration and settlement of Mars. Justice Ellis saw the pursuit of such long-term goals as "likely to yield much useful knowledge along the way, regardless of whether the endpoint is ever achieved", which she considered sufficed to meet the 'usefulness' (or 'merit') threshold.[57]

The latter is what appears to have proven decisive when it came to the proposed cryonics research. Evidence indicated that it could lead to advances in areas such as organ transplant medicine, *in vitro* fertilisation, stem cell research, and treatment of a range of diseases and disorders and enabling biodiversity. This conception of 'usefulness' (or 'merit') rendered, Ellis J reasoned, the indicators relied on by the Board as largely irrelevant. On this approach, however seemingly unlikely or unrealistic the ultimate object, merit for the purposes of charity law can be substantiated from the more proximate downstream public benefit that may ensue in pursuing that object. This, of course, also remains a matter of expert evidence rather than mere acceptance of the opinion of its proponent(s).[58]

Anti-Aging Research reveals, moreover, that when confronted with an object sitting outside the scientific (or otherwise academic) mainstream, its *potential* to nonetheless impact positively on human health may function to substantiate 'merit' (or 'usefulness' or 'utility'). Playing the 'health card' presumably carries greater weight than, say, questionable educational pursuits in the humanities (such as in *Hopkins*). Support for this proposition appears in a 2017 judgment rendered by the Australian Federal Administrative Appeals Tribunal, presided by a superior court judge, in *Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission*.[59] Although what was in issue was, *inter alia*, whether the applicant foundation was an "institution whose principal

57. *Ibid*.
58. As an aside, and reflecting the admittedly different factual scenario in *Hopkins*, any downstream benefit did not appear to have influenced Wilberforce J.
59. [2017] AATA 2424 (Austl) [*Waubra Foundation*].

activity is to promote the prevention or the control of diseases in human beings",[60] the tribunal targeted questions of merit underscoring the foundation's main object. The latter was to "promote human health and wellbeing through the prevention and control of diseases and other adverse health effects due to industrial sound and vibration".[61] In particular, the foundation was concerned about perceived adverse health effects of wind farms.

The Australian Charities and Not-for-profits Commission rejected the foundation's registration by reference to the current non-acceptance by the medical and scientific community of many of the asserted ills of wind farms. Yet the tribunal did not see this as determinative of the relevant inquiry, opining that credible or plausible evidence that a condition exists, or of a causal relationship between a particular activity or exposure and an adverse health condition, may suffice. The point saw elaboration as follows:

> [i]t is not uncommon in human experience for the appreciation that an activity or exposure is injurious to human health to develop over time. In the way scientific understanding and knowledge develops, it can sometimes take time for the association between an activity or exposure, on the one hand, and an effect on human health, on the other, to become accepted. This is particularly so if the activity or exposure has previously been thought to be benign or advantageous. Likewise, it can sometimes take time for there to be recognition that an activity or exposure can give rise to forms of disease which have not previously been recognised. Asbestosis and the association between tobacco smoking and lung cancer provide examples.[62]

Registration was not, accordingly, premised upon proof that wind turbines *do* injuriously affect human health. The tribunal, no doubt cognisant of opening the door to objects that do little more than 'cry wolf', marked a distinction between what is plausible or credible, as opposed to what is "farfetched" and "speculative".[63] In this sense, and consistent with the judicial approach identified earlier, it explicitly acknowledged the need

60. Being an eligibility requirement for registration under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/168, s 25-5(5).
61. *Waubra Foundation*, *supra* note 59 at para 8.
62. *Ibid* at para 138.
63. *Ibid* at para 141.

for a dividing line between what objectively has merit from what does not.

IV. Public Cultural or Artistic Displays

A second scenario where issues of 'merit' factor into charitable status concerns dispositions for aesthetic display, presentation or performance. Advancing education need not, as mentioned at the outset of this article, be confined to the giving of formal instruction. Courts have long recognised that it can comprise passive — visual or auditory — exposure to matters of cultural or artistic significance rather than any instruction or training to develop skills in these fields.[64] Education in the 'fine arts' has, in this regard, been said to include "the development of the aesthetic sense in the appreciation of … beautiful and attractive objects whether they be pictures, statuary, or other things that may allure delight or intrigue the senses".[65] Expressed more broadly, "the education of the public taste may be a valid charitable object"[66] because it "is one of the most important things in the development of a civilised human being".[67]

The absence of formal (or indeed usually also informal) instruction in many of these instances can accentuate questions of merit underscoring

64. The potentially strained approach to advancing education in this context, but recognition nonetheless that aesthetic appreciation of the arts is beneficial to the community, has in some jurisdictions prompted the statutory recognition of cultural purposes as charitable in their own right: *Charities Act 2013* (Cth), 2013/100, (Austl), s 12(1)(e) (confined in its application to federal statutory purposes); *Charities Act 2009* (I), s 3(11)(k) ("the advancement of the arts, culture [and] heritage"); *Charities Act 2011* (UK), c 25, s 3(2)(f) (same as Ireland).
65. *Re Chanter (deceased)*, [1952] SASR 299 (SASC (Austl)) at 302 per Mayo J.
66. *Commissioners of Inland Revenue v White*, (1980) 55 TC 651 (EWHC (Ch) (Eng)) at 655 per Fox J.
67. *Royal Choral Society v Inland Revenue Commissioners*, [1943] 2 All ER 101 (CA (Eng)) at 105, Lord Greene MR. See also *Re Shaw's*, *supra* note 30, Vaisey J ("the promotion or encouragement of these arts and graces of life which are, after all, perhaps the finest and best part of the human character" at 172).

that to which the public is passively exposed. There is nonetheless usually little debate in this regard. The relevant public exposure occurs precisely because of the meritorious nature of the cultural or artistic display, presentation or performance. This explains the longstanding recognition that public museums,[68] art galleries[69] and orchestras[70] advance education. Public attendance is partly a testament to merit (although it should not be assumed that low attendances necessarily dictate otherwise; other factors independent of merit may influence attendance).[71] Expert evidence as to the merit of these endeavours is thus ordinarily unnecessary.

Merit is also implicit in gifts (usually bequests) to fund prizes for artistic[72] or literary[73] pursuits. The very nature of a prize suggests competition for greatest merit based on specified criteria. That it encourages competitors to pursue meritorious artistic or literary compositions, and (almost invariably) invite public exposure, likewise

68. See *e.g. British Museum Trustees v White* (1826), 57 ER 473 (Vice Chancellor's Court); *Re Holburne*, (1885) 53 LT 212 (Ch (Eng)).
69. See *e.g. Public Trustee v Nolan*, (1943) 43 SR (NSW) 169 (SC (Austl)).
70. See *e.g. Re Perpetual Trustees Queensland Ltd*, [1999] QSC 200 (Austl).
71. *Re Hermann*, *supra* note 35.
72. See, for example, *Tantau v MacFarlane*, [2010] NSWSC 224 (Austl) (bequest to fund an annual award for a portrait in sympathy with the works of a particular noted artist upheld as charitable, even though relatively few artists presently painted in that genre; Ward J at para 150 held that the gift "has educational value insofar as it encourages appreciation and knowledge of a style of artwork" and, insofar as it was open to the awardee to use the award to promote public awareness of the works of the artist in question more generally, the gift was likely to facilitate a purpose beneficial to the community beyond the mere making of an award).
73. See *e.g. Re Litchfield*, [1961] ALR 750 (NTSC (Austl)) ('The Litchfield Award for Literature').

obviates the need for expert opinion in this regard.[74] A Canadian court has even upheld a bequest to a publishing house to assist "in publishing the work of an unknown Canadian author", presumably inferring from the testamentary language that the testator intended that the author be selected on merit rather than happenstance[75] (the appointment of a publishing house as trustee for this bequest supports this inference).

Potentially more challenging on the merit front are bequests to display the furniture and/or artwork of a testator, whether or not *in situ* (that is, within the testator's home or studio). Where the testator is an accomplished artist, courts are inclined to assume a benefit to the public from the display of his or her work. In *Sharp v AG (NSW)*,[76] for instance, Justice Stevenson upheld a testamentary trust created by a noted Australian artist to preserve his home to advance, protect and continue his works. His Honour reasoned that "the merit of the opportunity to preserve the work in situ of a major Australian artist is obvious" and, in any case, testimonials from leading figures in the Australian art scene "points to the merit and public benefit of preserving [the home] and its contents".[77]

The hurdle is likely to prove more substantial for an artist (much) less well known or regarded. In *Swaney v Austin Health*,[78] for instance, involving a bequest for a gallery to display the testator's art, Justice Bell treated evidence that the testator was "a reasonably talented amateur artist" as insufficient to justify characterisation of that purpose as charitable.[79] His Honour remained unpersuaded that displaying the

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74. *Cf. Town of Peterborough v MacDowell Colony Inc*, (2008) 943 A (2d) 768 (Sup Ct NH) (where a competitive non-profit 'artist-in-residence' program was held to be charitable object; although those selected derived direct benefit from the program, the Court reasoned that "an indefinite number of persons", that is, the general public, "necessarily receive[d] the benefits" of the art produced not only by the artists who become fellows, but the other artists who compete to become them at 778).
75. *Re Shapiro*, (1979) 27 OR (2d) 517 (ONSC) at 517.
76. [2015] NSWSC 1580 (Austl) [*Sharp*].
77. *Ibid* at para 35.
78. [2013] VSC 654 (Austl) [*Swaney*].
79. *Ibid* at para 16.

testator's art would benefit the public. How much can be read into this decision, however, may be queried, given that the gallery bequest was phrased in precatory terms ("a possible gallery to display my art")[80] and, in any case, envisaged a (clearly charitable) alternative destination for the funds in question ("to provide cash prizes for winning paintings or art works entered in [a specified annual art competition]").[81] Accordingly, it could not be said that an omission to display the testator's art works would frustrate his testamentary intentions.

Yet as the artist (and furniture collector) in *Re Pinion*[82] displayed, according to expert evidence, practically *nothing* in the way of artistic talent (or discernment) did not prevent Wilberforce J at first instance from upholding as charitable (under the education head) a bequest to the National Trust of his Notting Hill studio and its contents for the purposes of display. Those contents included the paintings (by both the testator and others), furniture, bric-a-brac, china and glass. The reasons why the National Trust refused the bequest became evident from evidence adduced before his Lordship. Evidence from an auctioneer and valuer, for probate purposes, indicated that the testator's entire whole collection was "far inferior to a collection such as one might find in an antique dealer's show room" and "would be of no interest or benefit to the public … whether housed in its existing surroundings or exhibited in a museum or other place to which the public has resort".[83] That the testator's studio was 'undistinguished' and 'shabby' hardly assisted the cause.

Yet Wilberforce J, deciding that this evidence was insufficient, adjourned the summons for expert evidence as to the artistic or educational value of the collection. Far from presenting any rosier a picture, the two experts summoned were little short of scathing. One opined that the items of furniture in the collection "could not have been of a lower quality", branded the pictures and china "quite worthless", before concluding that the collection has "no educational value whatsoever".[84] He expressed

80. *Ibid* at para 20.
81. *Ibid* at para 21.
82. *Re Pinion*, *supra* note 25.
83. *Ibid* at 88-89.
84. *Ibid* at 89.

surprise that a person with the testator's voracious appetite for bric-a-brac would not occasionally have acquired some pieces of mediocre quality, "but that has not proved to be the case".[85] The second expert, in similar vein, described the testator's works as "by any recognised standard … atrociously bad", and viewed "the proposal that this collection should form a trust [as] really quite fantastic".[86] Each expert also made reference to the condition of the studio, respectively described as "extremely squalid" and so "appalling … that the local authority was likely to condemn it".[87]

As regards the testator's own paintings, it was put to the experts that no expert opinion could be more than an opinion, and a fallible one at that, and that the rejects of one age could prove the masterpieces of another. The example was given of Vincent Van Gogh, who only sold one painting during his life (for only 400 francs).[88] While not disputing the fallibility of judgment as to artistic merit, the experts referred to a consensus of informed opinion; the case of Van Gogh was different, they maintained, as he was a revolutionary artist ahead of his time, but that even during his lifetime many informed people considered him a genius. The testator, on the other hand, was an "inconceivably bad academic artist" whose paintings were valueless.[89]

In seeking to support the gift, the Attorney-General not only objected to the admissibility of the expert evidence but argued that its object was *prima facie* educational (and thus charitable). By reason of this, he maintained that the court was inapt to judge its merit, particularly as the gift inhabited the field of fine arts where objective judgments were unattainable. Justice Wilberforce characterised this argument as including a *petitio principii*.[90] His Lordship accepted that once it can be established, on a reading of the gift, that it is for genuinely educational purposes, the inquiry need not be carried any further (later noting that "the court

85. *Ibid* at 89-90.
86. *Ibid* at 90.
87. *Ibid*.
88. *Ibid*.
89. *Ibid* at 91.
90. *Ibid* at 93. Namely 'begging the question', referring to the fallacy of aligning a premise with the conclusion of the argument.

cannot discriminate between … methods of education");[91] the "whole question", accordingly, was whether the gift exhibited an educational character[92] (later in the judgment described in terms of "any educational tendency").[93] Justice Wilberforce then essentially assimilated inquiry into this character or tendency with one into public benefit, against a backdrop of caution in making judgments as to aesthetic merit:

> [p]articularly where it is dealing with a subject matter in the sphere of art or aesthetics it must allow for the difficulty there is in making any secure objective judgment, for changes in fashion and in taste. It should recognise that the formation of an educated taste is a complex process, differing greatly as between individuals. It must allow for the differences — very great differences — of education and taste to be found among the members of the public who are likely to see the bequest. Nevertheless, making all these necessary allowances, there must come a point when the court, on the evidence, is impelled to say that *no sufficient element of benefit to the public is shown* to justify the maintenance in perpetuity of the subject matter given.[94]

Now fully couching the inquiry in terms of (public) benefit, his Lordship, albeit with "considerable hesitation", discerned a small benefit to be anticipated for the public; there is "just enough", he surmised, "given proper and skilled exhibition, in the collection to make a contribution to the formation of artistic taste to justify it", even if "[i]t may do no more than interest those who see it in styles of furniture and portraiture and encourage them to go further and to look for better specimens both of furniture and painting".[95] While conceding that the contribution would be a "small one", even "out of proportion to the resources locked up in preserving it", his Lordship did not think that the court "can measure the relation of benefit to expenditure and say that the former is, or is not, a justified use of the latter".[96] In conclusion, Wilberforce J was unable to say that to provide a room, with a number of objects possessing some degree of historical and artistic interest, open to the public, "will *not* be a

91. *Ibid* at 96.
92. *Ibid* at 93.
93. *Ibid* at 96.
94. *Ibid* at 96 [emphasis added].
95. *Ibid* at 97.
96. *Ibid*.

benefit to the public".[97]

Various ramifications could emerge from the first instance judgment in *Re Pinion*, including the following. *First*, it is legitimate for a court to seek expert opinion as to educational merit, although it will not be constrained by it. *Second*, there appears some confluence between educational merit and public benefit. *Third*, at least in the field of aesthetic education, by reason of varying perceptions as to taste (in the broadest sense), the threshold for merit or public benefit is a low one. *Fourth*, that threshold is not determined by an inquiry into proportionality between benefit and cost. *Fifth*, the relevant test is apt to being expressed in the negative (will the object *not* benefit the public?) as opposed to the positive (will the object benefit the public?).

Seeking to uphold the first instance determination, on appeal counsel for the Attorney-General argued that "[o]nce it is shown that there is a scintilla of educational merit in the gift it is charitable", and "[t]he fact that a charity is thoroughly wasteful and overendowed does not matter".[98] Contrarily, counsel for the testator's next-of-kin sought to shift the inquiry away from a possibility that someone would derive education or benefit from seeing the display, to one that located that benefit as the "natural and necessary consequence".[99]

While the English Court of Appeal did not explicitly endorse either view, in reversing Wilberforce J's decision it unsurprisingly inclined closer to the latter than the former. Common to each of the three separate judgments was a strong reliance upon the "unanimous" and "overwhelming" expert opinion that displaying the testator's collection lacked both educative value and public benefit.[100] Lord Justice Russell vividly concluded, to this end, that where the evidence speaks to the "virtual certainty on balance of probabilities that no member of the

97. *Ibid* at 98 [emphasis added].
98. *Ibid* at 103.
99. *Ibid* at 104.
100. See *Ibid*, Harman LJ (referring to the need for "an accepted canon of taste on which the court must rely, for it has itself no judicial knowledge of such matters", namely the opinions of experts at 107); *ibid* at 107, Davies LJ; *ibid* at 110–11, Russell LJ.

public will ever extract one iota of education from the disposition, I am prepared to march it in another direction, pressing into its hands a banner lettered 'De minimis non curat lex'".[101]

Several observations are apt concerning the appeal judgments, by way of distinction from the decision at first instance. *First*, while expert evidence figured prominently in each case, its weight in the one direction proved decisive on appeal. It stands to reason that, had the expert opinion been divided or equivocal, the Court of Appeal may have proven more inclined to accept that *de gustibus non est disputandum* ('in matters of taste there can be no disputes'). *Second*, like Wilberforce J, the appeal judges approached the relevant inquiry by reference to educational tendency, advancement, merit and public benefit therefrom, rather than targeting one over the other. This suggests a belief that each is interlinked. *Third*, while the Court of Appeal did not purport to raise the threshold for merit or public benefit, acceptance of the expert evidence spoke against that threshold being met on the facts. This in turn avoided any need to inquire into proportionality between benefit and cost. *Fourth*, their Lordships approached their inquiry via a positive question: did the evidence "sufficiently establish that the gift would tend to advance or promote education in the relevant field"?[102] The need for this inquiry was propelled by the doubt cast over the merit of the object in question.

In passing, it may be noted that although not referred to in the judgments in *Re Pinion*, essentially the same outcome, on similar reasoning, had ensued some 25 years earlier before the Supreme Court of South Carolina in *Medical Society*.[103] There the testatrix's attempt to establish a museum to display items of her personal property collectively and exclusively failed for not being charitable. Again, evidence from multiple experts was adduced, which unanimously spoke against the educational merit of the collection, one fearing that any exhibition thereof would constitute a "museum of bad taste".[104] Far from benefiting the public, this prompted the court to conclude that its exhibition would

101. *Ibid* at 111 (namely 'the law does not concern itself with trifles').
102. *Ibid* at 110, Russell LJ.
103. *Medical Society*, *supra* note 36.
104. *Ibid* at 580.

prove detrimental to the public.[105]

Two further observations concerning the English Court of Appeal's reasons in *Re Pinion* are merited. The first concerns Lord Justice Harman's remark that he could "conceive of no useful object to be served in foisting upon the public this mass of junk".[106] This may have been intended to reiterate the concern of counsel for the next-of-kin that, were the gift upheld, "[e]very bad artist, writer or composer would then be able to inflict his works upon the public, provided that he had the necessary money".[107] This is somewhat hyperbolic. After all, by its very nature charity hardly compels persons to partake. All in society have a choice whether or not, in this context, to view, read or listen. Moreover, it does not address the fact that the *inter vivos* establishment of a museum by a (well-endowed) individual is not circumscribed by merit (or taste). The point being made, rather, is that the law can be "censorious"[108] when it comes to testamentary purpose dispositions that are, according to expert opinion, entirely lacking in educational value or tendency.

The second observation pertains to Harman LJ's interpretation of the will as revealing an object "not to educate anyone, but to perpetuate his own name and the repute of his family".[109] Again, this appeared to reflect something raised by counsel for the next-of-kin, namely that "the testator himself said nothing whatever about education; his dominating purpose was the preservation of his own collection".[110] In response, it may be noted that explicit reference to education in a purpose disposition is not

105. *Ibid* at 581.
106. *Re Pinion*, *supra* note 25 at 107.
107. *Ibid* at 100.
108. *Collier*, *supra* note 32 at 92, Hammond J.
109. *Re Pinion*, *supra* note 25 at 106.
110. *Ibid* at 99.

essential to it being construed as for the advancement of education.[111] Most of the cases on aesthetic appreciation under the charity umbrella are not expressed in explicitly educational terms. A tendency to 'educate' is not confined to objects described in precisely that manner.

A further response is that, as noted at the outset of this article, it has long been established that charitable status is driven not by motive but by nature and effect. An object that is educational does not lose that character for charity law purposes merely because it was ostensibly propelled by egocentricity. The case law reveals multiple occasions where memorials to the testator and his or her family were no doubt motivators for testamentary dispositions exhibiting an educational slant.[112] So had the collection in *Re Pinion* exhibited at least some educational merit, that it may well have been motivated to perpetuate the testator's name would not itself have precluded charitable status.

V. Funding of Publication and Distribution of Works

Testators may wish to perpetuate their reputation in other ways, such as by leaving funds to support the publication or other dissemination of their work. As mentioned above in the context of public displays, there is nothing in principle to preclude a person from allocating funds *inter vivos* to this publication or dissemination. For instance, a budding author can self-publish, nowadays cheaply and conveniently via the internet, or otherwise disseminate their work to the public. That those wares lack

111. An odd decision in this context is *Emmert v Union Trust Company of Indianapolis*, 227 Ind 571 (Sup Ct 1949) at 453, where the majority of the Court, while conceding that the diaries of the testatrix's grandfather (the publication of which was to be funded by a bequest in the testatrix's will) were of educational value to the state and nation, nonetheless ruled against the disposition because of an ostensible absence of charitable intent. The strong dissent delivered by Gilkinson CJ better aligns with the case law trajectory, as it acknowledged that 'publication' necessarily involved public dissemination of what was established to have possessed educational merit.

112. See *e.g. Re Delius (deceased)*, [1957] Ch 299 (ChD (Eng)) [*Re Delius*] (discussed in Part V); *Sharp*, *supra* note 76 (discussed earlier in Part IV).

educational value does not stand in the way of their pursuit.

When, however, this is sought to be effected via testamentary means, to the extent that it (in all likelihood) involves a purpose gift, it must exhibit a charitable flavour.[113] Otherwise there is no one withstanding to enforce the purpose so prescribed. To this end, as an American court has remarked, "[a] man may do many things while living which the law will not do for him after he is dead".[114] Having said that, if the publication or dissemination of a person's work is effected via an *inter vivos* purpose trust, its validity likewise rests upon charitable status.

A case illustration is *Re Delius*,[115] where the wife of the composer Frederick Delius bequeathed her residuary estate on trusts for the advancement of her husband's musical works. She directed her trustees to "apply the royalties income and the income of my residuary trust fund for or towards the advancement in England or elsewhere of the musical works of my late husband"[116] by means of audio-recordings, publication and performance. Because the standard of Delius's work was widely perceived as high, Justice Roxburgh did not need to consider the position had the trust been for the promotion of the works of "some inadequate composer".[117] His Lordship noted the suggestion that perhaps a court should have no option but to give effect even to such a trust. Though purporting to disclaim any investigation of that problem, his ensuing

113. *Cf. Collier*, *supra* note 32 where Hammond J pondered "why testators do not simply make a specific bequest of a sum to a named person or institution and direct publication" instead of invoking "the problematical charity head" at 91. The problem, though, concerns who has standing to enforce such a purpose gift of this kind.
114. *Manners v Philadelphia Library Company*, 93 Pa 165 (Sup Ct 1880) at 172.
115. *Re Delius*, *supra* note 112.
116. *Ibid* at 299.
117. *Ibid* at 306. *Cf. Green v Monmouth University*, 237 NJ 516 (Sup Ct 2019) (where, in the context of the American doctrine of charitable immunity, the Supreme Court of New Jersey remarked that "courts should not be in the business of deciding what music constitutes 'educational' music and what does not" (at 538), before adding that "[r]equiring courts to engage in such an analysis is problematic" (at 539)).

reference to the promotion of a particular composer's music being charitable "presupposing … that the composer is one whose music is worth appreciating"[118] suggests that the court is not so hamstrung.

Such a view, in any event, aligns with the merit inquiry surfacing in the first two scenarios the subject of this article. The point is confirmed by later judgments in Australia and New Zealand. In the earlier of the two, *Re Elmore (deceased)*,[119] the Supreme Court of Victoria was asked to determine, *inter alia*, whether or not a bequest for the publication of the testator's prose and poetry should be characterised as charitable. As the testator was not a known or published author, the trustee of the estate produced evidence from an academic specialising in English. The evidence indicated that the testator's works had "no literary merit" and "no significant education value",[120] leading Justice Gowans to strike down the bequest.

The New Zealand decision, *Collier*,[121] similarly involved a bequest to publish a 'book' that was struck down. But what marks this case as unusual is that the presiding judge, Hammond J, appeared to reach this conclusion without the assistance of expert evidence. This was so notwithstanding his Honour's mention of the advisability of bringing before the court "expert evidence that a prospective work has at least *some* educative value or public utility to enable recognition of it", which he characterised as operating "as a floor below which a work cannot sink".[122] A review of the 'book' led Hammond J to describe it as "no such thing", and "no more than a short pamphlet, with some attachments"; his Honour could "[not] conceive of circumstances in which any publishing house would have had an interest in the book (and some have declined it)".[123] Its absence of "educative value" or "public utility" meant that the minimal threshold test was not met.[124]

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118. *Re Delius*, *ibid* at 307.
119. [1968] VR 390 (VSC (Austl)) [*Elmore*].
120. *Ibid* at 393.
121. *Collier*, *supra* note 32.
122. *Ibid* at 92 [emphasis original].
123. *Ibid*.
124. *Ibid*.

The omission to adduce expert evidence may well have been driven by a desire to contain costs (although the value of the estate approached NZD $2,000,000) and judicial confidence that the 'book' in question lacked educational merit. Given the cursory treatment of the 'book' issue in the judgment (in effect exhausted by what appears in the preceding paragraph), one can only assume that its content was *prima facie* so poor as to practically torpedo any claim to merit. That this is very much likely to be the exception than the rule explains the common judicial inclination, acknowledged by Hammond J, to rely upon expert evidence.

In any case, it may be queried whether educational merit necessarily ties to publishable quality, which is a possible inference from the remarks in *Collier*. Confident determinations as to (lack of) publishable quality may be possible at the extremes — compare, for instance, the publication of the works of Delius compared to those of the testatrix in *Collier* — but there remains a potentially broad middle ground where opinions may differ, and differ significantly. Academic writers who submit their work to refereed journals can all testify to this proposition. Moreover, *Collier* should not be read as suggesting that works rejected for publication by commercial publishers necessarily lack merit. Few, if any, published authors have never suffered the ignominy of rejected proposals (and often many of them).

To the extent that the concept of 'publishability' exhibits broad parameters — that rest upon time, place, audience as well as opinion — consistent and unanimous expert opinion is the prism through which the process of binary determination must pass. Should evidence of this kind be equivocal, variable or even diametrically opposed, it would presumably take an interventionist judge to side against upholding the disposition.

VI. Where Does This Leave Us?

The case law has revealed degrees of judicial interventionism when it comes to the merit of educational objects. What is consistent in this regard, however, is recognition that matters of ostensibly questionable educational merit justify being probed, whether or not by reference to 'benefit', almost invariably with resort to expert opinion. This in turn presents another wrinkle to the challenges identified at the outset of

the paper in resolving the broader charity equation, one that does not appear to have surfaced to any patent degree outside of the educational arena. What it brings is a further peculiarity in the charity context, which by virtue of its capacity to impede (usually testamentary) freedom of property disposition arguably justifies judicial caution.

Judgment-Proofing Voluntary Sector Organisations from Liability in Tort

Phillip Morgan*

Voluntary sector organisations (VSOs) may use ordinary principles of law to protect themselves from tort liabilities by rendering themselves judgment-proof. There are two viable judgment-proofing systems available to VSOs: (1) charitable purpose trusts, and (2) group structures. Whilst these systems are not fool-proof, they offer significant protection from tort liabilities. However, judgment-proofing may come at a high price to the voluntary sector.

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I. Introduction

Judgment-proofing is the careful structuring of organisations so as to render them men of straw for the purposes of litigation. Whilst typically found in a private sector context, judgment-proofing may also be used by voluntary sector organisations ("VSO"s). Such structures, whilst not fool-proof, provide significant protection to VSOs from tort litigation. However, judgment-proofing may come at significant cost to the voluntary sector.

VSOs may use ordinary principles of law to protect themselves from tort liabilities by rendering themselves judgment-proof. This structuring provides for a form of organisational protection which achieves a similar function to an immunity or damages cap. The existing literature on judgment-proofing is concerned with for-profits and not the voluntary sector. This article is original in considering judgment-proofing from

the perspective of the voluntary sector. Judgment-proofing has also not yet been considered from an English law perspective, and this article addresses this gap.

Judgment-proofing may provide significant asset protection for VSOs, and discourage tort claims against VSOs. It allows a VSO to externalise its accident costs, resulting in them falling on victims or individual volunteers. Whilst some scholars have doubted that judgment-proofing is viable, this article demonstrates that it is used in some high-risk industries. This article demonstrates that there are two viable judgment-proofing systems available to VSOs: charitable purpose trusts and group structures. The latter uses incorporation and a symbiotic relationship between a risk generating entity and an asset holding entity designed to insulate the second from risk. There is a risk that both systems may be challenged by courts and legislatures, but doctrinally they should offer significant protection.

Whilst judgment-proofing may provide significant protection to VSOs from tort liabilities, particular problems may arise with it in the voluntary sector context. Judgment-proofing may come at a cost for a VSO or the broader voluntary sector in terms of reputation, and reduced volunteering levels. A lower sector reputation may mean that it is more difficult for the sector to carry out many of its important roles. Judgment-proofing may also encourage greater state regulation, undermining the sector's independence. Legislatures and courts may also intervene in some cases. VSO judgment-proofing, whilst possible, may come at a high price for the sector.

Whilst this article focuses on the English common law, it makes reference to and draws upon material from other common law jurisdictions, and its conclusions apply throughout the common law world.

II. The Voluntary Sector

A. What is the Voluntary Sector?

The International Labour Organization defines voluntary work as non-compulsory activities, "performed willingly and without pay to produce goods or services for others who are outside the volunteer's family or household".[1] Whilst volunteering may be formal or informal, an organisational requirement distinguishes the voluntary sector from individual acts of altruism.[2]

Given the sector's diversity, it is notoriously difficult to define its parameters.[3] It includes charities, mutuals, co-operatives, and community organisations. The UK's National Council for Voluntary Organisations ("NCVO") describes VSOs as organisations that consist of "people with shared values com[ing] together to achieve something independently of state and markets".[4] The sector is independent of the state and of the for-profit sector. Its purpose is not to make and distribute profits to its owners, and it does not derive its power from the state or exercise public functions.[5] VSOs may have paid workers and/or managers, but to be a VSO, an organisation needs to significantly rely on volunteers as part of its workforce and/or leadership.[6] There is some sector overlap. For instance, VSOs may enter into contractual relationships with the state to deliver services and some mutuals distribute profits to members.[7]

The voluntary sector is diverse in the size, aims, motivations, and activities carried out by VSOs. Whilst the sector's income is dominated by large charities,[8] it extends significantly beyond charities. Not all VSOs

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1. International Labour Organization, "Volunteer Work" (28 April 2016), online: *International Labour Organization* <www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/WCMS_470308/lang--en/index.htm>.
2. Jonathan Garton, *The Regulation of Organised Civil Society* (Oxford: Hart Publishing, 2009) at 37.
8. Claire Bénard et al, "The Civil Society Almanac 2018 Summary" (2018) at 10, online (pdf): *The National Council of Volunteer Organisations* <data.ncvo.org.uk/documents/11/ncvo-uk-civil-society-almanac-2018.pdf>.

exclusively pursue charitable purposes, or have sufficient public benefit to be charitable. Some may also pursue political purposes.

At one extreme, the sector includes large, well-funded, formally-structured entities with international footprints managed by paid employees. Where volunteers are recruited for specific roles, they are trained and directed. This is termed a 'vertical' form of volunteering. At the other extreme are informal, unfunded, unincorporated associations, led by volunteers. All of their activities are undertaken by volunteers. This is termed a 'horizontal' form of volunteering.[9] The combination of the different functions of the sector, varied forms of volunteering, and motives for volunteering make the sector an intrinsically complex social phenomenon.[10]

B. Role of the Sector

The voluntary sector has a long history in the common law world.[11] The sector carries out functions that other sectors do not.[12] However, the sector does more than simply fill gaps left by other sectors. It also plays an important democratic function, allowing people to find solutions to social problems without needing to rely on the state. It can advocate minority interests, including those of disadvantaged groups,[13]

9. Colin Rochester et al, *Volunteering and Society in the 21st Century* (Basingstoke, UK: Palgrave Macmillan UK, 2010) at 10-13.
10. Lesley Hustinx, Ram Cnaan & Femida Handy, "Navigating Theories of Volunteering: A Hybrid Map for a Complex Phenomenon" (2010) 40:4 Journal for the Theory of Social Behaviour 410.
11. See *e.g.* Alexis de Tocqueville, *Democracy in America*, translated by Harvey Mansfield & Delba Winthrop (Chicago: University of Chicago Press, 2000) at 489-92.
12. Burton Weisbrod, "Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy" in Susan Rose-Ackerman, ed, *The Economics of Nonprofit Institutions* (Oxford: Oxford University Press, 1986) at 22-32; *cf.* Lester Salamon & Helmut Anheier, "Social Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally" (1998) 9:3 Voluntas 213; Garton, *supra* note 2 at 54.
13. Alison Dunn, "Political Activity and the Independence of the Voluntary Sector" in Alison Dunn, ed, *The Voluntary Sector, the State, and the Law* (Oxford: Hart Publishing, 2000) at 145 [Dunn, "Political Activity"].

and empower disadvantaged communities through mutual self-help, providing self-determination, and services delivered with a greater level of understanding. The sector's independence from government also means that communities can avoid the stigma associated with receiving government services.[14] Community proximity means that the sector can have greater efficiency and expertise than the state, permitting a more targeted provision of services.[15]

The sector helps to strengthen community ties, enhance social cohesion, and broaden community support networks. It is also an important conduit for altruism. VSOs can contribute towards government accountability and promote citizen involvement in society.[16] VSOs can help shape policy and can speak on behalf of their volunteers and beneficiaries, providing a voice to grassroots concerns.[17] They are often trailblazers, in many cases with the state subsequently following.[18]

C. Scale of the Sector

The scale of the voluntary sector reinforces the importance of considering the viability of judgment-proofing within the sector. The UK has one VSO per 400 people.[19] In 2017-18, it was estimated that 11.9 million people formally volunteered on a regular basis whilst 20.1 million people

14. James Douglas, "Political Theories of Nonprofit Organization" in Walter Powell, ed, *The Nonprofit Sector: A Research Handbook*, 1d (New Haven: Yale University Press, 1987) at 50.
15. Garton, *supra* note 2 at 57-59.
16. *Ibid* at 71-73; NCVO, "Commission on the Future of the Voluntary Sector, Meeting the Challenge of Change, Voluntary Action into the 21st Century" (NCVO, 1996) at 3-4.
17. Dunn, "Political Activity", *supra* note 13 at 143-45.
18. Douglas, *supra* note 14 at 48.
19. David Kane et al, "The UK Civil Society Almanac 2015 Highlights" (2015) at 12, online (pdf): *The National Council of Volunteer Organisations* <data.ncvo.org.uk/documents/8/ncvo-uk-civil-society-almanac-2015.pdf> (no equivalent calculation in 2018 or 2019 Almanac).

formally volunteered at least once.[20] The UK has more full time equivalent volunteers than there are paid employees in the construction sector.[21] The Office of National Statistics has estimated that regular volunteering (once a month or more) is worth GBP £23.9 billion per year to the UK (1.5% of the country's GDP).[22] The European Commission estimates that the UK's volunteer contribution to GDP is between 2-3%.[23] Large voluntary sectors are also found throughout the common law world. For instance, in 2013, it was estimated that 44% of Canadians volunteered for charitable or non-profit organisations, contributing 1.96 billion hours.[24] The value of volunteer services in Canada has been estimated at 2.6% of the country's GDP.[25] In 2014, 31% of Australians volunteered through organisations or groups, contributing 743 million hours.[26] In the US, in 2018, 30.3% of Americans volunteered through an organisation, a total of 77.3 million volunteers, providing an estimated USD $167 billion in

20. NCVO, "UK Civil Society Almanac 2019, Volunteering Overview" (2019), online: *The National Council of Volunteer Organisations* <https://data.ncvo.org.uk/volunteering/>.
21. Andrew Haldane, "In Giving, How Much do we Receive? The Social Value of Volunteering" (Lecture delivered at the Society of Business Economists, London, 9 September 2014) at 5, online (pdf): *Bank for International Settlements* <bis.org/review/r141028c.pdf>.
22. UK, Office for National Statistics, *Household Satellite Accounts — Valuing Voluntary Activity in the UK* by Rosemary Foster (London: Office for National Statistics, 2013) at 1.
23. UK, Education, Audiovisual and Culture Executive Agency, *Volunteering in the European Union* (Brussels: GHK, 2010) at 11.
24. Martin Turcott, *Volunteering and Charitable Giving in Canada* (Ontario: Statistics Canada, 2015) at 3.
25. The Conference Board of Canada, "The Value of Volunteering in Canada" (2018) at 6, online (pdf): <volunteer.ca/vdemo/Campaigns_DOCS/Value%20of%20Volunteering%20in%20Canada%20Conf%20Board%20Final%20Report%20EN.pdf>.
26. Australian Bureau of Statistics, Media Release, 4159.0, "General Social Survey: Summary Results, Australia, 2014" (30 June 2015), online: *Australian Bureau of Statistics* <www.abs.gov.au/ausstats/abs@.nsf/mf/4159.0>.

services.[27]

D. VSO Organisational Form

As we have seen above, an organisational requirement distinguishes the voluntary sector from acts of individual altruism. The legal forms available to the organisation depend on whether a VSO's objects are charitable. An incorporated VSO may take the form of a company limited by guarantee, a company limited by shares, a charitable incorporated organisation, an industrial and provident society, a friendly society, a community interest company, or a corporation. An unincorporated VSO may take the form of a trust or an unincorporated association.[28] The form adopted by a VSO may change over time. Many organisations start as unincorporated associations and later incorporate as their activities and potential liabilities expand.[29] The VSO may also consist of one or more entities and a mix of legal forms.

III. Tort Law and the Voluntary Sector

The voluntary sector delivers significant services and is a key plank in government policy across the common law world. It is therefore odd that the sector has attracted little attention from Commonwealth legal scholars[30] and no attention from English tort scholars.[31] Some limited

27. Corporation for National and Community Service, "Volunteering in US Hits Record High" (13 November 2018), online: *Corporation for National and Community Service* <www.nationalservice.gov/newsroom/press-releases/2018/volunteering-us-hits-record-high-worth-167-billion>.
28. Con Alexander et al, *Charity Governance*, 2d (Bristol, UK: Jordan Publishing, 2014) at 17-8.
29. William Henderson, Jonathan Fowles & Julian Smith, eds, *Tudor on Charities*,10d (London, UK: Thomson Reuters UK, 2015) at 330-31.
30. Notable exceptions include the work of Debra Morris and Jonathan Garton; the fact that tort may play a role in regulating the externalities of the voluntary sector is alluded to by Garton, *supra* note 2 at 100.
31. Save the author's own work, see *e.g.* Phillip Morgan, "Recasting Vicarious Liability" (2012) 71:3 Cambridge Law Journal 615; see also Phillip Morgan, "Vicarious Liability and the Beautiful Game — Liability for Professional and Amateur Footballers?" (2018) 38 Legal Studies 242.

attention has been paid in relation to torts and the voluntary sector in the US, Canada, Ireland, and Australia.[32] The purpose of this section is not to reinforce compensation culture concerns, but rather to briefly illustrate that tort does play a role within the voluntary sector, and it is not imprudent for VSOs to consider the management of liability risks.

The activities of VSOs may create tort litigation risks. Although within the UK official data as to the number of voluntary sector tort claims is not available,[33] it is possible to identify English tort cases where VSOs are the defendants. These cases include those where the VSO is alleged to be in breach of a direct duty to the victim or that the VSO is

32. See e.g. Jeffrey Kahn, "Organizations' Liability for the Torts of Volunteers" (1985) 133:6 University of Pennsylvania Law Review 1433; Kenneth Biedzynski, "The Federal Volunteer Protection Act: Does Congress Want to Play Ball?" (1998-1999) 23:2 Seton Hall Legislative Journal 319; Brenda Kimery, "Tort Liability of Nonprofit Corporations and their Volunteers, Directors, and Officers: Focus on Oklahoma" (1997-1998) 33 Tulsa Law Journal 683; Daniel Barfield, "Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?" (1994-1995) 29 Valparaiso University Law Review 1193; Andrew Popper, "A One-Term Tort Reform Tale: Victimizing the Vulnerable" (1998) 35 Harvard Journal on Legislation 123; Margaret H Ogilvie, "Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law" (2004) 4:2 Oxford University Commonwealth Law Journal 167; Myles McGregor-Lowndes & Linh Nguyen, "Volunteers and the New Tort Reform" (2005) 13:1 Torts Law Journal 41; Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (Dublin: LRC 93-2009).

33. Ministry of Justice, "Social Action, Responsibility and Heroism Bill: Impact Assessment" (2014) at para 9, online (pdf): *UK Ministry of Justice* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319479/sarah-bill-impact-assessment.pdf>.

vicariously liable for the torts of its volunteers or employees.[34] The actions against VSOs include claims as diverse as direct claims in negligence,[35] occupier's liability,[36] and vicarious liability for a volunteer's negligence[37] or for sexual abuse torts.[38] Similar cases may also be identified throughout the common law world. Within the US, it is possible to identify a large number of tort cases in which VSOs are sued. The causes of action are broad and include nuisance, conversion, negligence, occupier's liability, defamation, and vicarious liability for both negligence and intentional

34. See *e.g. Vowles v Evans*, [2003] EWCA Civ 318; *Scout Association v Barnes*, [2010] EWCA Civ 1476 [*Barnes*]; *Cattley v St John Ambulance Brigade* (25 November 1988), 87 NJ 1140/1986 c 133 (QBD (Eng)) [*Cattley*]; *Petrou v Bertoncello*, [2012] EWHC 2286 (QB); *Jones v Northampton BC*, Times, 21 May 1990 (CA (Eng)); *Prole v Allen*, [1950] 1 All ER 476 (Assizes (Somerset)); *Horne v RAC Motor Sports Association Limited*, 1989 WL 649997 (CA (Eng)); *Bowen v National Trust*, [2011] EWHC 1992 (QB); *Driver v Painted House Trust*, [2014] EWHC 1929 (QB) [*Driver*]; *Bottomley v Todmorden Cricket Club*, [2003] EWCA Civ 1575 [*Bottomley*]; *Murphy v Zoological Society of London*, Times, 14 November 1962 (QB); *Cole v Davis-Gilbert*, [2007] EWCA Civ 396; *Craddock v Farrer, and the Scout Association*, (Preston CC, 17 Nov 2000); *Morrison v The Scout Association*, (Newtownards CC, 6 Nov 2002); *A v The Trustees of the Watchtower Bible and Tract Society*, [2015] EWHC 1722 (QB) [*Watchtower Bible*].

35. *Bottomley*, *ibid*.

36. *Driver*, *supra* note 34.

37. *Barnes*, *supra* note 34; *Cattley*, *supra* note 34.

38. *Watchtower Bible*, *supra* note 34.

torts.[39] VSOs have also been defendants to tort actions in Australia[40] and Canada.[41] With sexual abuse torts, VSOs throughout the common law world, particularly churches and those involved in children's activities or residential care, have faced high-profile sexual abuse litigation for the acts of their employees, ministers, or volunteers.[42] It is not unknown for such

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39. The cases are too numerous to list; a small number of examples include: *Avenoso v Mangan*, 40 Conn L Rptr 637 (Conn Super Ct 2006); *Sweeney v Friends of Hammonasset*, 140 Conn App 40 (Conn App Ct 2013); *Entler v Koch*, 85 AD (3d) 1098 (NY App Div 2011); *Ayala v Birecki*, 17 Mass L Rptr 175 (Mass Super Ct 2003); *Gaudet v Braca*, 33 Conn L Rptr 200 (Conn Super Ct 2002); *Lomando v US*, 2011 WL 1042900 (NJ Dist Crt 2011); *Waschle ex rel Birkhold-Waschle v Winter Sports, Inc*, 127 F Supp (3d) 1090 (Mont Dist Crt 2015); *Meyer v Beta Tau House Corporation*, 31 NE (3d) 501 (Ind Ct App 2015); *Dogs Deserve Better, Inc v New Mexico Dogs Deserve Better, Inc*, 2016 WL 6396392 (N Mex Dist Crt 2016); *American Produce, LLC v Harvest Sharing, Inc*, 2013 WL 1164403 (Colo Dist Crt 2013); *Harris v Young Women's Christian Association of Terre Haute*, 250 Ind 491 (Ind Super Ct 1968); *McAtee v St Paul's Mission of Marysville*, 190 Kan 518 (Kan Super Ct 1962).
40. See *e.g. Echin v Southern Tablelands Gliding Club*, [2013] NSWSC 516 (Austl); *Goodhue v Volunteer Marine Rescue Association Incorporated*, [2015] QDC 29 (Austl); *Kennedy v Pender & Narooma Rugby League FC* (8 February 2001) NSWDC (Austl).
41. See *e.g. Grimmer v Carleton Road Industries Association*, 2009 NSSC 169. See also the notorious *Re Christian Brothers of Ireland in Canada* (2000), 47 OR (3d) 674 (ONCA) [*Christian Brothers*].
42. See e.g. *Jacobi v Griffiths*, [1999] 2 SCR 570; *John Doe v Bennett*, 2004 SCC 17 [Doe]; *JGE v Portsmouth Roman Catholic Diocesan Trust*, [2012] EWCA Civ 938 [JGE]; *Various Claimants v Catholic Child Welfare Society*, [2012] UKSC 56 [Various Claimants]; Austl, Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report Recommendations (Royal Commission 2017), online (pdf): < www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf>; Paula Giliker, "Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention" (2018) 77:3 Cambridge Law Journal 506; *Manter v Abdelhad*, 32 Mass L Rptr 709 (Mass Super Ct 2014); Timothy Lytton, *Holding Bishops Accountable* (Cambridge, Mass: Harvard University Press, 2008).

litigation to result in attempts to wind up the defendant VSO and seize its assets to pay claimants.[43]

VSO tort litigation risks may also be enhanced where they contract with the state to replace formerly state-delivered functions[44] or where they respond to new social challenges.[45] However, it is difficult to judge the significance of tort within the voluntary sector. This is not the place to discuss the voluminous literature on whether or not England is in the grip of a compensation culture.[46] Similar debates are also found in other

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43. See *e.g. Christian Brothers*, *supra* note 41. For an American account see Lytton, *ibid*.
44. Debra Morris, "Charities and the Big Society: A Doomed Coalition?" (2012) 32:1 Legal Studies 132 at 138; see also UK, Charity Commission for England and Wales, *Charities and Public Service Delivery: An Introduction and Overview (CC37)* (Charity Commission, 2012).
45. John Plummer, "Premium Issue for the Sector" *Third Sector* (21 February 2011), online: <www.thirdsector.co.uk/premium-issue-sector/finance/article/1055677>.
46. See Richard Lewis & Annette Morris, "Challenging Views of Tort: Part II" (2013) Journal of Personal Injury Law 137; Richard Lewis & Annette Morris, "Tort Law Culture: Image and Reality" (2012) 39:4 Journal of Legal Studies 562; UK, HM Government, *Common Sense Common Safety* (Report) by Lord Young (London: Cabinet Office, 2010) [Lord Young, *Common Sense*]; Richard Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" (2014) Journal of Personal Injury Law 209; Annette Morris, "'Common Sense Common Safety': the Compensation Culture Perspective" (2011) 27 Journal of Professional Negligence 82; James Goudkamp, "The Young Report: An Australian Perspective on the Latest Response to Britain's 'Compensation Culture'" (2012) 28 Journal of Professional Negligence 4; Richard Lewis, Annette Morris & Ken Oliphant, "Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom?" (2006) 14 Torts Law Journal 158; Annette Morris, "The 'Compensation Culture' and the Politics of Tort" in TT Arvind & Jenny Steele, eds, *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013) at 57-79; Annette Morris, "Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury" (2007) 70:3 Modern Law Review 349; Kevin Williams, "State of Fear: Britain's 'Compensation Culture' Reviewed" (2005) 25 Legal Studies 499.

common law jurisdictions for example Australia and Ireland.[47]

Such debates will not be solved by examining statistics of claim rates since culture does not just affect the propensity to sue but also affects the way in which the spectre of liability changes people's behaviour. In examining the interface between tort and the voluntary sector, we also must be more specific and concern ourselves only with the voluntary sector. For instance, a claims culture in road traffic accidents is not necessarily representative of the voluntary sector's experience.

Whilst the reported English cases identified above may not be representative of VSO tort litigation, there is evidence of voluntary sector concerns in relation to tort litigation. The sector is increasingly aware of risks.[48] Within the UK, some VSOs have expressed concerns about tort's

47. David Ipp, "The Politics, Purpose and Reform of the Law of Negligence" (2007) 81 Australian Law Journal 456; David Ipp, "Policy and the Swing of the Negligence Pendulum" (2003) 77 Australian Law Journal 732; Austl, Commonwealth, Law of Negligence Review Panel, *Review of the Law of Negligence: Final Report* by David Ipp (Canberra: Commonwealth of Australia, 2002); Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (Dublin: LRC 93-2009).

48. Katherine Gaskin, *On the Safe Side: Risk, Risk Management and Volunteering* (England: Volunteering England and The Institute for Volunteering Research, 2006); Alex Blyth, "Risk Management: Occupational Hazards" *Third Sector* (27 July 2005); Gracia McGrath, Opinion, "Are Legal Concerns Affecting Volunteer Numbers?" *Third Sector* (17 August 2005), online: <www.thirdsector.co.uk/opinion-hot-issue-legal-concerns-affecting-volunteer-numbers/article/620049>.

impact on their operations[49] and fears as to risks or liabilities.[50] There is reference to voluntary sector tort fears in both Lord Young's report[51] and Lord Hodgson's report.[52] However, whilst both reports widely consulted within the voluntary sector, and Lord Hodgson was the then President of the NCVO and his report task force included leading figures from the sector, the findings of both reports on this issue are given without any evidential support. However, one UK survey notes that 5% of the surveyed VSOs have had insurance or legal claims against volunteers or trustees.[53]

There is also evidence that the voluntary sector responds to tort litigation risks. Schwartz's study revealed that the removal of, or reduction in, charitable immunity from torts in the US, combined with increasing insurance rates, led to behavioural changes in the voluntary and non-profit sector.[54] Surveys within the US have also demonstrated that potential liability reduces charitable activity and that liability risks can influence

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49. See generally UK House of Commons debates on the *Promotion of Volunteering Bill* (Bill 18 of 2003-04), *e.g.* HC Deb (5 March 2004) cols 1149-1200.
50. "We continue to get a lot of calls from charities and individual volunteers about risk and liability. The chances of any action being taken against them are very low but there is clearly a great concern about risk" per Justin D Smith, NCVO Executive Director for Volunteering and Development, quoted in UK, House of Commons Library, *Social Action, Responsibility and Heroism Bill* (Research Paper 14/38, 2014) at 26; see also Sport England, "Sports Volunteering in England in 2002" (July 2003) at 71-2, 146-147, online (pdf): <sportengland.org/media/3617/valuing-volunteering-in-sport-in-england-final-report.pdf>.
51. Lord Young, *Common Sense*, *supra* note 46 at 23.
52. UK, Red Tape Task Force, *Unshackling Good Neighbours* (London: Cabinet Office, 2011) at 8 (Chair: Lord Hodgson), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62643/unshackling-good-neighbours.pdf>.
53. Gaskin, *supra* note 48 at 4, 12.
54. Gary Schwartz, "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?" (1994) 42 UCLA Law Review 377 at 413.

the provision and delivery of non-profit organisations services.[55] Further, there is evidence that charitable hospitals have increased their charges in response to the removal of charitable immunity.[56] There is also some evidence from Ireland that liability and insurance issues have caused some volunteer services to close.[57] Empirical research conducted on behalf of the UK's Cabinet Office shows that the risk of liability impacts on volunteering levels.[58] Similar evidence has also been given in the UK Parliament,[59] and also by a US House of Representatives committee report,[60] and in a detailed US study by Horwitz and Mead.[61]

It is not the purpose of this section to establish that there is a compensation culture problem within the voluntary sector but rather to show that tort does play a role in the voluntary sector, that VSOs have expressed concerns as to liabilities in tort, and that responsible VSOs

55. Charles Tremper, "Compensation for Harm from Charitable Activity" (1991) 76 Cornell Law Review 401 at 417-18.
56. Bradley Canon & Dean Jaros, "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity" (1979) 13 Law & Society Review 969; *cf.* Gregory Caldeira, "Changing the Common Law: Effects of the Decline of Charitable Immunity" (1981-82) 16:4 Law & Society Review 669.
57. I, Seanad Éireann Deb (30 June 2011), vol 209, no 2, Civil Law (Miscellaneous Provisions) Bill 2011: Second Stage, at 149 online (pdf): <data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2011-06-30/debate/mul@/main.pdf>.
58. Natalie Low et al, *Helping Out: A National Survey of Volunteering and Charitable Giving* (London: National Centre for Social Research and the Institute for Volunteering Research for the Third Sector in the Cabinet Office, 2007) at 8, 52.
59. UK, HC, Constitutional Affairs Committee, *Compensation Culture* (Third Report of Session 2005-06, 754-1) at 42-43, online (pdf): <publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf>; UK, HC Deb (8 June 2006), col 469 (Julian Brazier); UK, HC Deb (8 June 2006), col 419 (Bridget Prentice).
60. US, *Volunteer Liability Legislation*, 105th Cong (Washington, DC: US Government Publishing Office, 1997) at 10 (Hon Paul Coverdell).
61. Jill Horwitz & Joseph Mead, "Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence" (2009) 6:3 Journal of Empirical Legal Studies 585 at 614-15, 627.

should consider their liability risks and how to mitigate them. This may also include judgment-proofing.

IV. What is Judgment-Proofing?

The collectability of damages is important in deciding whether or not to bring a claim in tort since judgments for damages against men of straw are of little value. Judgment-proofing is a deliberate technique designed to evade the payment of damages. It involves an entity holding insufficient wealth to meet claims or holding its wealth in a form safe from the enforcement of judgment debts. Thus, whether or not an entity is judgment-proof varies from claim to claim.[62] 'Hard' judgment-proofing is where claimants can only reach nominal assets. 'Soft' judgment-proofing is where claimants can reach substantial assets, but these are insufficient to meet the judgment.[63] Depending on the form of judgment-proofing used, a form of organisational protection can be created which resembles an immunity, or a liability cap.

The primary aim of judgment-proofing is to avoid paying tort damages rather than consensually-created liabilities. The reason is that liability in contract may be preserved through mechanisms such as personal (or third party) guarantees or security interests. Given the centrality of damages claims to the law of tort, it is surprising that judgment-proofing has received no attention in the tort law community other than from law

62. Stephen Gilles, "The Judgment-Proof Society" (2006) 63 Washington & Lee Law Review 603 at 608.

63. Lynn LoPucki, "The Death of Liability" (1996) 106:1 Yale Law Journal 1 at 26, at n 107 [LoPucki, "Death"].

and economics scholars.[64]

V. Why Judgment-Proof?

Judgment-proofing offers an organisation the opportunity to conduct activities whilst also avoiding litigation risks. The extent to which judgment-proofing is used is unclear, and some scholars doubt that it is ever viable or used.[65] However, there is evidence of its use amongst professionals,[66] and in high risk industries such as asbestos,[67] tobacco,[68] and shipping.[69] Nevertheless, despite this association with these sectors

64. See *e.g.* Steven Shavell, "The Judgment Proof Problem" (1986) 6 International Review of Law & Economics 45; Kyle Logue, "Solving the Judgment-Proof Problem" (1994) 72 Texas Law Review 1375; Richard MacMinn, "On the Judgment-Proof Problem" (2002) 27 Geneva Papers on Risk and Insurance Theory 143; Steven Shavell, "Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem" (2005) 36:1 RAND Journal of Economics 63; Tim Friehe, "A Note on Judgment Proofness and Risk Aversion" (2007) 24 European Journal of Law and Economics 109; Yeon-Koo Che & Kathryn Spier, "Strategic Judgment Proofing" (2008) 39:4 RAND Journal of Economics 926; See J.S. Summers, "The Case of the Disappearing Defendant: An Economic Analysis" (1983) 132 University of Pennsylvania Law Review 145.
65. James White, "Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability" (1998) 107 Yale Law Journal 1363; Lynn LoPucki, "Virtual Judgment Proofing: A Rejoinder" (1998) 107 Yale Law Journal 1413; Lynn LoPucki, "The Essential Structure of Judgment Proofing" (1999) 51 Stanford Law Review 147 [LoPucki, "Essential Structure"]; Steven Schwarcz, "The Inherent Irrationality of Judgment Proofing" (1999) 52 Stanford Law Review 1; Steven Schwarcz, "Judgment Proofing: A Rejoinder" (1999) 52 Stanford Law Review 77.
66. Che & Spier, *supra* note 64 at 927.
67. See *Adams v Cape Industries Plc* (1989), [1990] Ch 433 (CA (Eng)) [*Adams*]. See also Al Ringleb & Steven Wiggins, "Liability and Large-Scale, Long-Term Hazards" (1990) 98:3 Journal of Political Economy 574.
68. See LoPucki, "Death", *supra* note 63 at 65-66, at nn 274-75.
69. The well-known practice of one ship companies used to evade sister ship arrest.

the potential attraction of judgment-proofing to VSOs is clear. VSOs that may wish to judgment-proof are primarily those likely to face major claims; for instance, those involved in outward bound activities, contact sports, the provision of activities or care of children, those that work with vulnerable groups, and some medical organisations.

Insurance is a mandatory requirement for participation in certain activities,[70] and where the voluntary sector contracts with the state to deliver public services, the state can ensure that tort victims will receive compensation by requiring liability insurance.[71] However, many activities which will be conducted by the voluntary sector, quite rightly, do not require mandatory insurance. Any additional requirement for compulsory insurance will limit these activities and potentially exclude communities and individuals of lesser means from participating in civil society, eroding the democratic role of the sector.

Where a VSO is a charity, the trustees have a duty to protect its assets and resources, including from tort liabilities. Often this duty is discharged through purchasing insurance.[72] However, this is not the only way to discharge this duty. Judgment-proofing as an alternative, or used in combination with insurance, increases in attractiveness where insurance becomes unavailable or expensive. Whilst this assumes responsive premium setting, this has occurred in the context of charities

70. See *e.g. Road Traffic Act 1988* (UK), s 143; *Employers' Liability (Compulsory Insurance) Act 1969* (UK).

71. In the light of *Gwilliam v West Hertfordshire Hospitals NHS Trust*, [2002] EWCA Civ 1041 it is sensible for the public authority to require this; *cf. Glaister v Appleby-in-Westmorland Town Council*, [2009] EWCA Civ 1325.

72. UK, Charity Commission for England and Wales, *Charities and Insurance (CC49)* (Charity Commission, 2012) at para 1.1.

which facilitate children's outdoor activities.[73] There have also been problems in obtaining insurance when an organisation is dealing with a new social problem.[74] This may force the claims of tort victims onto the assets of the organisation. Such depletion of assets may remove essential community services and discourage community activities. The threat of such claims may also discourage the making of large donations to a VSO if the donation will be potentially targeted by tort claimants. From the perspective of a VSO, there may be some value in structuring itself so as to protect itself and its assets in the case of withdrawal of insurance coverage, or a failure to obtain affordable insurance coverage, or from claims which exceed its insurance limit. For example, as noted above, institutional sexual abuse litigation has in some cases endangered the future of the organisation itself. Further, a VSO may wish to expand its activities to deal with emerging problems whilst simultaneously protecting its existing operations and assets, particularly where the new area is 'high risk'.

VI. What Judgment-Proofing Mechanisms are Available to VSOs?

Previous judgment-proofing literature concerns for-profits rather than VSOs, and there is *no* literature on judgment-proofing in an English law context. Given that judgment-proofing has primarily been discussed in a US context, we need to draw on this material.

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73. The Scout Association had its premium increased by 66% in 2004, leading to a curtailment of activities and the closure of some Scout troops who often have their own insurance. The charity Kids had its premium raised by 57%, and Trident Trust, a work placement charity for those aged 18-25, saw its premiums double. David Bamber, "School trips and charities hit by soaring insurance costs" (29 August 2004), online: *The Telegraph* <www.telegraph.co.uk/news/uknews/1470462/School-trips-and-charities-hit-by-soaring-insurance-costs.html>.
74. Tremper, *supra* note 55 at 429-30.

There are two viable techniques through which to judgment-proof a VSO and thus construct organisational protection: the use of charitable purpose trusts and the use of group structures.[75] With both techniques there is a risk that the mechanisms will be challenged in the courts. However, as a matter of doctrinal law, both the use of charitable purpose trusts and group structures should provide significant protection from claims.

VII. Charitable Purpose Trusts

Perhaps due to the focus on for-profits, the US literature on judgment-proofing does not deal with the possibility of using charitable purpose trusts. Such mechanisms are highly suited to creating a judgment-proof structure for VSOs, although a VSO may only use such mechanisms where at least some of its purposes are exclusively charitable. Whilst not all VSOs are charities it may be possible to locate some charitable purposes in a number of VSOs which are not charities.

Where the tort, or the trustee's vicarious liability for the tort of another, is connected with the administration of the trust, the trustee who acts properly has a right of indemnity, and the claimant if need be may stand in the trustee's place and enforce his claim directly again the trust property through subrogation.[76] It is trite law that where an individual trustee commits a tort which is not connected with the administration or purposes of the trust that the assets of the trust are not available to satisfy judgment against the trustee, and that trust assets are not available to the trustee's creditors in the case of the trustee's bankruptcy.[77]

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75. Utilising secured debt and offshore trusts are unsuitable for VSOs struggling with insurance premiums.
76. *Bennett v Wyndham*, [1862] 45 ER 1183 (Ch (Eng)).
77. *Re Pumfrey*, (1882) 22 Ch D 255 (Ch (Eng)) (the creditor's claim against the trust funds is derivative, based on the trustee's own right of indemnity); *Re Johnson*, (1880) 15 Ch D 548 (Ch (Eng)) [*Johnson*] (if there is no right of indemnity, there is no claim); *Ex parte Edmonds*, [1862] 45 ER 1273 (Ch (Eng)).

Thus, if an impecunious teacher, who also happens to be a trustee of a charitable trust to provide housing for the homeless, is sued for negligently crashing his bicycle into a pedestrian whilst travelling to work as a teacher, the trust assets are entirely unconnected with the claim and the claimant cannot get their hands on them as there is no right of indemnity. If an individual is a trustee for two separate charitable purpose trusts — the first a trust to provide accommodation for the homeless, and the second a children's educational outward bound trust — the funds of the latter may be targeted by a claimant child who is negligently injured on a hike by a group leader employed by the trustee (by suing the trustee, who can obtain an indemnity from the trust), but the funds of the housing trust are unconnected with this, and may not be targeted.

In both cases, it should make no difference if the trustee is instead a corporate trustee. Nor should it make any difference if the two separate charitable purpose trusts have similar purposes; for instance, if both are educational charitable purpose trusts. The VSO's assets may thus be partitioned into separate charitable trusts to protect them from claims brought against the VSO. The removal of assets from the VSO to separate trusts may be used to judgment-proof the organisation.

Donations to a non-profit or charity will generally go into the general funds of the organisation and will therefore become potentially available to tort creditors. This is so even if the donor's motive is to benefit a particular cause. However, it is possible to impress the donation with a trust where it is made for a certain purpose. In such a case, the non-profit is obliged to apply the donation to that purpose, and this binds third parties.[78] This will depend on the circumstances in which the donation was solicited or made.[79] Thus, for instance, when an educational VSO solicits donations to sponsor the education of a particular named child in a developing country, the funds may be impressed with a trust that the funds are to be applied to that purpose. However, where acquired assets pass into a VSO's general funds, rather than to separate trusts, the VSO may subsequently create separate charitable trusts to shield these newly acquired assets and judgment-proof the organisation.

Such mechanisms will not involve significant governance changes for many VSOs. For instance, whilst an incorporated charity holds its assets

beneficially,[80] and they are thus available to creditors,[81] it is possible, and indeed common, for them to hold particular assets on trust, and it is standard accounting practice for charities to distinguish between income, endowment, and special trusts, which are separately accounted for.[82]

The use of separate trusts means that if the parent organisation is swept away through litigation, the assets in the separate charitable purpose trust are still applied to the charitable purposes since the trust does not fail for the want of a trustee. However, tort creditors can still potentially access that asset where it is the activities of *that* trust that cause their injury. The method of asset partitioning used therefore protects assets from unrelated claims. However, when combined with a group structure (see below) it can also be used to protect the assets from related claims. Nevertheless, as we will see below, controversial litigation in Canada has permitted unrelated tort claims to access trust assets.

In the case of an unincorporated association, judgment-proofing the trust funds may also be attempted by removing a trustee's right to an indemnity from the trust funds. Whilst an express attempt to do this is highly unlikely to be successful, since this right to an indemnity may not be excluded or restricted by the terms of the trust,[83] and few trustees would agree to serve if this were the arrangement. Nevertheless, an attempt to remove the right of indemnity can be attempted via alternative means. This right to an indemnity can be removed by a deliberate trustee default in relation to the trust fund for sums that exceed likely claims.[84] This would, for instance, involve loans from the funds or deliberate breaches

80. *Liverpool and District Hospital for Diseases of the Heart v AG*, [1981] Ch 193 (Ch (Eng)). Note individuals holding charitable assets hold them on trust.
81. *Re Wedgwood Museum Trust Limited (In Administration)*, [2011] EWHC 3782 (Ch) at 281 [*Wedgwood*].
82. Alexander et al, *supra* note 28 at 156-58, 188-90.
83. Lynton Tucker, Nicholas Le Poidevin, & James Brightwell, *Lewin on Trusts*, 19d (London: Sweet and Maxwell, 2015) at 834-54; *Trustee Act 2000* (UK), s 31(1).
84. Note that in *Johnson*, *supra* note 77, the trustee was in default and was thus not entitled to an indemnity upon which the creditors could use to found their claim.

of fiduciary duties. Such a deliberate and cynical fraud designed to frustrate a creditor's or future creditor's equitable derivative claim upon the indemnity is likely to be ignored by courts which are likely to permit the claim to continue. In addition, such a mechanism would expose trustees (many of whom will be volunteers) to personal liability, and in the case of charitable trusts, will additionally attract the attention of the Charity Commission for England and Wales ("Charity Commission"). Few trustees would agree to such a scheme. Further, in addition to this derivative claim upon the indemnity, a tort victim may also have a direct claim against the trust funds in so far as there was unjust enrichment of the funds by the wrong.[85]

Using a separate trust structure may not necessarily be a situation of deliberate judgment-proofing. Legal policy recognises that some assets need to be protected from general creditors. Otherwise a defendant will never acquire them from a third party (such as a donor) in the first place.[86] In fact, the acquisition of this asset or funds would represent a windfall to claimants, and objections to this form of asset protection must be limited.

A. Challenges to Charitable Trust Judgment-Proofing

To understand the level of protection provided to VSOs by judgment-proofing, we also need to examine potential challenges to it. Using more than one charitable purpose trust in order to insulate assets from potential claims is not risk-free. In *Christian Brothers*,[87] which has faced judicial,[88]

85. See *e.g. Whiting v Hudson Trust Company*, 234 NY 394 (NY Ct App 1923).
86. Examples include retention of title clauses and *Barclays Bank Ltd v Quistclose Investments Ltd*, [1970] AC 567 (HL (Eng)).
87. *Supra* note 41.
88. *Rowland v Vancouver College Ltd*, 2001 BCCA 527 at paras 179-83, Braidwood JA, dissenting (majority did not deal with the correctness of the Ontario decision).

academic,[89] and legislative[90] disapprobation, the Court of Appeal for Ontario allowed claimants to dip into a charitable purpose trust pot that was entirely unconnected with their claim and, in doing so, departed from traditional trust principles.

In *Christian Brothers*, there were three relevant separate entities: (1) Vancouver College Ltd ("VCL"), a registered charity and a Catholic private school in Vancouver incorporated in 1927; (2) St Thomas More Collegiate Ltd ("STMCL"), a registered charity and Catholic high school in British Columbia incorporated in 1962; and, finally, (3) the Christian Brothers of Ireland in Canada ("CBIC"), incorporated by Act of Parliament in 1962.

CBIC operated schools and orphanages in Canada. Due to claims relating to abuse committed at an orphanage in Newfoundland, it was sought to wind up CBIC so that its assets would be available to compensate the claimants. The question was whether the assets of the two schools were also available in that winding up process to compensate the claimants.

The shares in VCL were held by four individual Christian Brothers in trust for the Christian Brothers of Ireland. The majority of the shares of STMCL were held by CBIC, with a minority being held by a lay teacher.

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89. Kevin Davis, "Vicarious Liability, Judgment Proofing, and Non-Profits" (2000) 50 University of Toronto Law Journal 407; Timothy Youdan, "Creditor-Proofing Charities: What to do in Light of the Christian Brothers Decisions" (2005) 42 Canadian Business Law Journal 198; Alison Dunn, "Neither Fish nor Fowl? The Use of Charitable Company Assets under English Law" (2005) 42 Canadian Business Law Journal 223 [Dunn, "Neither Fish nor Fowl?"]; Ogilvie, *supra* note 32; Jason Neyers & David Stevens, "Vicarious Liability in the Charity Sector: An Examination of Bazley v Curry and Re Christian Brothers of Ireland in Canada" (2005) 42 Canadian Business Law Journal 371; *cf.* David Wingfield, "The Non-Immunity of Charitable Trust Property" (2003) 119 Law Quarterly Review 44.

90. The British Columbia, Legislative Assembly following the Trustee Act Modernization Committee, *Report on Creditor Access to the Assets of a Purpose Trust* (BCLI Report No 24, 2003), legislated against the decision via the *Charitable Purposes Preservation Act*, SBC 2004, c 59.

For Justice Feldman, giving the leading judgment, the availability of the assets of the two schools followed from a rejection of the doctrine of charitable immunity. The entire corporation is vicariously liable, and all of its property is available to meet a claim, whether it holds it beneficially or holds it on trust.[91] It was therefore unnecessary to examine whether an asset is beneficially owned or 'trust funds'. Justice Feldman considered that there is no need for the claim to relate to particular assets of a corporation for those assets to be made available to meet judgments.[92] Where a charitable corporation has more than one charitable purpose, all assets, and not just those connected with that purpose, are available to meet claims.[93] According to Justice Feldman, it would be contrary to the policy which underlies the rejection of charitable immunity to allow special charitable purpose trusts to be used to segregate assets in order to defeat tort claimants.[94] Justice Doherty, whilst concurring, was more reticent, dealing only with the winding up of a charitable corporation — a final accounting, which looks at the corporation as a "single whole entity".[95]

The decision means that a charitable purpose trust can be wound up for the liability of the trustee, which is unconnected with the administration or activities of the trust.[96] However, a narrower reading can be given that it applies only in the case where the trustee is a charitable corporation. Nevertheless, the decision departed from traditional trust principles and is a "radical break with precedent".[97] However, the critics of the decision fail to distinguish between the two schools such that the decision may be defensible as far as VCL is concerned, in that it was beneficially owned by CBIC, but not STMCL. Neyers and Stevens consider that it abolishes the charitable purpose trust, although it could be confined to apply only where a charitable corporation is the trustee. Further, they state:

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91. *Christian Brothers*, *supra* note 41 at 82.
92. *Ibid* at 83.
93. *Ibid* at 84.
94. *Ibid* at 28, 82-85.
95. *Ibid* at 106.
96. Ogilvie, *supra* note 32 at 191.
97. Davis, *supra* note 89 at 408, 429.

> [t]he court speaks of claims against CBIC, as if the corporate patrimony were the only patrimony on the scene. The court largely ignores, or misunderstands, the possibility that CBIC both owned property beneficially and that it was the trustee of two charitable purpose trusts.[98]

A rejection of charitable immunity does not lead to such an outcome. That charitable immunity from tort is not the law in Canada — or England — is not controversial. It follows from the decision in *Mersey Docks and Harbour Board Trustees v Gibbs*[99] that charitable trust assets are potentially available to tort claimants. However, this decision does not deal with the question of whether both sets of assets are available when an individual or charitable corporation holds its own assets, and also holds assets as a trustee as part of a separate charitable purpose trust. That the former assets are available to meet a judgment is uncontroversial, but to make the latter assets available is to ignore the existence of the separate trust, and to ignore general principles of the law of trusts.[100]

Where there are two trusts, the trusts may be wholly unrelated and the only thing they may have in common is the identity of a trustee. The fact that a corporate trustee is being wound up should not change matters since "the continued existence of a charitable trust does not depend on the continued existence of the trustee. The trust would continue and, if necessary, the court would appoint a new trustee".[101]

Christian Brothers does not represent the position in England. In English trust law, it is not generally possible to lift the veil of a trust so as to make trust assets available to meet the liabilities of the settlor unless the trust is a sham.[102] Thus, the use of separate charitable purpose trusts to protect assets is still possible.

Nevertheless, even if the English courts were to follow the Ontario courts in *Christian Brothers*, it is still possible to plan around the decision

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98. Neyers & Stevens, *supra* note 89 at 412, 371-81.
99. (1866) 11 ER 1500 (HL (Eng)).
100. Davis, *supra* note 89 at 436, 441.
101. Youdan, *supra* note 89 at 205.
102. *R v Vickers*, [2010] EWCA Crim 3246 at para 7, Moses LJ; *Larkfield Limited v Revenue and Customs Prosecutions Office, Barnes, and May*, [2010] EWCA Civ 521.

through the use of separate corporations[103] or with charitable purpose trusts where the trustees are not a charitable corporation.[104] In addition, in *Christian Brothers*, the risk generating entity held the shares of the asset holding entities. An alternative structure could avoid this. If the claims had arisen from one of the two schools, apart from the assets of the school in question it is difficult to see how CBIC and its assets could have been targeted. The problem with the structuring as used in CBIC is that the liability generating organisation owned one of the asset holding organisations and not the other way around. Separate charitable purpose trusts therefore still provide a viable mechanism for judgment-proofing if structured properly.

Whilst such mechanisms may not be suitable for smaller VSOs, despite potential challenges to judgment-proofing structures based on separate charitable purpose trusts they remain viable options for larger concerns. Nevertheless, as the litigation in *Christian Brothers* shows, the use of such structures may still embroil the organisation in complex litigation, and judges may be tempted to re-write the law of trusts where faced with the victims of egregious torts and assets protected through the use of separate trusts. Further, not all VSOs have charitable purposes. Therefore, using charitable trusts is not available as a judgment-proofing strategy for all VSOs.

VIII. Group Structure Judgment-Proofing

Group structure judgment-proofing is potentially available to protect all types of VSOs, not just those with charitable purposes. It involves a relationship between more than one incorporated entity within a group structure: one (X) which holds most of the assets and a second (Y) which generates risks but holds little, if any, assets.[105] Y is owned by X. This system protects the assets of X from Y's judgment creditors since only Y's assets are exposed to claims.

Incorporation is available to VSOs, which results in separate legal

103. Dunn, "Neither Fish nor Fowl?", *supra* note 89 at 242.
104. Youdan, *supra* note 89 at 207-11.
105. LoPucki, "Essential Structure", *supra* note 65 at 149.

identity and limited liability.[106] Limited liability means that claims against the company may only be executed against the company's assets, not the assets of shareholders.[107] It also has the advantage of protecting organisational assets from claims brought against the members or volunteers in a personal capacity.[108]

An enterprise may be subdivided into different companies: parent, subsidiary, and sub-subsidiary companies. A subsidiary is a separate legal entity from its parent even if they are managed in a coordinated fashion.[109] This results in asset and liability partitioning. Limited liability also operates within a group of companies.[110] A group structure itself does not render the risk-generating subsidiary company judgment-proof; it merely defeats liabilities which exceed the value of the company assets.[111] To create a judgment-proof entity, the risk generating entity needs to be stripped of assets. Within the for-profit sector, any revenues which are generated by the subsidiary are regularly removed. With a VSO structured into an asset holding parent company and a risk-generating subsidiary company which generates revenue — for instance, by charging for its services — it is also possible to strip the subsidiary of its revenues albeit by different means to the for-profit sector. For instance, an incorporated charity might own a limited company that regularly makes donations to its parent's charitable purposes. Where the subsidiary does not generate revenue, since it delivers its services for free, the structure may operate without any need to strip the subsidiary of revenue.

106. See also UK, Charity Commission for England and Wales, *Charity Types: How to Choose a Structure (CC22a)* (Charity Commission, 2014).
107. See *Insolvency Act 1986* (UK), s 74(2)(d) [*Insolvency Act*].
108. Henry Hansmann & Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale Law Journal 387 at 394.
109. *Adams*, *supra* note 67 at 536, Slade LJ.
110. *Re Southard & Co Ltd*, [1979] 1 WLR 1198 (CA (Eng)) at 1208, Templeman LJ.
111. LoPucki, "Death", *supra* note 63 at 21.

There is evidence to suggest that this method of judgment-proofing is used by some Canadian charities.[112] Guidance on risk management in charities produced by the Charity Commission also envisages the passing on of risk to a third party, such as a trading subsidiary.[113]

A. Challenges to Group Structure Judgment-Proofing

Group structure judgment-proofing is potentially vulnerable to a number of challenges. Firstly, veil-piercing, which disregards the separate legal identities and looks through the company to its shareholders. Nevertheless, decisions of the Supreme Court of the United Kingdom make it clear that it will be rare,[114] and it is unlikely that veil-piercing would be available in the case of a judgment-proof VSO.[115] In *Adams*,[116] the Court of Appeal of England and Wales ruled that a court is not entitled to pierce the veil, even where the corporate structure has been deliberately created to protect the parent from future liability in tort, by ensuring that such risks fall on a subsidiary. The ability to construct such a structure was considered to be an inherent right, whether or not it was socially desirable to do so.[117] Given the reliance by the Supreme Court in *Prest*[118] on *Adams*, the decision undoubtedly remains good law.

Secondly, direct duties may be used to challenge the structure where an attempt is made to establish a direct duty of care between the claimant and the parent company, bypassing the subsidiary. Such claims are

112. Mark Anshan, "Credit Proofing Charity Assets" (30 April 2014), online: *Drache Aptowitzer LLP* <drache.ca/articles/charities-article-archive/credit-proofing-charity-assets/>.
113. UK, Charity Commission for England and Wales, *Charities and Risk Management (CC26)*, (Charity Commission, 2010) at 17.
114. *Prest v Petrodel Resources Ltd*, [2013] UKSC 34 [*Prest*]; *VTB Capital Plc v Nutritek International Corp*, [2013] UKSC 5 [*VTB*].
115. See *VTB*, *ibid* at para 143, Lord Neuberger.
116. *Supra* note 67.
117. *Ibid* at 544.
118. *Supra* note 114 at paras 21-22, Lord Sumption.

distinct from veil-piercing, but are extremely rare[119] and offer little relief from a judgment-proof structure.

Thirdly, an attempt might be made to establish dual vicarious liability[120] of an asset-holding parent company (*i.e.* to establish that the parent company as well as the subsidiary company is vicariously liable for the subsidiary company's employee/volunteer). However, careful corporate structuring and policies will prevent such a claim from being successful, particularly if the parent company distances itself from the subsidiary's operations and does not involve itself with the subsidiary's employees or volunteers. That a parent company may be vicariously liable for a subsidiary company's torts[121] does not, at this stage of English legal development, offer relief to a claimant.[122] Nevertheless, there may be pressure to develop such claims, given the new highly restrictive approach to veil-piercing where judgment-proofing via a group structure is used to evade liability for egregious torts such as institutionalised sexual abuse, which may occur in VSOs associated with the provision of

119. *Lubbe v Cape Plc*, [2000] UKHL 41; *Connelly v RTZ Corp Plc*, [1999] CLC 533 (QB (Eng)) (strike out, duty of care was arguable); *Ngcobo v Thor Chemicals Holdings Ltd*, [1995] EWCA Civ J1009-1; *Vedanta Resources Plc v Lungowe*, [2019] UKSC 20 (jurisdictional challenge, duty of care was arguable). Whilst successful in *Chandler v Cape Plc*, [2012] EWCA Civ 525, it is easily evaded. *Thompson v The Renwick Group Plc*, [2014] EWCA Civ 635 demonstrates that a duty will not be imposed where the parent company acts as a holding company. See also *Okpabi v Royal Dutch Shell Plc*, [2018] EWCA Civ 191; *AAA v Unilever Plc*, [2018] EWCA Civ 1532.

120. See *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2005] EWCA Civ 1151; *Various Claimants*, *supra* note 42.

121. Phillip Morgan, "Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?" (2015) 31 Journal of Professional Negligence 276; Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc" (2013) 76:3 Modern Law Review 603.

122. See generally William Rands, "Domination of a Subsidiary by a Parent" (1999) 32 Indiana Law Review 421 at 443-46 (such claims have been allowed in the US, but these are mostly veil-piercing cases rather than true vicarious liability cases).

activities for children. Finally, where the subsidiary has dissipated wealth, this judgment-proofing strategy may also be disrupted through attempts to reverse the transactions through which the subsidiary has dissipated its wealth.[123]

Despite these potential challenges, a group structure still offers a viable mechanism for judgment-proofing VSOs. However, its viability is limited to more sophisticated entities and it is not appropriate for smaller community based VSOs. Furthermore, this strategy of judgment-proofing potentially exposes the directors of the undercapitalised company to personal liability.[124] This is shifting the risk from the entity to its officers and directors — who may be unpaid volunteers.

IX. Voluntary Sector-Specific Concerns Towards Judgment-Proofing

Now that we have established that judgment-proofing is available to VSOs, and that it may offer significant protection to the voluntary sector from liabilities in tort, we must now address voluntary sector specific concerns towards judgment-proofing. Given that so far the discussion of judgment-proofing within the literature concerns for-profits, these voluntary sector issues have not yet been discussed.

A. Voluntary Sector Reputation

Being seen to utilise clever structuring to avoid paying for the consequences of liability may have reputational consequences for a VSO.

Maintaining a high reputation is important to a VSO's and the broader voluntary sector's ability to discharge a number of the sector's roles, particularly the sector's ability to speak truth to power, and in providing public goods. Judgment-proofing creates a reputational risk for VSOs since a deliberate strategy of judgment-proofing deprives

123. *Insolvency Act*, *supra* note 107, ss 238, 423; See John Armour, "Transactions at an Undervalue" in John Armour & Howard Bennett, eds, *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003) at 37, 97.

124. See *Insolvency Act*, *ibid*, ss 212, 214.

tort victims of their remedies, requiring them to fall back on their own resources, the welfare state, and charity. It is also possible that the use of judgment-proofing may imperil the high reputation that the voluntary sector itself enjoys.

Industries in which judgment-proofing has been used, such as the asbestos and tobacco industry, may have little concern about their public image when compared with the voluntary sector. Nevertheless, even within such industries, attempts to judgment-proof may also face other external pressures such as governmental and union pressure, public inquiries, as well as negative publicity, which ultimately forces the asset holding entity to provide more capital to meet compensation claims, as has been experienced with asbestos manufacturing in Australia.[125] Where there is widespread use of judgment-proofing the legislature may intervene; for instance, as with environmental legislation in the US in response to widespread use of poorly capitalised subsidiaries in the waste disposal industry[126] or in the UK with pension liabilities.[127]

With the voluntary sector, the public relations consequences of judgment-proofing may be more pronounced than for-profits. Where a VSO relies on government funding or contracts, its use of judgment-proofing may lead to the loss of opportunities if the entity develops a reputation for irresponsible risk-taking. It may also lead to greater regulation of the sector. This is particularly so if tort claimants attempt to target the state or local authority directly, in an attempt to bypass a judgment-proof VSO. A poor reputation may also lead to a decline in donations and volunteers and the loss of influence at the local and national policy making level.[128] High levels of public trust and confidence are required if the sector is to effectively speak truth to power.

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125. Peter Cane & James Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9d (Cambridge: Cambridge University Press, 2018) at 217.
126. See *e.g. The US Comprehensive Environmental Response, Compensation, and Liability Act*, 42 USC § 9601 et seq (1980).
127. See *e.g. Pensions Act 1995* (UK), c 26, s 75 [*Pensions Act*].
128. See Lytton, *supra* note 42.

B. Public Relations Examples

The reported English cases on clerical sexual abuse, so far, reveal no attempt to have been made by the Roman Catholic Church in England to rely on judgment-proofing, despite the fact that due to an accident of history, the Church is structurally judgment-proof in England. The litigation, so far, has instead primarily been contested on the scope of vicarious liability.[129]

Whilst a Diocesan Bishop of the Roman Catholic Church may be vicariously liable for a Diocesan Priest,[130] on the basis that they are in a relationship "akin to employment",[131] the Bishop is not a corporation sole in English law, unlike in the Anglican Church. There is thus no legal continuity as a matter of civil law between successors in the office.

Essentially, this means that a Bishop appointed in the 2010s is being held liable for the "akin to employment"[132] relationship that was exercised by his (often now dead) predecessor over a priest of the diocese in the 1970s, a time when the Bishop might not even have been ordained as a priest. As a matter of law, this simply cannot be correct. Further, the Bishop is being sued in a personal capacity — in his own name. His own assets and estate are being exposed. Whilst the institution and its insurers are currently backing 'their man', he does not own the assets of the Diocese. The assets will be held in various charitable trusts, which may be incorporated, and/or held by various trustees. Again, the identity of the trustees may be different to those at the time of the alleged abuse.[133]

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129. See *e.g. Maga v Archbishop of Birmingham*, [2010] EWCA Civ 256; *JGE*, *supra* note 42.
130. *JGE*, *ibid*.
131. *Ibid* at para 18.
132. *Ibid*.
133. There are allegations that the changing identity of trustees has been utilised as a litigation device at the issuing stage, see generally Justin Levinson, "Tactics in Child Abuse Claims against the Catholic Church", Personal Injury Focus, *1 Crown Office Row* (September 2006) online: <www.preview2.1cor.enstar.net/1158/section.nc?startpointt1164i23=50&form_1105.replyids=wmocztgus&startpointt1159i19=280>.

The institution of a Roman Catholic Diocese is a creature of Roman Catholic Canon law, which is not recognised by English common law. It therefore exists at law, if at all, as an unincorporated association. For there to be an unincorporated association there is a need for a contract between each and every member.[134] Whilst such contracts are easily found,[135] the characterisation of a Diocese as an unincorporated association may be disputed since an unincorporated association requires a contract between members, and the desire for the relationship between members to be governed by Roman Catholic Canon law may mean that there is no intention to create legal relations as a matter of the English law of contract.

That reliance on such a defence, which is perfectly valid as a matter of law, may be a public relations disaster is demonstrated by the experience in New South Wales. In *Trustees of the Roman Catholic Church v Ellis*,[136] a claim brought against Cardinal Pell, Archbishop of Sydney, was struck out. The claim related to abuse committed by a priest between 1974 and 1979. Cardinal Pell had no relevant connection with the Sydney Archdiocese prior to 2001. Further, the claims brought against the Diocesan trustees in *Ellis* were also unsuccessful, since they were property holders only, and were well-removed from the management, appointment, or oversight of priests.[137]

As a matter of law, the defence was conducted entirely properly. However, the decision in *Ellis* has gained notoriety and much negative media publicity for the Roman Catholic Church both in Australia and internationally. The Archdiocese of Sydney had to issue a public

134. *Conservative and Unionist Central Office v Burrell*, [1982] 1 WLR 522 (CA (Eng)) at 525.

135. Nicholas Stewart, Natalie Campbell & Simon Baughan, *The Law of Unincorporated Associations* (Oxford: Oxford University Press, 2011) at 12.

136. [2007] NSWCA 117 (Austl) [*Ellis*], permission to appeal to the HCA refused, [2007] HCATrans 697.

137. See generally *Doe*, *supra* note 42 at para 12 (related, but unsuccessful, arguments have been run in Canada, although this was in the context of a statutorily created corporation sole).

declaration that it "has not organised its affairs to avoid its responsibilities to victims" and that it subsequently provided Mr. Ellis with financial assistance.[138]

There is increasing pressure at both the Governmental and Parliamentary level in Australia for reform. A Parliament of Victoria inquiry was highly critical of the position taken by the Roman Catholic Church, rejecting Cardinal Pell's insistence that the Church had not relied on a 'legal technicality', and declaring that there was tension between a commitment to justice and such defences, and that government intervention was necessary. The Committee recommended that nominal defendants be used in such cases.[139] In May 2014, the Government of Victoria accepted this recommendation in principle.[140]

Cardinal Pell also faced critical cross examination in relation to the *Ellis* case before Australia's Royal Commission into Institutional Responses to Child Abuse,[141] where the Archdiocese's internal litigation correspondence was publicly exposed. Cardinal Pell felt it necessary

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138. Catholic Archdiocese of Sydney, "The Ellis Decision — a Re-statement of the Law" (14 September 2015), online: *Catholic Archdiocese of Sydney* <www.sydneycatholic.org/justice/royalcommission/ellis.asp> in Key Facts.
139. Austl, Commonwealth, *Betrayal of Trust, Inquiry in the Handling of Child Abuse by Religious and Other Non-Government Organisations*, Parl Paper No 275 (2013) at 511-12.
140. Government of Victoria, "Victorian Government Response to the Report of the Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations '*Betrayal of Trust*'", online (pdf): *Government of Victoria* <www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Government_Response_to_the_FCDC_Inquiry_into_the_Handling_of_Child_Abuse_by_Religious_and_Other_Non-Government_Organisations.pdf>.
141. See Austl, Royal Commission into Institution Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (Royal Commission, 2015) at 229-30.

to make a public apology for his handling of the case.[142] The Royal Commission, in its final report, recommended that legislation should be introduced at state level so that where sexual abuse litigation concerns an institution:

> with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings: a. the property trust is a proper defendant to the litigation, b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.[143]

Victoria and New South Wales have now implemented this recommendation via the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*[144] and the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*,[145] respectively. Western Australia has dealt with *Ellis* via the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018.*[146] Other jurisdictions appear to be following suit.

The lesson to be learned from *Ellis* is that reliance on judgment-proofing defences by a VSO may lead to highly damaging publicity. It may also lead to legislative attempts to close the door upon the use of such structures.

Nevertheless, care must be taken with this case study. The claim in tort

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142. Catherine Armitage, "George Pell apologises to John Elllis [sic], but can't look at him" (27 March 2014), online: *The Sydney Morning Herald* <www.smh.com.au/nsw/george-pell-apologises-to-john-elllis-but-cant-look-at-him-20140327-35lo9.html>. See generally BBC, "George Pell: Cardinal found guilty of sexual offences in Australia" (26 February 2019), online: *BBC* <bbc.co.uk/news/world-australia-47366113> (Cardinal Pell has now himself been convicted of sex offences).
143. Austl, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (Royal Commission 2017) at Recommendation 94; Austl, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission 2015) at 496-509.
144. (Vic), 2018/18.
145. (NSW), 2018/56.
146. (WA), 2018/13.

related to institutional child abuse, and this is very different to ordinary negligence. The values of Christianity and the Roman Catholic Church, and the expected conduct of its adherents, may also have influenced the public perception of the way in which the litigation was conducted. A secular organisation, such as the Scouts, may be perceived in a different light. Further, even when the Roman Catholic Church has defended such claims on other grounds — for instance, on points relating to the scope of vicarious liability — it has still faced negative publicity for its actions. Because of the size and scope of the voluntary sector, there is a plurality in the nature of the services that are offered, the species of tort, and the conduct underlying the tort. This makes the issue of public relations and public perception complex. A person who strains their wrist whilst spinning a tombola drum at a village fete is in a very different class to the victims of systematic institutional abuse of minors.

In other cases, the use of judgment-proofing mechanisms to attempt to defend assets from claims has generated public support. Whilst not a tort case, an attempt was made to protect the Wedgwood collection and museum from claims relating to group pension liabilities.[147] In this case, the failed attempt to assert the existence of a structure (separate incorporation) designed to protect assets against claims generated considerable public support and inspired a successful public campaign, resulting in The Heritage Lottery Fund, The Art Fund, as well as other trusts, saving the museum's collection for the nation.[148] Further with the *Christian Brothers* litigation the attempt to defend the assets of the schools in British Columbia was politically popular, particularly since the abuse occurred in a province thousands of miles away, and was

147. See *Wedgwood*, *supra* note 81. *Pensions Act*, *supra* note 127, s 75 bypassed the mechanism of separate incorporation, which was used to protect the Wedgwood collection and museum from potential adverse trading conditions. The museum, as last man standing, had to foot the bill of the entire Wedgwood Group's pension deficit.

148. BBC, "Wedgwood collection 'saved for nation'" (3 October 2014), online: *BBC* <www.bbc.co.uk/news/uk-england-stoke-staffordshire-29460282>.

entirely unconnected with the schools.[149] Indeed, after the decision was handed down by the Court of Appeal of Ontario, the Legislative Assembly of British Columbia expressly legislated against the decision.[150] These examples demonstrate that whilst the use of judgment-proofing structures has the potential to damage the reputation of the sector, not all such uses will necessarily do so.

C. Reduced Volunteering?

Volunteers are the life-blood of the voluntary sector. If a judgment-proof VSO cannot be viably sued for its wrongs or the wrongs of its 'agents', then if victims are not to go uncompensated, claims, which might otherwise have been brought against the VSO, may instead be brought against its volunteers.

Whilst many volunteers will not have sufficient assets or insurance to meet a non-driving-related tort claim, and even where they do, it may be more difficult to sue them when compared to organisations,[151] volunteers may place their own assets at risk when they volunteer for judgment-proof VSOs. Judgment-proofing would also protect VSOs against their own volunteers' claims where they are injured through the organisation's negligence.

Whilst claims against volunteers may be rare, particularly where they are uninsured, English law does not prevent such claims, and VSO judgment-proofing encourages it. We have seen above that there is evidence that tort law deters volunteering. Judgment-proofing increases tort's deterrent effect on volunteers and increases the cost of volunteering.

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149. Paul Schratz, "Long Ago, Far Away Abuse May Close Canadian Schools" (21 July 2002), online: *National Catholic Register* <www.ncregister.com/site/article/long_ago_far_away_abuse_may_close_canadian_schools/>.
150. *Charitable Purposes Preservation Act*, SBC 2004, c 59. This Act, whilst retrospective, did not affect the settlement with the liquidator in relation to the schools per subsection 6(2).
151. See Robert Heidt, "The Unappreciated Importance, For Small Business Defendants, Of The Duty To Settle" (2010) 62 Maine Law Review 75 at 92; Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35:2 Law & Society Review 275.

This may over-deter volunteers[152] and lead to a reduction in volunteering or a diversion of volunteer efforts away from judgment-proof VSOs towards VSOs which are not judgment-proof. Whilst volunteers may be able to spread this cost through personal insurance policies, these premiums still represent an increase in volunteering costs and formality, which points towards reduced volunteering.

VSOs with a reputation for judgment-proofing may lose volunteers, a relevant factor in deciding whether or not to adopt judgment-proofing. However, since many volunteers will not be aware of the insurance and judgment-proofing status of the VSO for which they volunteer, there is a risk that high profile incidents of judgment-proofing resulting in individual volunteers being sued in a personal capacity, may damage the reputation of the whole sector, and impact volunteering levels across the sector.

X. Conclusion

Whilst some scholars have doubted the existence of judgment-proofing, this article demonstrates that judgment-proofing is a real phenomenon, particularly in high risk industries. Judgment-proofing may also be tempting to VSOs concerned with insurance costs, or protecting assets from large claims, or branching out into new and potentially hazardous areas of services. It is possible to create a judgment-proof structure within the voluntary sector by using charitable trusts and/or corporate group structuring. Such devices are used to generate a structure whereby the risk-generating elements of a VSO hold insufficient assets to meet claims. The VSO makes itself a man of straw whilst continuing to have access to and use of the assets, allowing it to have its cake and eat it.

Although using judgment-proofing is not fool-proof, and may face legal challenges, it may provide significant asset protection and discourage claims, allowing the organisation to externalise its accident costs. This will leave the loss to fall on victims or individual volunteers. Nevertheless, the widespread use of judgment-proofing mechanisms by VSOs may create

152. Gilles, *supra* note 62 at 682.

pressure on legislatures and the courts to generate new legal solutions to get around such structures in egregious cases; for instance, by expanding direct duties of care, expanding the law of vicarious liability, re-writing the law of trusts (as in Ontario), or the creation of special legislative mechanisms (as in Australia).

There are also a number of sector-specific concerns in relation to judgment-proofing. The use of judgment-proofing to evade paying for liabilities can generate reputational concerns for VSOs. Whilst the use of such mechanisms is not universally condemned, the use of such structures to evade paying for tort liabilities has generated negative commentary in some cases. Such structures may threaten the reputation of the sector, which, as well as impacting on donations and volunteering levels, may impact the public role and prominence of the sector, and its ability to speak truth to power. Public discourse is enriched by the sector's ability to draw upon its unique knowledge and experience. Maintaining the sector's reputation is important in facilitating its ability to meet demands for public goods and its ability to contribute towards government accountability.

Whilst VSOs may construct organisational protection from tort through judgment-proofing mechanisms, it comes at a cost both for the VSO itself (above and beyond the costs of constructing and administering the judgment-proofing scheme), and for the sector as a whole.

Donor Advised Funds: What Can North America Learn From the Australian Approach?

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Charity law is a public and private hybrid that seeks to balance donor intent with the achievement of public benefit. In supporting that balance, regulatory frameworks typically intrude less on donor intent when the recipient charity is a publicly controlled charity, rather than a private foundation. This approach is challenged by the rise of donor advised funds — public charity intermediaries that behave in many ways like privately controlled foundations. The rise has been particularly marked in the United States, but is also apparent in Canada and Australia. Pertinently, while Australia took many years to regulate private foundations, it shortly afterwards also introduced specific rules for public charitable foundations. This article therefore examines whether the United States and Canada can draw guidance from Australia's experience in dealing with donor advised funds, especially in relation to delay in distributions and conflicts of interest.

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I. Introduction

Charity law is a hybrid of private and public law.[1] Unlike private law's starting position of freedom, public law typically requires that actions be justified by some positive law, and so unfettered donor freedom is not an appropriate frame of reference.[2] After all, charity law itself comprises a framework of rights and obligations that a donor/creator selects when creating a charity. That framework reflects a tension between respecting donor and charity controller intent and overriding donor/

1. See generally Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016).
2. *Ibid* at 11.

charity controller intent to achieve a greater or fairer public benefit.[3] The framework of rights and obligations is usually more supportive of donors when it is a publicly controlled charity to which they donate, rather than a privately controlled charity. However, recent times have seen the rise, in the United States, Canada, Australia and other jurisdictions of public charities acting like private foundations, such as donor advised funds ("DAF"s).

This article examines the issue of privately influenced public charities in the form of DAF sponsors. It does so by asking what the United States and Canada can learn from Australia's approach to dealing with public charity philanthropic intermediaries. Although Australia took more than 50 years longer than the United States to introduce a specific regulatory regime for private charitable foundations, it relatively swiftly followed this step with rules for public charity intermediaries modelled on those applying to private foundations.

To identify focal areas in which the Australian rules might help, as well as limits based on differing circumstances, Part II sketches the current nature and trajectory of DAFs in the United States and Canada and examines key problems that have emerged. Part III describes the Australian regulation of public charity intermediaries and of DAFs in particular. Aspects of the Australian regime are then considered in Part IV as potential methods to address the key issues of delay in distributions and achievement of public benefit, and of conflicts of interest. Part V concludes.

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3. In the context of *cy-près*, see Mark Ascher, Austin Wakeman Scott & William Fratcher, *Scott and Ascher on Trusts*, 5d (New York: Aspen Publishers, 2006) at §§ 39.5, 39.5.4; UK, *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, Cmd 8710 (1952) at 16-7, 23-28, 75 (Lord Nathan). More broadly, see *ibid* at 12-13.

II. Donor Advised Funds

A DAF is a named management account within a charitable foundation (usually a public charitable trust or corporation).[4] A donor makes a gift of property to the charitable foundation and typically obtains a tax deduction or credit. While the donor retains no ownership interest in the property transferred and has no legal power to direct the charitable foundation's dealings with the property, the charitable foundation provides administrative and investment assistance to the donor and gives the donor advisory privileges about how it should deal with the donated property.[5] The charitable foundation thus often acts in accordance with the donor's wishes about when and to which entities it distributes the donated property. The commercial imperative for charitable foundations to act in accordance with donors' wishes is emphasised where financial services firms provide DAF services as part of their wealth management operations, which is the case for some of the largest DAF sponsors such as Fidelity Charitable. Indeed, the growth of DAF sponsors, especially those affiliated with financial services firms, has surged in the United States. Drew Lindsay in the Chronicle of Philanthropy found that in 2017, three of the top five DAF providers were financial services firm affiliates and the largest, Fidelity Charitable, raised more than double

4. As to the characteristics of DAFs, see especially Canada, Senate, Report of the Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* (June 2019), (Chair: The Honourable Terry M Mercer) at 109-13, online (pdf): *Senate of Canada* <sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf> [*Catalyst for Change*]; US, Internal Revenue Service, "Donor Advised Funds" (26 March 2019), online: *Internal Revenue Service* <www.irs.gov/charities-non-profits/charitable-organizations/donor-advised-funds>; Michael J Hussey, "Avoiding Misuse of Donor Advised Funds" (2010) 58:1 Cleveland State Law Review 59 at 60-61, 64-65; see also *Internal Revenue Code*, 26 USC, § 4966(d)(2) (2019) [*IRC*].

5. *Catalyst for Change*, *supra* note 4; Internal Revenue Service, *ibid*.

the non-DAF top fundraising charity.[6] United States DAF sponsors held over USD $110 billion of assets in 2017, which was around one-eighth of private foundation assets,[7] but as just noted, DAF sponsors are some of the fastest growing charities in the country. Financial service linked DAFs also hold a material, albeit lower, proportion of DAF assets in Canada.[8]

Nevertheless, as demonstrated by the *Fairbairn v Fidelity Charitable* lawsuit,[9] donors have less control over a DAF than over a private foundation of which they are the trustee or a director of the trustee company. Further, not all DAF providers are linked to financial services firms. A number of large national providers are independent of financial services firms, such as the National Philanthropic Trust and the National Christian Foundation.[10] Community foundations, which are charities with a purpose focused on a particular geographic region, are also prominent. The Silicon Valley Community Foundation raises a comparable amount to the large financial services DAF providers,[11] although many community foundations are much smaller. In Canada,

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6. Drew Lindsay, "America's Favorite Charities 2018" (2018) 31:1 Chronicle of Philanthropy 9. Fidelity Charitable raised USD $6.8 billion, Schwab Charitable USD $3.1 billion and Vanguard Charitable USD $1.5 billion. The largest non-DAF fundraiser, United Way, raised USD $3.26 billion, followed by the Salvation Army with USD $1.47 billion.
7. National Philanthropic Trust, "2018 Donor-Advised Fund Report" (2018) at 12-13, online: *National Philanthropic Trust* <www.nptrust.org/reports/daf-report/>.
8. In the Canadian context, see Canada, Senate, Special Committee on the Charitable Sector, *Minutes of Proceedings*, 42:1, No 6 (18 September 2018) at 80 (Keith Sjogren, Strategic Insight), online (pdf): <sencanada.ca/Content/SEN/Committee/421/cssb/pdf/06issue.pdf> [Sjogren].
9. *Fairbairn v Fidelity Investments Charitable Gift Fund*, 2018 WL 6199684 (ND Cal 2018) [*Fairbairn*]. Paul Sullivan, "Lawsuit Could Cool a Fast-Growing Way of Giving to Charities" (31 May 2019), online: *New York Times* <www.nytimes.com/2019/05/31/your-money/donor-advised-funds-charitable-giving-lawsuit.html>. The dispute relates to the speed with which Fidelity Charitable disposed of donated shares.
10. Lindsay, *supra* note 6.
11. *Ibid*. There was USD $1.4 billion raised in 2017.

community foundations hold around half of all DAF assets.[12] In addition, some non-philanthropic intermediaries, such as universities, also provide DAFs alongside their various other activities; they are commonly labelled "single-issue charities".[13] Nevertheless, viewed on its own, every DAF management account is effectively a philanthropic intermediary.

A. The Characteristics of DAFs

Roger Colinvaux has written incisively on DAFs, examining them as alternatives to private foundations, as public charity substitutes and as instigators of new donations.[14] Each of these perspectives is valid, albeit the increase in the size of DAFs seems to be far outstripping their likely impact in generating new donations.[15] Further, the public charity substitution effect can be viewed as a temporal substitution. Colinvaux focuses on whether gifts are made to DAFs in substitution for other charities, an outcome that Colinvaux characterises as more prominent for pure fundraising DAF sponsors such as Fidelity Charitable, than for single-issue charities or community foundations.[16] However, all DAFs involve some level of temporal deferral because they are intermediaries

12. Sjogren, *supra* note 8 at 80.
13. National Philanthropic Trust, *supra* note 7 at 40-46.
14. Roger Colinvaux, "Donor Advised Funds: Charitable Spending Vehicles for 21st Century Philanthropy" (2017) 92:1 Washington Law Review 39 [Colinvaux, "Donor Advised Funds"].
15. Compare *ibid* at 60.
16. *Ibid* at 54-58.

— they add an extra step before funds can be deployed more actively.[17] Of course, charities that are not foundations do not always immediately and directly apply their assets to their purposes. Nevertheless, adding an extra step would mean a slower application of assets to purposes when compared to direct donation to the same ultimate recipient, unless the DAF can speed up the process somehow, for instance by faster and better realisation of non-liquid assets.

This article focuses on DAFs as quasi-private foundation substitutes and as temporal substitutes and examines their advantages and disadvantages from that perspective. However, it does so without losing sight of the fact that DAFs potentially serve a role in raising the overall level of donations to charity, such that the advantages of DAFs should not be unduly eliminated.

17. *Ibid* at 55-58. Colinvaux does discuss deferral, but does so in the context of national DAF sponsor organisations like Fidelity Charitable. I think, as Adam Parachin appears to do, that it is not possible to characterise intermediaries such as national DAF sponsor organisations in the way that Colinvaux does as "not hav[ing] an independent substantive charitable purpose or goal" (*ibid* at 55). Rather, all charities have an overarching purpose and must select (different) means to achieve that purpose and those means are characterized as charitable or not by reference to the overarching purpose. See Canada, Senate, *Proceedings of the Special Senate Committee on the Charitable Sector Transcript*, 42:1, No 14 (8 April 2019) (Adam Parachin, Osgoode Hall Law School), online: *Senate of Canada* <sencanada.ca/en/Content/SEN/Committee/421/cssb/14ev-54665-e>. The issue of deferral is equally pertinent for all charities, although some charities raise particular risks.

B. Advantages

DAFs are administratively simpler and less costly than establishing a separate private foundation.[18] Yet they still permit a high degree of the flexibility, control and donor (and the donor's family) involvement in decisions about the use of DAF funds.[19] In the United States and Canada, there are also more restrictive rules that reduce the deduction to a private foundation in some circumstances, but which do not apply to donations to DAFs, especially non-cash gifts.[20] Indeed, many DAFs, especially national sponsor organisations, claim that they are more experienced with handling non-cash gifts and thus achieve lower transaction costs.[21] United States private foundations are also subject to excise taxes on investment income and a payout requirement, whereas DAFs are not.[22] Additionally, from a tax administrator's perspective, there are cost advantages in regulating a smaller number of large DAF

18. *Catalyst for Change*, *supra* note 4 at 109-10; Charlotte Cloutier, "Donor-Advised Funds in the US: Controversy and Debate" (2005) 19:2 The Philanthropist 85 at 89; Victoria B Bjorklund, "The Rise of Donor-Advised Funds: Why Congress Should Not Respond" (Paper delivered at the Boston College Law School Forum on Philanthropy and the Public Good Conference on The Rise of Donor-Advised Funds: Should Congress Respond?, Washington, DC, 23 October 2015) at 71, online: *Digital Commons* <lawdigitalcommons.bc.edu/philanthropy-forum/donoradvised2015/papers/6/>; Janet Bandera, "Summarizing the Differences Between Private Foundations and Donor-Advised Funds Helps Determine Which Approach Works Best for Donors and Donor Families" (2008) 25:4 Journal of Taxation of Investments 90.
19. Cloutier, *ibid* at 88-89.
20. See *e.g.* Colinvaux, "Donor Advised Funds", *supra* note 14 at 52-53; Mary C Hester, "Donor-Advised Funds: When Are They the Best Choice for Charitably Minded Clients?" (2008) 108:1 Journal of Taxation 330 at 334; Mark Gillen, Lionel Smith & Donovan Waters, *Waters' Law of Trusts in Canada*, 4d (Toronto: Thomson Reuters, 2012) at 14; *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 38 [*ITA*]. The contrasting treatment of public and private foundations is more marked in the United States.
21. Hester, *ibid* at 333.
22. *IRC*, *supra* note 4, §§ 4940, 4942.

providers compared with a large number of private foundations.[23]

The stellar growth of DAFs indicates that these advantages are highly valued by donors. However, as noted above, that growth appears to far outpace the other potential advantage of DAFs — increasing overall levels of giving.

C. Disadvantages

The literature on DAFs highlights three key disadvantages: (1) delay in the distribution of assets to "doing" charities and in the achievement of public benefit; (2) reduced transparency and accountability; and (3) heightened potential for conflicts of interest.

1. Delay

A number of commentators and members of Parliament in Canada and the United States have noted concerns that there can be too much delay between the time when a donation is made to a DAF and the time when those donated funds are distributed to a charity to use in carrying out its purpose.[24] Typically, this is on the basis that the recipient charity will use the funds to achieve public benefit, whereas the funds serve only a warehousing purpose in a DAF.

Delay is partially enabled by the lack of a clear minimum distribution rule for United States public charitable foundations and the application of a low, 3.5%, minimum disbursement quota for all

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23. Bjorklund, *supra* note 18 at 72.
24. *Catalyst for Change*, *supra* note 4 at 110-11; Howard Husock, "Does Dave Camp Hate Mark Zuckerberg? The Surprising Attack On Donor Advised Funds" (28 March 2014), online: *Forbes* <www.forbes.com/sites/howardhusock/2014/03/28/does-dave-camp-hate-mark-zuckerberg-the-surprising-attack-on-donor-advised-funds/#315e8c6746b8>; Colinvaux, "Donor Advised Funds", *supra* note 14 at 67-71; Ray Madoff, "5 Myths About Payout Rules for Donor-Advised Funds" (13 January 2014), online (blog): *The Chronicle of Philanthropy* <www.philanthropy.com/article/5-Myths-About-Payout-Rules-for/153809>; Brian Galle, "Pay it Forward? Law and the Problem of Restricted-Spending Philanthropy" (2016) 93:5 Washington University Law Review 1143 at 1198-1200.

registered charities in Canada.[25] United States public charities such as DAF providers are subject to an 'operational' test due to the wording of *IRC* paragraphs 501(c)(3) and 170(c)(2)(B), which the Internal Revenue Service ("IRS") has interpreted for philanthropic intermediaries as requiring the organisation to distribute assets "commensurate with its financial resources".[26] However, the application of this test depends very much on the circumstances and whether the charity has a good reason for retaining assets, and it appears that the IRS's main concern is with charitable assets being consumed in administrative expenses or otherwise used for a private purpose.[27] This test is clearly quite woolly. Thus, while some commentators have suggested that it will require a certain degree of distributions from DAFs,[28] given that the purpose of many DAF sponsors is to support charitable organisations by means of fundraising through the provision of flexible donor accounts, there seem to be good reasons for DAFs to distribute at the rate suggested by donors unless those rates are extremely slow or the fees charged are extremely high.[29] Additionally, it appears that most large United States DAF providers have adopted model policies on 'timing, distributions and inactivity' based on

25. *IRC*, *supra* note 4, § 4942. The United States imposes a 5% distribution requirement on the net investment assets of most private foundations. In Canada, registered charities must expend or distribute 3.5% of their property (less some liabilities), but excluding property directly used in carrying on charitable activities or administration and with some ability to carry forwards and backwards credits for excess expenditure: see *ITA*, *supra* note 20, ss 149.1(2)(b), (3)(b), (4)(b).
26. US, Internal Revenue Service, *Exempt Organizations Continuing Professional Education Technical Instruction Program for Fiscal Year 1989, Special Emphasis Program: Charitable Fund-raising* (1989) at 13-6, online (pdf): *IRS* <www.irs.gov/pub/irs-tege/eotopicm89.pdf>.
27. *Ibid* at 14-5.
28. See *e.g.* Colinvaux, "Donor Advised Funds", *supra* note 14 at 63-64.
29. An analogy might be drawn here to United States "reasonableness" of accumulation cases, which consider when accumulation is "unreasonable, unnecessary and to the public injury": Ascher, Scott & Fratcher, *supra* note 3 at § 39.7.9.

initial negotiations with the IRS.[30] Nevertheless, individual DAFs are not subject to any hard disbursement rule. Thus while it appears that overall payout rates are far above these minima,[31] there have been suggestions that a substantial minority of DAF accounts make no distributions at

30. Bjorklund, *supra* note 18 at 69-70. See also Hussey, *supra* note 4 at 74-75 (noting that the required rate of distributions under some policies is miniscule).

31. National Philanthropic Trust, *supra* note 7 at 18. For instance, in the United States, the overall payout rate has been calculated as being above 20% for every year from 2013 to 2017. The payout rate is calculated as distributions during the year, divided by assets at the start of the relevant year. This approach is preferred to other payout calculations as it more closely approximates the Canadian, United States and Australian approach of using the previous year's (or several years') assets to calculate the required distribution. In Canada, payout rates for DAF sponsors have been estimated at around 12% to 17% on average: Sjogren, *supra* note 8 at 91; Strategic Insight, "Donor-advised Funds: The Intersection of Philanthropy and Wealth Management" (2018) at 41, online (pdf): *Investor Economics* <www.investoreconomics.com/reports/donor-advised-funds-the-intersection-of-philanthropy-and-wealth-management>.

all for long periods.[32] There is some empirical evidence to support this.[33] There have also been suggestions that payout rates are dropping (and will continue to drop) as DAFs mature.[34]

Delay is also enabled in the United States by the use of DAFs as recipients of private foundation payouts, which satisfies the private foundation 5% payout rule, but still leaves funds in an intermediary vehicle.[35] Canadian private foundations may likewise meet their 3.5% disbursement quota by distributing to DAFs, as DAFs should generally constitute 'qualified donees', and these arrangements would not typically fall foul of the non-arm's length inter-charity gift rules in section 188.1(12) of the *ITA*.[36] Further, DAFs may distribute to other DAFs in the United

32. Philip Hackney & Brian Mittendorf, "Donor-advised Funds: Charities with Benefits" (6 April 2017), online: *The Conversation* <theconversation.com/donor-advised-funds-charities-with-benefits-74516>; Sjogren, *supra* note 8 at 91.

33. Paul Arnsberger, "Donor-Advised Funds: An Overview Using IRS Data" (Paper delivered at the Boston College Law School Forum on Philanthropy and the Public Good Conference on The Rise of Donor-Advised Funds: Should Congress Respond?, Washington, DC, 23 October 2015) 61 at 62, online: *Digital Commons* <lawdigitalcommons.bc.edu/philanthropy-forum/donoradvised2015/papers/> (while Arnsberger's data includes a large number of very small DAFs, which may skew the results, it suggests that in the United States in 2012, around 22% of DAF sponsors paid out no grants at all); Ellen Steele & Eugene Steuerle "Discerning the True Policy Debate over Donor-Advised Funds" (October 2015) at 6-7, online (pdf): *Urban Institute* <www.urban.org/sites/default/files/publication/72241/2000481-Discerning-the-True-Policy-Debate-over-Donor-Advised-Funds.pdf> (citing a Vanguard Charitable employee that 30% of DAFs do not pay an amount out in a given year and a Silicon Valley Community Foundation employee that 4% of DAFs over USD $1million did not make a payout).

34. See *e.g.* Galle, *supra* note 24 at 1199.

35. The Economist, "Give and Take — A Philanthropic Boom: 'Donor-Advised Funds'" (23 March 2017), online: *The Economist* <www.economist.com/finance-and-economics/2017/03/23/a-philanthropic-boom-donor-advised-funds>.

36. *ITA*, *supra* note 20. The provisions impose a penalty. Additionally, paragraph 149.1(4.1)(d) could be used to revoke charity status of the DAF recipient.

States and Canada (satisfying the Canadian 3.5% disbursement quota).[37] There are additional anti-avoidance rules in Canada that could be used to revoke charity status or impose administrative penalties where a charity has entered into a transaction (including a gift to another charity) "and it may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities".[38] Nevertheless, views expressed to the Special Senate Committee on the Charitable Sector indicate that such transfers occur.[39] There is also evidence in the United States context to suggest that inter-DAF transfers are material.[40]

Delay also occurs in part due to conflicts of interest that are particularly pertinent for DAF providers linked to financial service providers, as discussed below.

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37. In the Canadian context, see Canada, Senate, Special Committee on the Charitable Sector, *Minutes of Proceedings*, 42:1, No 6 (18 September 2018) at 102 (Kevin McCort, President and Chief Executive Officer, Vancouver Foundation), online (pdf): <sencanada.ca/Content/SEN/Committee/421/cssb/pdf/06issue.pdf> [McCort].
38. *ITA*, *supra* note 20, at ss 149.1(4.1)(a), 188.1(11). For a discussion of the provisions, see Theresa Man, "Disbursement Quota Reform: The Ins and Outs of What You Need to Know" (Paper delivered at the National Charity Law Symposium, Toronto, 6 May 2011) at 14-6, online (pdf): *Canadian Bar Association* <www.cba.org/cba/cle/PDF/CHAR11_Man_Paper.pdf>.
39. McCort, *supra* note 37.
40. In the United States, see *The Economist*, *supra* note 35 (for the 2015 and 2016 years for several large DAFs, the first and third largest recipients of DAF distributions were DAFs); H Daniel Heist & Danielle Vance-McMullen, "Understanding Donor-Advised Funds: How Grants Flow During Recessions" (2019) 48:5 *Nonprofit and Voluntary Sector Quarterly* 1066 at 1069, citing Giving USA, "Giving USA Special Report: The Data on Donor-Advised Funds – New Insights You Need to Know" (28 February 2018), online: *Giving USA* <givingusa.org/just-released-special-report-the-data-on-donor-advised-funds-new-insights-you-need-to-know/>.

2. Conflicts of Interest

Conflicts of interest have also been cited in relation to DAFs. As identified in Part II, DAF providers offer administration services to donors, for which they obtain a fee, which raises a potential conflict between the DAF provider's interests and those of the donor. In addition, a number of the largest DAF providers are linked to financial services firms that provide investment services, again for a fee.[41] Desire to obtain fee income, including for affiliated entities, can result in conflict between the DAF provider's mission and duties and the interests of its for-profit affiliate. Often the fees are based on the amount of assets under investment, which can create a disincentive for the DAF provider to distribute too quickly.[42] There are suggestions in the *Fairbairn* litigation that Fidelity Charitable's desire to increase the investment assets of its affiliated entity Fidelity Investments before the end of the financial year motivated the swift sale of Energous shares.[43] There have also been suggestions that DAF providers adopt behavioural 'nudges' to influence donors to distribute less.[44]

While there is clearly potential for conflicts of interest for DAF providers in relation to their own administration service fees, a legal conflict is less clear cut for a DAF provider where its commercial affiliate earns investment fees. It is not clear that DAF providers, or their employees, will always have a financial interest in increasing its affiliate's fees. Nor would there necessarily be any duty owed to the commercial affiliate that would conflict with the DAF's duties to donors and to its

41. As to fees, see *e.g.* Hester, *supra* note 20 at 344.
42. Compare Sjogren, *supra* note 8 at 81; Hussey, *supra* note 4 at 75; Colinvaux, "Donor Advised Funds", *supra* note 14 at 57; The Economist, *supra* note 35.
43. Sullivan, *supra* note 9.
44. See *e.g.* Ann Charles Watts, "The Wolf in Charity's Clothing: Behavioural Economics and the Case for Donor-Advised Fund Reform" (2018) 43:3 University of Dayton Law Review 417 at 438-39.

charitable purpose.[45] Nevertheless, there may be an unwritten cultural and institutional bias for DAF sponsors established by a financial services firm to promote the interests of that firm.[46]

3. Transparency and Accountability

While private foundations must typically file separate returns with tax authorities detailing their major donors, assets and distributions, public charitable foundations do not.[47] Instead they must identify assets and distributions at the DAF level, but only at the whole of foundation level, and do not have to publicly disclose donors.[48] This minimal disclosure may hamper the formation of relationships that better inform donors about the effectiveness of their giving.[49] Further, to the extent that private foundations funnel distributions to DAFs, they may be able to effectively avoid the accountability rules for private foundations that allow the public to determine the ultimate destination of donations.[50]

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45. It is likely that DAF sponsors would not be required to use the investment services of their affiliate, as the IRS has applied Internal Revenue, 26 CFR subparagraphs 1.501(c)(3)-1(d)(1) (2001) [26 CFR] to preclude subparagraph 501(c)(3) status for charities that are required to use the services of a particular commercial entity: see Colinvaux, "Donor Advised Funds", *supra* note 14 at 66.
46. Compare Colinvaux, "Donor Advised Funds", *ibid* at 66.
47. Terry LaBant, "Charitable Giving: Beyond the Checkbook" (2018) 128:1 Journal of Taxation 36 at 38; Steele & Steuerle, *supra* note 33 at 2.
48. *Ibid*.
49. Compare Watts, *supra* note 44 at 440-41.
50. See *e.g.* Roger Colinvaux, "Fixing Philanthropy: A Vision for Charitable Giving and Reform" (2019) 162:9 Tax Notes 1007 at 1011; Suzanne Goldenberg, "Secret Funding Helped Build Vast Network of Climate Denial Thinktanks" (15 February 2013), online: *The Guardian* <www.theguardian.com/environment/2013/feb/14/funding-climate-change-denial-thinktanks-network>.

III. The Australian Context

The following section outlines the broad regulatory regime for Australian charities (Part III.A), as well as the more specific rules that apply to donation concessions for ancillary fund philanthropic intermediaries (Part III.B). Part III.C then identifies the way that DAFs arise in the Australian context as part of public ancillary funds and notes the contours of Australian DAFs.

A. Regulation of the Charity Sector

Unlike a number of other federations (such as the United States and Canada), Australia relies on a national charities commission rather than its federal tax authority to act as the principal regulator. Australia's first independent national charity-focused regulator (the Australian Charities and Not-for-profits Commission, or "ACNC")[51] was created in 2012 and, at the same time, Australia adopted a comprehensive statutory definition of 'charity' at the federal, but not state, level.[52] Becoming a registered charity with the ACNC is a necessary precondition to unlocking the various federal tax concessions, such as income tax exemption.[53] Thus, the ACNC determines charity status and registers eligible entities;[54] monitors and enforces registered charities' obligations;[55] and maintains a public register containing information on registered charities.[56] Registered charities are subject to regular financial and non-financial reporting, and the ACNC has significant additional information gathering and monitoring powers.[57] Registered charities must also comply with governance standards that enshrine minimum outcomes in respect of the

51. *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/168 [*ACNC Act*].
52. *Charities Act 2013* (Cth), 2013/100 (Austl).
53. See, *e.g. Income Tax Assessment Act 1997* (Cth), 1997/38 (Austl), s 50-5 [*ITA 97*].
54. *ACNC Act*, *supra* note 51, s 15-5(2), part 2-1.
55. *Ibid*, s 15-5(2)(b)(ii), ch 3-4.
56. *Ibid*, part 2-2.
57. *Ibid*, part 4-1, division 60.

practices and procedures adopted by an entity to govern its operations.[58] Charities are also potentially subject at both the federal and state level to a range of additional regulators, including the federal Commissioner of Taxation.[59] However, prior to the introduction of the ACNC, there had been various concerns about the practical enforcement of charity controller duties by the relevant regulators. For instance, one concern was that the loss of tax concessions was frequently too punitive (and often harmful to potential benefit recipients) to be a realistic option for the Commissioner of Taxation and that the charity sector was not a high priority for the national corporate regulator given its many other responsibilities.[60] A further concern was that state and territory attorneys-general and incorporated association regulators lacked sufficient resources and information to effectively pursue breaches and that court intervention, where required, imposed onerous procedural burdens.[61]

B. Ancillary Funds

In contrast to the situation in Canada and the United States, donation concessions do not generally follow charity status in Australia. Instead, the concessions are provided for various classes of entities or by way of specific listing in the legislation. Deductible gift recipient ("DGR") status means that donors can claim an income tax deduction for gifts

58. *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth), 2013/124, s 45.1.

59. Austl, Treasury, *Scoping Study for a National Not-for-profit Regulator: Final Report* (2011) at 63, online (pdf): *Archive* <web.archive.org/web/20190522155200/archive.treasury.gov.au/documents/2054/PDF/20110706%20-%20Final%20Report%20-%20Scoping%20Study.pdf >.

60. *Ibid* at 66; Ian Murray, "Fierce Extremes: Will Tax Endorsement Stymie More Nuanced Enforcement by the Australian Charities and Not-for-profits Commission?" (2013) 15:2 Journal of Australian Taxation 233 at 252-55.

61. Austl, Treasury, *Scoping Study for a National Not-for-profit Regulator*, Consultation Paper (2011) at 10-11, online (pdf): *Australian Treasury* <www.treasury.gov.au/sites/default/files/2019-03/Scoping_Study_Report_Consultation_Paper.pdf>.

or contributions, provided certain other integrity criteria are satisfied.[62] There is no cap on the amount of the deduction. Non-cash gifts can also be made and provided integrity rules are satisfied, and minimum value thresholds reached, the deduction is for the value of the property.[63] A gift of property, such as shares, would typically cause unrealised capital gains to be brought to account, without any exemption.[64]

There are numerous DGR categories, grouped in overarching classifications, some of which are (1) health; (2) education; (3) research; and (4) welfare and rights.[65] "Ancillary funds" are one class of DGR and are classified as either public or private ancillary funds.[66] As purpose trusts,[67] most public and private ancillary funds should be in the form of charitable trusts. The public/private distinction relates to the range of persons who may donate to and administer the trust, rather than the nature of those who benefit.[68] Ancillary funds are thus philanthropic intermediaries that can receive tax deductible donations and then distribute them to other DGRs, but they are not permitted to distribute to other ancillary funds.[69] However, if the Commissioner of Taxation approves, donors have the ability to port assets out of a private ancillary fund ("PAF") into the sub-fund of a public ancillary fund ("PuAF"), to port assets from one PuAF to another or to port assets out of a PuAF to

62. *ITA 97*, *supra* note 53, s 30-15(1).
63. *Ibid*.
64. The only gifts which result in both a deduction and a disregarding of unrealised capital gains are gifts of culturally significant items to Australian public galleries, museums and libraries: see *ibid* at s 30-15(1) items 4 and 5 shown in table, s 118-60(2). Testamentary bequests to DGRs do not generally qualify for a deduction, but can result in unrealised capital gains being disregarded, see s 118-60(1).
65. *ITA 97*, *supra* note 53, sub-division 30-B.
66. *Ibid*, s 30-15(1) item 2 shown in table.
67. *Ibid*, item 2 shown in table in s 30-15(1); *Taxation Administration Act 1953* (Cth), 1953/1 (Austl), schedule 1, ss 426-102(1), 426-105(1).
68. *Private Ancillary Fund Guidelines 2009* (Cth), 2009/1 (Austl), rules 14, 44-46 [*PAFG 2009*]; *Public Ancillary Fund Guidelines 2011* (Cth), 2011/1 (Austl), rules 14, 44-45 [*PAFG 2011*].
69. *ITA 97*, *supra* note 53, s 30-15(1) item 2 shown in table.

establish a PAF.[70] This may be to deal with generational change (so that PAF assets are then split into multiple smaller sub-funds for the next generation), or because the sub-fund has grown to the point that the administration costs of a PAF become less onerous.[71] An express reason for portability was also so that an ancillary fund donor can switch to a different trust manager with lower fees.[72]

To meet the description of a PuAF or PAF, the trustees must have agreed to comply with the public or private ancillary fund guidelines.[73] The guidelines are sets of regulations that impose a range of conditions, including that the ancillary fund must meet a minimum annual distribution requirement of 5% (for PAFs) or 4% (for PuAFs) of the market value of the fund's net assets as at the end of the preceding financial year.[74]

These minimum distribution rates were described, when first introduced in the context of PAFs, as "strik[ing] the right balance between ensuring resources flow to the charitable sector now, whilst also allowing PAFs to grow for the benefit of the sector in the future".[75] The rules are thus premised on an understanding that the distribution

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70. *PAFG 2009*, *supra* note 68, rule 51A; *PAFG 2011*, *supra* note 68, rule 50.
71. See *e.g.* David Ward, "Public Ancillary Funds (PuAF) Trustee Handbook" 2d (August 2016) at 18, online (pdf): *Australian Philanthropic Services* <australianphilanthropicservices.com.au/wp-content/uploads/2014/05/PA-PuAF-Handbook-2016.pdf>.
72. Compare Austl, Commonwealth, Assistant Treasurer, *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016* (Explanatory Statement) (2016) at 4.
73. *Taxation Administration Act 1953* (Cth), 1953/149 (Austl), vol 2, schedule 1, ss 426-102(1), 426-105(1).
74. *PAFG 2009*, *supra* note 68, rule 19; *PAFG 2011*, *supra* note 68, rule 19. Where the fund meets its expenses from its own assets or income, the minimum distribution is AUD $11,000 or 5% (AUD $8,800 or 4%: public ancillary funds), whichever is the greater.
75. Nick Sherry, Press Release of the Assistant Treasurer, No 6, "Important Philanthropic Reforms and Further Sector Consultation" (25 June 2009), online: *Archive* <web.archive.org/web/20091002174820/http:/ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/006.htm&pageID=003&min=njsa&Year=2009&DocType=0>.

of benefits between different generations is a relevant issue, while also enabling ancillary funds to endure.

A number of other rules in the guidelines may also help to address the potential for enhanced agency costs from the misapplication of funds, or mission drift. These include rules as to the trustees' degree of care, skill and diligence;[76] the need for an (private), or a majority of the (public), individual(s) involved in decision making of the fund to be persons with a degree of responsibility to the community;[77] exclusion from the control of a fund for persons convicted of indictable taxation offences;[78] limits on indemnification of trustees;[79] and disclosure of a range of related party transactions, along with restrictions on such transactions or related party benefits.[80]

In addition to the general reporting obligations for income tax exemption and charity registration, ancillary funds are also obliged to lodge annual information returns, including assets, liabilities, donations, income, expenses, and distributions.[81] This is somewhat similar to the Form 990 information required of DAF sponsors in the United States[82] and affords the Commissioner reasonable insight into ancillary fund accumulation. However, unlike the Form 990, Australian ancillary funds do not have to report on the number of DAF or sub-fund management accounts.[83]

Thus ancillary funds are analogous to charitable foundations in Canada, and PAFs play a similar role to private foundations in the United States context. PuAFs are frequently used to establish the Australian

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76. *PAFG 2009*, *supra* note 68, rule 13; *PAFG 2011*, *supra* note 68, rule 13.
77. *PAFG 2009*, *ibid*, rule 14; *PAFG 2011*, *ibid*, rule 14.
78. *PAFG 2009*, *ibid*, rule 16; *PAFG 2011*, *ibid*, rule 16.
79. *PAFG 2009*, *ibid*, rule 18; *PAFG 2011*, *ibid*, rule 18.
80. *PAFG* 2009, *ibid*, rules 26.2, 41-2; *PAFG 2011*, *ibid*, rules 26.2, 41-2.
81. See *e.g.* Australian Taxation Office, "Ancillary Fund Return 2019" (July 2019), online (pdf): *Australian Taxation Office* <www.ato.gov.au/assets/0/104/1909/2003/c35eab28-a707-47bd-a21c-c23d991027f0.pdf> [ATO, "Ancillary Fund Return 2019"].
82. Arnsberger, *supra* note 33 at 62; Heist & Vance-McMullen, *supra* note 40 at 5-6.
83. ATO, "Ancillary Fund Return 2019", *supra* note 81.

equivalent of DAFs being 'sub-funds'. However, before discussing sub-funds, it is important to put the size and growth of ancillary funds in context. Since their inception in 2001, the number of PAFs has grown fairly steadily each year to 1,426 as at 1 July 2016, holding assets of AUD $8.3 billion and with grants for the preceding year of AUD $457 million.[84] The number of PuAFs has remained relatively constant at 1,449 as of 1 July 2016, holding AUD $3.8 billion in assets and with grants for the preceding year of AUD $394 million.[85] It is clear that both the number of ancillary funds and the amounts held are much lower than in the United States. Nevertheless, despite being subject to minimum annual distribution requirements, PuAFs and PAFs have, in general, been building their net assets from additional donations and retained earnings.[86] A proposal in 2015 to reduce the minimum distribution requirements for ancillary funds resulted in angst about whether this would permit inappropriate retention of assets by ancillary funds,[87] and about whether the minimum distribution rate should instead be increased.[88]

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84. Australian Taxation Office, "Taxation Statistics 2015-16" (19 April 2018), online: *Australian Government* <data.gov.au/data/dataset/taxation-statistics-2015-16/resource/6a9547fc-2217-4f0b-a403-5117909f9ebb?inner_span=True> [ATO, "Taxation Statistics"].
85. *Ibid*.
86. *Ibid*; John McLeod, "The Support Report: The Changing Shape of Giving and the Significant Implications for Recipients" (June 2018) at 17-9, online (pdf): *JB Were* <www.jbwere.com.au/content/dam/jbwere/documents/JBWere-Support-Report-2018.pdf>.
87. Philanthropy Australia, "Philanthropy Australia Submission — Exposure draft of amendments to the Private Ancillary Fund Guidelines 2009 and the Public Ancillary Fund Guidelines 2011" (12 February 2016) at 4, online (pdf): *Australian Treasury* <treasury.gov.au/sites/default/files/2019-03/T289758-Philanthropy_Australia.pdf>.
88. See *e.g.* Community Council of Australia, "Private Ancillary Fund (PAF) and Public Ancillary Fund (PuAF) Amendment Guidelines 2015" (February 2016), online: *Community Council for Australia* <www.communitycouncil.com.au/content/private-ancillary-fund-paf-and-public-ancillary-fund-puaf-amendment-guidelines-2015>.

C. DAFs or "Sub-funds"

In the Australian context, DAFs are typically created as management accounts, called 'sub-funds', within a public ancillary fund.[89] Those public ancillary funds are often community foundations, affiliates of trustee or financial services entities, or form part of the fundraising component of more directly active charities such as universities.[90] The primary advantage is generally the reduced administration requirements and costs of a sub-fund within a PuAF compared with establishing and operating the donor's own PAF. The income tax donation distinctions are not as marked as in North America, although PuAFs are subject to a marginally lower required minimum distribution rate (discussed in Part III.B), which may make them slightly more attractive than PAFs. However, as in North America, establishing a sub-fund within a PuAF involves the donor ceding control and retaining only advisory rights.[91]

There is virtually no public reporting on Australian sub-funds, and the private and public reporting to and by the Australian Taxation Office and the ACNC noted in Part III.B does not require any identification of sub-funds. A survey of large Australian sub-fund providers nevertheless indicates that, based on their 2017-18 data, there are over 1,995 Australian sub-funds with assets of AUD $1 billion and which made distributions that year of AUD $57 million.[92] While the eight-fold size differential between sub-funds and PAFs mirrors that in the United States, the number of Australian sub-funds and PAFs are relatively equal, which differs from the large number of United States DAFs. The absolute numbers are also relatively small in Australia.

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89. McLeod, *supra* note 86 at 19; Krystian Seibert, "Snapshot of Sub-funds in Australia: CSI Swinburne Research Brief" (March 2019) at 1, online (pdf): *Centre for Social Impact Swinburne* <researchbank.swinburne.edu.au/file/68f5d8fa-1441-42b6-b73d-939e70a2e354/1/2019-seibert-snapshot_of_sub-funds.pdf>.
90. McLeod, *supra* note 86 at 19.
91. Seibert, *supra* note 89 at 1. See also Australian Taxation Office, Taxation Determination TD 2004/23.
92. Seibert, *ibid*.

IV. Aspects of the Australian Rules that May Help Address DAF Problems

The Australian regulation of philanthropic intermediaries provides useful ideas for dealing with the issues of deferred distributions/public benefit and conflicts of interest. However, when it comes to transparency and accountability, the United States rules seem more demanding than those in Australia. While this is an important area, especially to the extent that it bolsters market mechanisms for controlling conflicts of interest, the Australian approach does not seem particularly informative for North American readers and so is not explored further.

A. Dealing with Delay in Distributions/Public Benefit

1. Minimum Distribution Requirements

There have been calls, including initially by the United States Treasury, for DAF sponsors to be subject to a 5% minimum distribution rule akin to that for private foundations, whether applied generally or only to DAF assets.[93] Canada already has a lower 3.5% disbursement quota. However, the United States Treasury's 2011 report into DAFs noted divergent views on payout rules and indicated that it was premature to make any recommendation.[94] Commentators have more recently tended to focus on a timeframe within which a DAF provider must distribute each donation to a DAF. For instance, a five to ten year window, so as to provide a temporal link to the original donation, but also sufficiently

93. US, Treasury, *General Explanations of the Administration's Fiscal Year 2001 Revenue Proposals* (February 2000) at 106-07, online (pdf): *United States Treasury* <www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2001.pdf> [US Treasury, *General Explanations*].

94. US, Treasury, *Report to Congress on Supporting Organizations and Donor Advised Funds* (December 2011) at 81-82, online (pdf): *United States Treasury* <www.treasury.gov/resource-center/tax-policy/Documents/Report-Donor-Advised-Funds-2011.pdf>.

long to avoid disincentivising donors.[95] Analogously, it appears that the United States Treasury and the IRS are now considering whether distributions by private foundations to DAFs should be subject to time limits on further DAF distributions.[96] The chief reasons for this change of emphasis appear to be concerns that a 5% rate may act to reduce overall distribution levels and that it may also allow DAFs to last indefinitely. A focus on contributions potentially fits with Heist and Vance-McMullen's DAF empirical analysis which demonstrates that DAF distributions are influenced not just by the quantum of assets, but also by the level of annual contributions.[97]

Several commentators have also argued the relevant payout rule should apply at the individual DAF account level since it is the low distributing DAFs that present problems.[98] Tracking individual accounts, especially tracking timeframes for contributions, would add administration costs, detracting from a key advantage of DAFs.[99]

What guidance can be obtained from Australia? A 4% minimum distribution rate was imposed on PuAFs in 2012 along with a one-year transition period.[100] Prior to this, the Australian Taxation Office applied a much more vague test under the income tax endorsement provisions that required a charitable fund to be "applied for the purpose for which it was established",[101] which the Taxation Office interpreted to require some

95. Colinvaux, "Donor Advised Funds", *supra* note 14 at 67-68. Madoff has suggested a seven-year payout period: *supra* note 24. See also, Hussey's individual retirement account approach: *supra* note 4 at 88-91.
96. US, Internal Revenue Service, *Request for Comments on Application of Excise Taxes With Respect to Donor Advised Funds in Certain Situations*, Notice 2017-73 (18 December 2017), online (pdf): *Internal Revenue Services* <www.irs.gov/pub/irs-drop/n-17-73.pdf>.
97. Heist & Vance-McMullen, *supra* note 40 at 19.
98. Hussey, *supra* note 4 at 90-91; Colinvaux, "Donor Advised Funds", *supra* note 14 at 68-69.
99. See *e.g.* James A Borrasso, "Opening the Floodgates: Providing Liquidity to the Charitable Marketplace through Changes to Donor-Advised Funds" (2018) 18:4 University of Illinois Law Review 1533 at 1563-64.
100. *PAFG 2011*, *supra* note 68, rule 52.
101. *ITA 97*, *supra* note 53, s 50-60 (now repealed).

distributions, with the level depending on the circumstances.[102] Like the United States operational test, this meant a fairly flexible framework for PuAFs. While there are no figures for earlier years,[103] as a percentage of total assets at the start of the financial year, PuAF payout rates have gradually declined between 2012 and 2016 from 22% to 11%.[104] Despite this downward trend and although the underlying data has not been publicly released, it appears that average distribution rates for PuAFs remain closer to the 22% mark.[105] At the same time, the number of PuAFs has remained almost constant, while assets have more than doubled from AUD $1.7 billion to AUD $3.8 billion.[106] While the reduction in the distribution rate may thus partly reflect increased donations into ancillary funds — due to greater certainty following the implementation of the guidelines — it is lower than the overall payout rate for DAFs in the United States and suggests some caution in implementing a low payout rate. Nevertheless, payouts are significantly higher than the minimum distribution rate of 4%. It also appears that a number of PuAFs have been applying the minimum distribution requirements to *each* sub-fund (or DAF) that they manage.[107] Further, despite concerns about added complexity, it does not seem that a minimum distribution requirement

102. For a discussion of the Australian Taxation Office's approach, see Ian Murray, "Charity Accumulation: Interrogating the Conventional View on Tax Restraints" (2015) 37:4 Sydney Law Review 541 [Murray, "Charity Accumulation"].
103. Public ancillary fund data was not collected before 2012.
104. These number are based on distributions divided by assets at the start of the financial year. The figures are derived from ATO, "Taxation Statistics", *supra* note 84.
105. Letter from the Prime Minister's Community Business Partnership to the Treasury on the Exposure Draft of Amendments to the Private Ancillary Fund Guidelines 2009 and the Public Ancillary Fund Guidelines 2011 (12 February 2016) at 3-4, online (pdf): *Community Business Partnership* <www.communitybusinesspartnership.gov.au/wp-content/uploads/2017/06/signed_paf_puaf_submission_to_treasury_-_feb_2016.pdf>, referring to data privately provided by the Australian Taxation Office.
106. The figures are derived from ATO, "Taxation Statistics", *supra* note 84.
107. See *e.g.* Ward, *supra* note 71 at 10.

has dampened enthusiasm for PuAFs. Indeed, as noted above, a number of PuAFs are voluntarily tracking the distribution requirement at the sub-fund level. This may be because sub-funds are internally tracked in any event as separate management accounts, so that it is quite easy to calculate a payout rate. If the payout rate was set higher (than 4% or 5%) such that it exceeded expected investment earnings after taking account of inflation, likely around 10%,[108] then complexity would not be increased, but the payout would start to resemble a rule that required contributions to be spent within a certain timeframe.

The risk with too high a payout rate is that it may reduce overall donations to charities if DAF donations are not replaced by other charitable donations. One way to view this risk is by comparing the cost of the tax benefit obtained by donors with the extra giving achieved by DAFs, which may be lost. Due to the non-cash donation rules in the United States (and non-taxation of unrealised capital gains when assets are given to a DAF),[109] this cost may come close to the full value of the donated assets multiplied by the donor's marginal income tax rate plus that value multiplied by the top capital gains tax rate. Similarly, in Canada, donors can potentially obtain a tax credit for donations to DAFs and some non-cash assets (like publicly listed shares) are exempt from capital gains tax on donation. The Special Senate Committee on the Charitable Sector has recommended testing a capital gains tax exemption for donations of private company shares.[110]

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108. Galle, *supra* note 24 at 1187-90. Several United States studies of foundation returns suggest that the mean (not the median) return after inflation is around 9% to 11%.
109. James Andreoni, "The Benefits and Costs of Donor-Advised Funds" (2018) 32:1 Tax Policy and the Economy 1 at 25. Andreoni discusses the likely percentage of the value of non-cash assets that an unrealised gain comprises, noting that it may not be unreasonable to assume that many DAF donors have an 85% unrealised gain. As to non-cash donation deductions, see *e.g.* Roger Colinvaux & Harvey P Dale, "The Charitable Contributions Deduction: Federal Tax Rules" (2015) 68:2 Tax Law 331 at 341-46; Colinvaux, "Donor Advised Funds", *supra* note 14 at 72-75.
110. *Catalyst for Change*, *supra* note 4 at 101-08.

Account must also be taken of the time to distribute the DAF funds (potentially with a lower return on investment than if the money had been put to use by a charity, reflecting an opportunity cost)[111] and less the not inconsiderable transaction costs of accepting non-cash assets.[112] Nevertheless, as top marginal tax rates/the highest level of tax credits, plus capital gains tax rates are still less than 100% and as the average deferral is around four years,[113] this cost should typically be less than the benefit of the additional giving. However, that is only where all DAF giving is new giving. Andreoni has conducted cost-benefit analysis in the United States to calculate that if the average DAF donor saves close to top marginal rates on DAF donations and that the return on investment in DAFs is marginally smaller than for direct giving to charities, then around 30-40% of all giving to DAFs would need to be additional giving in order for the benefits to exceed the costs.[114] Given the large increase in giving to DAFs in the United States, coupled with fairly flat overall rates of giving,[115] this seems unlikely. The lower base of charity assets in Canada makes increased giving more likely, although a rate of 30-40% is very high.

Thus, while there should be some concern about reduced giving, we should also look very closely at the advantages and disadvantages of the temporal substitution effected by DAFs. That is, substituting funding for today's generation with funding for a future generation. Further guidance on this issue can be obtained from discussions in Australia

111. Compare Andreoni, *supra* note 109 at 18-19, 22-23.
112. Colinvaux, "Donor Advised Funds", *supra* note 14 at 75-81. Colinvaux discusses the transaction costs of non-cash donations, noting that financial service firm-linked DAF sponsors may actually be well placed to reduce these costs compared with other charities.
113. See, *e.g.* Andreoni, *supra* note 109 at 27-30.
114. *Ibid* at 33.
115. Compare Colinvaux, "Donor Advised Funds", *supra* note 14 at 60. Andreoni, *supra* note 109 at 38-39, has also examined the effect of 2013 tax rate changes in the United States on DAF giving to conclude that DAFs are not causing material increases in giving.

about accumulation by charities.[116] Those discussions suggest that, while accumulation can produce additional public benefit through enhancing the sustainability of services, pluralism and efficiency,[117] it is inherent in the notion of accumulation that the delivery of some benefits will be deferred. Further, an emphasis on the sustainability and longevity of the charity itself may be matched by too little regard for potential benefit recipients in the current generation or for efficiency in distributing benefits. This is a particular problem for philanthropic intermediaries as the benefits arising from accumulation are largely premised on an accumulating charity using some of its assets for activities or distributions other than accumulation. A significant build-up of assets in a small number of intermediaries, which reflects the more mature DAF sector in the United States, is likely to displace assets from those other charities and thus reduce their financial resilience because their ability to plan for the

116. See especially Ian Murray, "Nudging Charities to Balance the Needs of the Present Against Those of the Future" in Ron Levy et al, eds, *New Directions for Law in Australia* (Canberra: ANU Press, 2017) 347; Murray, "Charity Accumulation", *supra* note 102; Ian Murray, "Accumulation by Charities: Do Australian Legal Restraints Maintain an Intergenerational Balance?" (PhD Dissertation delivered at the University of Tasmania, 2018 — forthcoming in 2020 as a monograph with Cambridge University Press) [Murray, "Intergenerational Balance"]; Fiona Martin, "'To Be, or Not to Be, a Charity?' That is the Question for Prescribed Bodies Corporate Under the Native Title Act" (2016) 21:1 Deakin Law Review 25 at 38-40; Michael Booth et al, "Financial Reserves: A Necessary Condition for Not-for-profit Sustainability?" in Zahirul Hoque & Lee Parker, eds, *Performance Management in Nonprofit Organizations* (New York: Routledge, 2014) 109; Austl, Treasury, *Consultation Paper: Native Title, Indigenous Economic Development and Tax* (October 2010) at 6, online (pdf): *Treasury* <treasury.gov.au/sites/default/files/2019-03/CP_Native_Title_IED_and_Tax.pdf>.

117. Pluralism being a state of affairs in which decision-making authority and power are distributed amongst various groups and which is perceived as enhancing autonomy and innovation. See Robert Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* (New Haven: Yale University Press, 1982); Nicholas Miller, "Pluralism and Social Choice" in Robert Dahl, Ian Shapiro & José Antonio Cheibub, eds, *The Democracy Sourcebook* (Cambridge: MIT Press, 2003) 133 at 140.

future and deal with contingencies is reduced by having less control over when and whether funds will be received from DAFs.[118] Intermediaries also heighten the risk of another set of agency costs,[119] including a desire to amass assets to enhance their social status, raising the risk of a loss of focus on a charity's purpose, or 'mission drift'; or, as discussed in Part II.C.2, to maintain fee levels.[120]

The benefits and detriments of accumulating assets raise issues of fairness between different generations and efficiency as to the distribution of any net (public) benefit. Accumulation thus raises a social concern that a charity is achieving insufficient public benefit for the present generation.[121] 'Intergenerational justice' is a potential normative basis for answering how that balance should be set between public benefit for now and public benefit for the future, in order to maintain social cohesion.

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118. Compare Cloutier, *supra* note 18 at 99.
119. Agency costs arise from the inevitable divergence between the interests of a principal and a person to whom the principal delegates some decision-making authority. See Michael Jensen & William Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3:3 Journal of Financial Economics 305 at 308-09. In the charity context, see *e.g.* Geoffrey Manne, "Agency Costs and the Oversight of Charitable Organizations" (1999) 2:1 Wisconsin Law Review 227 at 234-35; Oliver Williamson, "Organization Form, Residual Claimants and Corporate Control" (1983) 26:2 The Journal of Law and Economics 351 at 358-59.
120. As to the agency costs imposed by DAFs, see Galle, *supra* note 24 at 1162-66.
121. See *e.g.* The Law Commission, "The Rules against Perpetuities and Excessive Accumulations" (31 March 1998) at 10.19, online (pdf): *Law Commission* <www.lawcom.gov.uk/app/uploads/2015/03/lc251_The_Rules_Against_Perpetuities_and_Accumulations.pdf>; Michael Klausner, "When Time Isn't Money: Foundation Payout Rates and the Time Value of Money" (2003) 1:1 Stanford Social Innovation Review 51. Compare Evelyn Brody, "Charitable Endowments and the Democratization of Dynasty" (1997) 39:3 Arizona Law Review 873 at 928-39.

Intergenerational justice is not Hansmann's 'intergenerational equity'.[122] It refers to normative theories about the obligations that are owed by the present generation in relation to people in the past and the future. While the content and concept of intergenerational justice remain debated, it is often applied to theories that employ political, philosophical concepts of 'justice' to relations between non-contemporaneous persons.[123] Justice has various dimensions, including 'distributive justice', which concerns the basis upon which and methods by which benefits and costs ought to be allocated amongst members of society.[124] Intergenerational justice may, therefore, mean that the current generation owes a duty to redistribute resources to persons intergenerationally, based on the degree to which this would satisfy their fundamental social and economic needs.[125] Of course, this depends on the resources likely to be available to future generations. So, intergenerational justice might require a charity to subsidise current benefit recipients by borrowing or distributing heavily to fund the current provision of services. Alternatively, a charity might increase resources available for future benefit recipients by accumulating the majority of its resources as investments or constructing long-lasting facilities.

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122. Henry Hansmann, "Why do Universities Have Endowments?" (1990) 19:1 Journal of Legal Studies 3 at 14. Hansmann's treatment of intergenerational equity has dissuaded some recent writers from exploring the relevance of intergenerational justice to charity accumulation more broadly: see *e.g.* Booth et al, *supra* note 116 at 116-7.
123. Axel Gosseries & Lukas Meyer, eds, *Intergenerational Justice* (New York: Oxford University Press, 2009); Joerg Tremmel, ed, *Handbook of Intergenerational Justice* (Cheltenham: Edward Elgar, 2006).
124. See generally, John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Harvard University Press, 1999) at 52-58, 78-81; Gary A. Cohen, "Where the Action Is: On the Site of Distributive Justice" (1997) 26:1 Philosophy & Public Affairs 3 at 3, 12-13.
125. See *e.g.* Frederic Gaspart & Axel Gosseries, "Are Generational Savings Unjust?" (2007) 6:2 Politics, Philosophy and Economics 193 at 201-04, 209, 211-12; Dieter Birnbacher, "Responsibility for Future Generations" in Joerg Tremmel, ed, *Handbook of Intergenerational Justice* (Cheltenham: Edward Elgar, 2006) 23 at 34.

Taking one interpretation of intergenerational justice as an example, 'sufficientarian' principles, such as Rawls' just savings principle,[126] could be used to allocate costs and benefits.[127] Intergenerational justice, through a sufficientarian lens, has been interpreted as requiring that the current generation avoid the pursuit of benefits that would impose costs on future generations, where to do so would result in the world being handed on in a lesser state to future generations, or in a state that fails to meet 'sufficientarian' standards for members of future generations.[128] The benefit of this approach is that it can preclude the argument that current generations should materially sacrifice their own wellbeing to benefit larger (and likely better-off) future generations.[129] If an absolute priority is afforded to those below the threshold, sufficientarianism may approve a small increase in well-being for more disadvantaged members of the present generation, rather than a very large increase for only marginally-less disadvantaged members of future generations who are above the threshold.[130] That future generations may miss out in this

126. Rawls conceived of intergenerational savings obligations to preserve capital so as to enable the establishment and then maintenance of just institutions ("just savings" principle) as a substitute for and constraint on (rather than application of) distributive justice principles: see Rawls, *supra* note 124 at 251-58.

127. As to 'sufficientarianism' or 'sufficiency', see Roger Crisp, "Equality, Priority and Compassion" (2003) 113:4 Ethics 745 at 752, 755-762; George Sher, *Equality for Inegalitarians* (Cambridge: Cambridge University Press, 2014) ch 8-9.

128. See *e.g.* Lukas Meyer, "Intergenerational Justice" in Edward Zalta, ed, *Stanford Encyclopedia of Philosophy* (Summer 2016 Edition) online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/archives/sum2016/entries/justice–intergenerational/> [Meyer, "International Justice"]; Peter Laslett, "Is There a Generational Contract?" in Peter Laslett & James Fishkin, eds, *Philosophy, Politics, and Society*, vol 6: Justice Between Age Groups and Generations (New Haven: Yale University Press, 1992) 24 at 29-30, 44-45.

129. If an absolute priority is given to people below the threshold. See *e.g.* Meyer, "International Justice", *ibid*.

130. Lukas Meyer & Dominic Roser, "Enough for the Future" in Axel Gosseries & Lukas Meyer, eds, *Intergenerational Justice* (New York: Oxford University Press, 2009) 219 at 222-25.

way is less troubling if the threshold is low and relates to fundamental needs.[131] A sufficientarian approach also forestalls the assertion that future generations must level themselves down to the position of earlier generations since the sufficientarian standard simply sets a minimum. Sufficientarianism might oblige a DAF intended to support educational charities to distribute heavily to universities to ensure (by way of scholarships and other processes) that particularly disadvantaged students are able to access educational opportunities, but only in such a way that the DAF, or other DAFs or charities, can continue to fund educational opportunities to students from future generations.

If intergenerational justice is conceived in terms of Rawlsian notions of justice, intergenerational justice rules ought primarily to be reflected in society's basic structure or institutions.[132] Mandatory payout rates or timeframes are one way to achieve this. However, such payout rules do not do a very good job of reflecting the full range of principles of intergenerational justice. For instance, 'prioritarian' approaches, which prioritise the most disadvantaged first (in whatever generation they are born),[133] might — with a reasonably strong priority and expectations that future generations will, on the whole, be better off — require distribution rates set at or close to 100% for new charities and at generational neutrality levels for pre-existing charities.[134] Further, if flexibility is a DAF benefit worth saving because it supports pluralism or permits a sufficientarian standard to change over time as needs vary, it is likely to be difficult to set a rate that permits flexibility yet still precludes material accumulation.

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131. Yitzhak Benbaji, "Sufficiency or Priority" (2006) 14:3 European Journal of Philosophy 327 at 338-42.
132. Compare John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001) at 10-12. The "basic structure" is the way the "main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time". This would include not only a political society's constitution but also broad structures such as "the structure of the economy" and "the family in some form".
133. See *e.g.* Meyer & Roser, *supra* note 130 at 234-35.
134. Gaspart & Gosseries, *supra* note 125 at 203-04, 209, 211-12.

Certainly, the current rates ranging from 3.5% to 5% do not seem to be stopping a large build-up of assets.

Another method may be to shape charity or tax law (part of society's basic structure) to ensure that DAF directors and trustees consider issues of intergenerational justice, as reasonably understood by them, when making accumulation and spending decisions — and that the requirement to consider intergenerational justice is also imposed on DAF donors.[135] The approach is consistent with charity independence and pluralism. However, it is not intended to give DAF controllers and DAF donors a blank slate to adopt any approach to accumulation that they wish or to simply ignore the issue. To do so would undermine the objective of producing public benefit in a fair and efficient manner. Rather, DAF directors and trustees could be expected to give genuine consideration to intergenerational issues and to act accordingly, including by requiring a degree of consideration by DAF donors and a response by the DAF provider if DAF donors do not consider the requirements of intergenerational justice.

This approach could be grafted onto existing fiduciary and statutory duties that already apply to charity directors and trustees. For instance, when complying with their duty to act with genuine consideration when exercising discretionary powers,[136] DAF decision-makers (and advisers to the decision-makers, being the DAF donors) could be obliged to give genuine consideration to principles of intergenerational justice and to have regard to intergenerational justice in acting impartially as between potential benefit recipients. Given the potential alignment of DAF and donor interests in accumulating assets, key concerns with this approach are accountability and enforcement. Accountability might require the formulation of an accumulation/reserves policy at the DAF provider and DAF account level, including an explanation as to why levels of reserves

135. For a more detailed discussion, see Murray, "Intergenerational Balance", *supra* note 116.

136. In an Australian context, see *Lutheran Church of Australia (South Australia District) Inc v Farmers' Co-operative Executors and Trustees Ltd*, (1970) 121 CLR 628 (HCA) at 639, 652-53, per Barwick CJ and Windeyer J respectively.

are held and the amount, purpose and proposed time of expenditure for any earmarked funds; and reporting against compliance by the DAF provider with the accumulation/reserves policy.[137] Enforcement would require an effective regulator or regulators. Concerns about effective regulation of the charity sector and of conflicts of interest in the United States (see Part IV.B) may therefore make a payout rule a better option. Regulation in Canada seems more effective and may become even more so as a result of the recommendations of the Special Senate Committee on the Charitable Sector. Therefore, Canada may have more scope to implement duties to consider intergenerational justice. However, even there, a high minimum payout could potentially be offered as a safe-harbour alternative to minimise increased administration costs.

2. No Circular Distributions to Other Philanthropic Intermediaries

As outlined in Part III.B, Australia prohibits any distributions from a private or public ancillary fund to another ancillary fund. Distributions must be made to other classes of (largely) non-intermediary deductible gift recipients. The one exception is portability of all the assets of an ancillary fund to another ancillary fund, with the approval of the Commissioner of Taxation. Portability does not remove the obligation to distribute the minimum percentage in the year that porting occurs.[138] Given the Commissioner of Taxation's involvement in portability, these rules are relatively effective at ensuring that philanthropic intermediaries cannot keep circulating assets without distributing to non-intermediaries. They

137. Compare the requirement for reserves policies and reporting on those policies, at the whole of charity level, in Australia and in England and Wales: ACNC, "Charity Reserves: Financial Stability and Sustainability" (December 2016) at 5-7, online: *ACNC* <www.acnc.gov.au/ACNC/FTS/Charity_reserves.aspx>; Charity Commission for England and Wales, "Charity Reserves: Guidance CC19" (January 2016) at 9-10, online (pdf): *Charity Commission for England and Wales* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/743078/CC19_sep18.pdf>; *Charities (Accounts and Reports) Regulations* (UK), SI 2008/629, s 40(3)(p).

138. *PAFG 2009*, *supra* note 68, rule 51A; *PAFG 2011*, *supra* note 68, rule 50.

do, however, permit some flexibility to deal with changed circumstances and to bolster market mechanisms that operate to reduce conflicts of interest.

The Canadian anti-avoidance rules also serve this purpose to an extent,[139] but they are vague, which is likely to make their behavioural impact uncertain. In particular, it is unclear what length of time constitutes an undue delay. Is a one or two-year delay acceptable? They may also apply in some change of circumstance situations such as moving assets from a private foundation to a public foundation DAF due to family changes or where a DAF donor believes enough has been accumulated to warrant the extra administrative costs of a private foundation.[140] The United States has started the journey to dealing with circular distributions by imposing excise taxes, under the *Pension Protection Act 2006*[141] reforms, on a range of distributions, but with an express savings for distributions to another public charity, thus potentially preventing distributions back to private foundations.[142] However, at least one writer has suggested that the wording of the amendments still permits DAFs to make distributions to private foundations provided that the distribution is for a charitable purpose (*i.e.* a purpose specified in *IRC* section 170(c)(2)(B))[143] and the DAF sponsor exercises expenditure responsibility (*i.e.* oversight).[144] It clearly remains possible to distribute to another DAF provider. Indeed, *IRC* section 4966 is worded so as to permit a "distribution" from a DAF account within a DAF provider to another DAF account within the same provider.[145]

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139. As discussed in Part II.C.1, nn 36-38.
140. For a general discussion, see Man, *supra* note 38 at 23-25.
141. *Pension Protection Act of 2006*, 120 Stat 780 (US).
142. *IRC*, *supra* note 4, § 4966. The express exceptions for distributions to DAFs and to the DAF sponsor organization of the relevant DAF are contained in *IRC* paragraph 4966(c)(2).
143. *Ibid*, § 170(c)(2)(B).
144. Hester, *supra* note 20 at 334.
145. See also *ibid*.

Canada currently defines "charitable foundations" (public and private) and "charitable organizations" as categories of qualified donees.[146] The United States defines "private foundations",[147] "donor advised funds"[148] and DAF "sponsoring organizations".[149] It should, therefore, be relatively easy for Canada and the United States to prohibit transfers between foundations as Australia does. If Canada removes the foundation/organization distinction as recommended by the Special Senate Committee on the Charitable Sector,[150] an approach analogous to that in the United States could still be adopted. The United States attempts to isolate charities that are primarily philanthropic intermediaries in its definition of private foundation. While the United States' definition of a DAF sponsor is broader, even that definition could be tightened to target organisations that primarily sponsor DAFs, rather than universities and other charities that provide DAFs as a sideline.[151] That position would be closer to Australia, since ancillary funds cover only charitable foundations that are intended to be philanthropic intermediaries.

One learning from Australia is that there should be some ability to switch DAF providers and between public and private foundation status in support of market mechanisms or if circumstances change, provided this is subject to regulatory oversight. Australian experience also suggests that an absolute prohibition on grants to individuals or to other intermediaries can cause problems for DAFs wishing to make grants in relation to rural, regional and remote areas where there are not many eligible recipients. This has been a particular problem for

146. *ITA*, *supra* note 20, s 149.1(1).
147. *IRC*, *supra* note 4, § 509(a).
148. *Ibid*, § 4966(d)(2).
149. *Ibid*, § 4966(d)(1).
150. *Catalyst for Change*, *supra* note 4 at 84.
151. See *e.g.* US Treasury, *General Explanations*, *supra* note 93.

Australian community foundations, many of which operate PuAFs.[152] In some instances, community foundations have had trouble finding DGR recipients, especially since many charities are not DGRs.[153] This problem is likely to be less pressing in Canada and the United States where most charities are eligible recipients. However, some consideration may need to be given to whether grants to individuals should be permitted in rural, regional and remote areas. Further, in some rural, regional and remote areas, community foundations (which may have significant local knowledge) are the main charity. If the community foundation cannot accept distributions from a private foundation, then this limits the level of charitable activities that can be carried out in that community.[154] This issue is likely to apply in the United States and Canada, and so thought should be given to whether distributions should be permitted to community foundations which have a purpose primarily linked to a rural, regional or remote geographic location. This would be consistent with the Special Senate Committee on the Charitable Sector's recommendation that Canada trial distributions to non-qualified donees to support collaboration between charities and others.[155]

B. Addressing Conflicts of Interest

There are many existing rules in Canada and the United States that deal with conflicts of interest and that could potentially address DAF provider and affiliate fees. For instance, state or provincial law duties of loyalty that apply to charity controllers would also incorporate a duty not to profit to the charity's detriment and to avoid or address conflicts

152. Philanthropy Australia, "Submission — Tax Deductible Gift Recipient Reform Opportunities" (3 August 2017) at 9, online (pdf): *Australian Treasury* <static.treasury.gov.au/uploads/sites/1/2017/12/Philanthropy-Australia.pdf> [Philanthropy Australia, "Tax Deductible"]; see also, James Boyd & Lee Partridge, "Collective Giving and its Role in Australian Philanthropy" (July 2017) at 50, online (pdf): *Creative Partnerships Australia* <www.communitybusinesspartnership.gov.au/wp-content/uploads/2017/07/collective_giving_report_2017.pdf>.
153. Philanthropy Australia, "Tax Deductible", *ibid*.
154. Boyd & Partridge, *supra* note 152 at 50; *ibid* at 7.
155. *Catalyst for Change*, *supra* note 4 at 97-99.

of interest.[156] Albeit concerns have been expressed in the United States that some states have watered these obligations down.[157] Further, the United States *Pension Protection Act 2006* reforms applied additional self-dealing rules to DAF providers, moving them closer to the treatment of private foundations.[158] While the additional excise taxes on excess benefits transactions, taxable distributions and prohibited benefits appear largely aimed at benefits derived by donors, their advisors and their affiliates,[159] the exception is *IRC* subparagraph 4958(f)(1)(F). This provision renders an investment advisor to a DAF sponsor (such as a financial services affiliate) a 'disqualified person' so that any transaction with the investment advisor would need to be examined to determine if the value of economic benefits provided exceeded the value of the services received. However, where services are provided at market rates and are simply more expensive because more assets are under management, this

156. See *e.g.* Johnny Rex Buckles, "The Federalization of Fiduciary Obedience Norms in Tax Laws Governing Charities: An Introduction to State Law Concepts and an Analysis of their Implications for Federal Tax Law" (2012) 4:2 Texas Tech School of Law Estate Planning & Community Property Law Journal 197 at 199-200; Barry Reiter, *Directors' Duties in Canada* (Toronto: LexisNexis, 2016) ch 26, especially at 812-16.

157. Marion Fremont-Smith, *Governing Nonprofit Organizations* (Cambridge: Harvard University Press, 2004) at 234-36 [Fremont-Smith, *Governing*].

158. See *e.g.* Frederick J Gerhart, "Charitable Incentives and Charitable Reforms under the Pension Protection Act of 2006" (2007) 19:7 The Health Lawyer 21 at 26-27; Michael A Lehmann, "Major Changes for Exempt Organizations in the Pension Protection Act of 2006" (2007) 106:1 Journal of Taxation 30 at 35-37.

159. This is especially true of *IRC* sections 4966 (taxable distributions) and 4967 (prohibited benefits). *IRC* section 4958 might also apply to DAF sponsor transactions too, in that financial services affiliates may be "persons" who are "in a position to exercise substantial influence over the affairs of the" DAF sponsor: *IRC*, *supra* note 4, § 4958(f)(1)(A).

type of provision may be less helpful.[160]

Similarly, section 188.1(4) of the *ITA* imposes a penalty where a charity confers an 'undue benefit' on a person.[161] 'Undue benefit' is defined broadly to include rights and would apply where a DAF financial services affiliate does not deal at arms-length with the DAF provider or can be characterised as a member or settlor of the DAF provider.[162] Several commentators have also suggested that the provision would apply to excessive remuneration for senior employees.[163] Reasonable consideration for services rendered is excluded,[164] such that, as for *IRC* section 4958, there may be some uncertainty. Nevertheless, the provision could apply to DAF providers for giving, beyond consideration for services, the right to provide investment services or receive a bonus in relation to a larger sum of money than would otherwise be invested.

However, it is a fundamental requirement that charities have purposes for the achievement of public benefit, not private benefit. This is typically reflected in state or provincial law concerning the creation or validity of charitable corporations and trusts,[165] as well as tax legislation. Thus, the United States income tax rules require that for a section 501(c)(3) organisation, none of the net earnings may "inure to the benefit of any private shareholder or individual" such that DAF sponsors must ensure

160. Treasury's 'initial contract' exception may also mean that if fees have been agreed by way of a formula under an initial contract, there is no excess benefit transaction, but this would only apply if the DAF affiliate was not a disqualified person before entering into the contract. Compare Marina Vishnepolskaya, "Compensation of Investment Advisors of Sponsoring Organizations Maintaining Donor-Advised Funds: Complying with the Excess Benefit Transaction Rules" (2010) 28:1 Journal of Taxation of Investments 3; 26 CFR, *supra* note 45, § 53.4958-4(a)(3).

161. *ITA*, *supra* note 20, s 188.1(4).

162. *Ibid*, s 188.1(5).

163. Robert Hayhoe & Marcus Owens, "The New Tax Sanctions for Canadian Charities: Learning from the US Experience" (2006) 54:1 Canadian Tax Journal 57 at 75-76.

164. *ITA*, *supra* note 20, s 188.1(5)(a).

165. As to Canada, see Gillen, Smith & Waters, *supra* note 20 at 14.IV; In the United States context, see American Law Institute, *Restatement of the Law of Charitable Nonprofit Organizations*, TD No 1 (2016), § 1.01.

that they are not "operated for the benefit of private interests such as designated individuals, the creator… or persons controlled, directly or indirectly, by such private interests".[166] These rules are meant to stop DAF providers from providing benefits to people except where that provision is in pursuit of their purposes or incidental thereto.[167] Likewise, to be a qualified donee "charitable foundation" under the Canadian *ITA*, a DAF provider must be "constituted and operated exclusively for charitable purposes" and it must be the case that "no part of the income of [the DAF provider] is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee, or settlor thereof".[168]

When it comes to addressing management and investment fees charged by DAF providers and their commercial affiliates, as both entities rely on those fees — directly or indirectly — on their ability to attract donors, it might also be anticipated that market mechanisms would limit fees.[169] Donors are likely to jealously guard their advisory privileges, and so it is probably true that they will not exert much pressure on DAF providers to force other donors to distribute at higher rates such that market mechanisms are unlikely to deal with the deferral issue.[170] However, donors might be expected to be far more interested in monitoring fees.

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166. *IRC*, *supra* note 4, § 501(c)(3); 26 CFR, *supra* note 45, § 1.501(c)(3)-1(d)(1)(ii).
167. See *e.g.* Terry W Knoepfle, "The Pension Protection Act of 2006: A Misguided Attack on Donor Advised Funds and Supporting Organizations" (2009) 9:4 Florida Tax Review 221 at 224, 259-60.
168. *ITA*, *supra* note 20, s 149.1(1).
169. For discussion of market mechanisms to enforce the fiduciary duties of charity controllers in the related context where those charities rely on donations for their operations, see *e.g.* Johnny Rex Buckles, "Should the Private Foundation Excise Tax on Failure to Distribute Income Generally Apply to 'Private Foundation Substitutes'? Evaluating the Taxation of Various Models of Charitable Entities" (2010) 44:3 New England Law Review 493 at 511-12, 521 (with some reservations expressed about controlling conflicts of interest).
170. Compare *ibid* at 527-28.

In summary, there seems no shortage of mechanisms for dealing with conflicts of interest, even if some fine-tuning of intermediate sanctions could be achieved to more clearly target the accumulation of assets to charge higher fees. An outsider's impression is that there is no significant need for more rules, but rather for better education about and enforcement of existing rules. Greater fee disclosure information would help, as would the ability to switch DAF providers, as noted for PuAFs in the Australian context. Many commentators have also noted patchy and inconsistent enforcement at the state level in the United States and the provincial level in Canada.[171] Federal enforcement also currently appears weakened as the United States IRS is still reeling from the fallout over its targeting of politically aligned charities and is underfunded to regulate charities.[172] While not so wounded, the chief Canadian regulator, the Canadian Revenue Agency, is also recovering from its imposition of increased political activity reporting and political activity audits, as well as from perceptions of bias in its role as charity regulator arising from its

171. As to Canada, see *e.g. Catalyst for Change*, *supra* note 4 at 64-65; Terry de March, "The Prevention of Harm Regulator" in Myles McGregor-Lowndes & Bob Wyatt, eds, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) 119 at 119-20. Compare Gillen, Smith & Waters, *supra* note 20 at 14.VII. In the United States context, see *e.g.* Fremont-Smith, *Governing*, *supra* note 157 at 53; Evelyn Brody, "Whose Public? Parochialism and Paternalism in State Charity Law Enforcement" (2004) 79:4 Indiana Law Journal 937 at 946-50.

172. See *e.g.* Austl, Treasury, Treasury Inspector General for Tax Administration, "Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review", Final Report No 2017-10-054 (September 2017), online (pdf): *The Treasury* <www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf>; Marcus Owens, "Challenged Regulators" in Myles McGregor-Lowndes & Bob Wyatt, eds, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) 81 at 91 [Owens, "Challenged Regulators"].

role as a tax-collector.[173]

The Australian approach to enforcement involves a central role for the national charity regulator, the ACNC, in coordinating activities at the state and federal level. Much of the recent Australian legislation also explicitly contemplates on-going information sharing between state and territory regulators and the ACNC.[174] This is also reflected in division 150 of the *ACNC Act*, which permits the ACNC to disclose information to all other state/territory and Commonwealth government agencies (fiscal and non-fiscal) if that would assist those agencies to perform their functions or exercise their powers and would also promote the objects of the *ACNC Act*.[175] This coordinated approach is assisted by the fact that, unlike the Canadian and United States tax regulators, the ACNC has an institutional focus on charities.[176] It also appears that the ACNC has (in relation to the IRS), and is using to a greater extent (in relation to the CRA), an ability to share information with state and territory attorneys-

173. See *e.g.* Adam Parachin, "Reforming the Regulation of Political Advocacy by Charities: From Charity Under Siege to Charity Under Rescue?" (2016) 91:3 Chicago-Kent Law Review 1047 at 1048, 1050-52; Bob Wyatt, "Reflections on the Long and Winding Road of Regulation" in Myles McGregor-Lowndes & Bob Wyatt, eds, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) 139 at 148-53; *Catalyst for Change*, *supra* note 4 at 109.

174. *Consumer Acts Amendment Act 2017* (Vic), 2017/13, (Austl), s 4; *Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA), 2017/24, (Austl), s 4; *Red Tape Reduction Legislation Amendment Act 2017* (ACT), 2017/17, (Austl), s 14.

175. *ACNC Act*, *supra* note 51, division 150-40.

176. In relation to the IRS, contrast Owens, "Challenged Regulators", *supra* note 172 at 82; Elizabeth Boris & Cindy Lott, "Reflections on Challenged Regulators" in Myles McGregor-Lowndes & Bob Wyatt, eds, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) 97 at 97.

general and other regulators.[177] When compared with the IRS approach to information gathering on registration and annually for small charities, that of the ACNC is superior.[178]

Better enabling national regulators to adopt a central coordination role for enforcement is broadly consistent with the North American discourse about charity regulation within a federation.[179] That is because this approach leaves charity regulation fragmented between different levels of government and different agencies within a federation, but with room for centralisation of information gathering and reporting and greater coordination in governance enforcement. Although a tax regulator is always likely to be less focused on charity enforcement than a stand-alone charity regulator, there still appears to be some room for the IRS and CRA to improve their coordination of enforcement.

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177. For the IRS, see Owens, "Challenged Regulators", *supra* note 172 at 83; Boris & Lott, *ibid* at 106; Marion Fremont-Smith, "The Future of State Charities Regulation" (Paper delivered at the Columbia Law School Charities Regulation and Oversight Project Policy Conference on the Future of State Charities Regulation, New York, 2013) at 7-8, online: *Columbia University Libraries* <academiccommons.columbia.edu/doi/10.7916/D82R3PQ2>. Thus, even after the *Pension Protection Act of 2006*, *supra* note 141, expanded the IRS' ability to disclose information to state regulators, it seems that information sharing arrangements between the IRS and state regulators are virtually non-existent: American Law Institute, *Restatement of the Law of Charitable Nonprofit Organizations*, TD No 3 (2019), §5.03 cmt b. It appears the CRA has the ability to share information, but needs to use that ability further, a matter partly due to provincial inaction: see *Catalyst for Change*, *supra* note 4 at 59-60; de March, *supra* note 171 at 127-28.

178. Evelyn Brody & Marcus Owens, "Exile to Main Street: The IRS's Diminished Role in Overseeing Tax-Exempt Organizations" (2016) 91:3 Chicago-Kent Law Review 859 at 881-84.

179. Lloyd Mayer, "Fragmented Oversight of Nonprofits in the United States: Does it Work – Can it Work?" (2016) 91:3 Chicago-Kent Law Review 937 at 944-45; Lloyd Mayer & Brendan Wilson, "Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis" (2010) 85:2 Chicago-Kent Law Review 479.

V. Conclusion

Although the Australian experience with sub-funds or DAFs is still relatively niche, the Australian regulatory regime and discourse provide some guidance. First, as DAFs — by their very nature — involve a degree of temporal deferral, they raise issues of fairness and efficiency about the intergenerational distribution of public benefit that could threaten social cohesion if not addressed. Intergenerational justice is a potential normative basis for answering how the balance should be set between benefit for the current versus future generations. It is possible to implement payout rules for DAF providers that are consistent with some interpretations of intergenerational justice, and the Australian PuAF payout rules indicate that a moderate payout requirement is unlikely to dissuade donations to DAFs and would not impose too onerous an administrative burden. However, the Australian trend of a declining PuAF payout percentage suggests that a higher payout rate may be preferable and a higher rate would start to resemble proposals from North American commentators for contributions to be spent within a certain timeframe. It would, however, be administratively simpler, thus retaining one of the benefits of DAFs.

Another approach that is better aligned with charity independence and pluralism and with the flexibility benefits of DAFs is to impose on DAF directors and trustees (and through them, DAF donors) a duty to give genuine consideration to principles of intergenerational justice when exercising discretionary powers over the distribution of DAF assets. Accountability and enforcement would be critical to such an approach, and the current regulatory climate in the United States does not appear conducive. Canada may have more leeway, especially if the Special Senate Committee on the Charitable Sector's recommendations are followed, along with the comments below on regulation and conflicts of interest. The genuine consideration duty approach could be twinned with a payout safe-harbour to reduce administration costs.

Second, a prohibition on circular distributions can be implemented relatively easily and seems preferable to more general anti-avoidance rules. However, the Australian experience demonstrates that there is likely to be value in permitting an ability to switch DAF providers and to switch the

status of a whole pool of funds from a private to a public foundation (and vice versa), provided this is subject to regulatory oversight. Additionally, in rural, regional and remote areas, a community foundation will often be the key charity. If it cannot accept contributions from private foundations or other DAFs, this may mean that rural, regional and remote communities miss out. Some consideration therefore needs to be given to an exception for distributions to community foundations which have a purpose primarily linked to such a region.

Finally, to better address conflicts of interest posed by financial services-affiliated DAF providers, greater thought should be given to improved charity regulators rather than introducing new rules. The report of the Canadian Special Senate Committee on the Charitable Sector, in particular, raises hopes for improved regulatory cooperation in Canada — a major change in Australia with the introduction of the ACNC. However, a core institutional focus on charities is also key and is much harder to achieve within a tax authority.

Why and When Discrimination is Discordant with Charitable Status: The Problem with "Public Policy", The Possibility of a Better Solution

Adam Parachin*

When courts have considered when and why discrimination renders an institution ineligible for charitable status, they have resorted to the doctrine of public policy to explain the non-charitableness of discrimination. Public policy is not, though, up to the task. It is undisciplined, inspires courts to consider irrelevant factors and offers no principled explanation as to when and why discrimination should and should not vitiate charitable status. A better approach would be to address this issue using the traditional analytical tools of charity law — charitable purposes, charitable activities and public benefit. But this is a deceptively difficult task, which perhaps accounts for the appeal of public policy to courts. Nonetheless, this paper looks inward to the law of charity, developing an "in-house" rule against discrimination grounded in the internal logic and values of charity law. Specifically, this paper discovers in the public benefit requirement an inclusive ethic through which charity law affirms the equal worth, value and dignity of others. Discrimination is non-charitable when it fails this standard through stigmatizing rejection. But not all differential treatment under charitable trusts contradicts the inclusive ethic of charity law.

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I. Introduction

When charity lacks its characteristic warm glow, courts sometimes turn to public policy to conclude that the prerequisites for charitable status are unmet. This happened in, for example, *Bob Jones v United States*,[1] where private schools engaging in racial discrimination were found to be non-charitable, *Canada Trust Co v Ontario Human Rights Commission*,[2] where a discriminatory scholarship fund was found to be non-charitable, and *Royal Trust Corp v University of Western Ontario*,[3] where another discriminatory scholarship fund was found to be non-charitable. The problem with these decisions is not the conclusions reached but rather the basis — public policy — for decision-making. As has been widely observed, public policy is a poor basis for judicial decision-making.[4] So how do we account for the appeal of public policy to courts in these kinds of cases? When courts invoke public policy in these fact patterns, it is (I think) because they instinctively perceive a discordance with charitable status at law but struggle to articulate that intuition using the usual frames of reference employed in charity law. The above authorities had very little to say about the traditional charity law touchstones of charitable purposes, charitable activities and public benefit. It is almost as though public policy was relied upon in these decisions as shorthand for 'noncharitable for inarticulable reasons'.

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1. 461 US 574 (1983) [*Bob Jones*].
2. (1990) 69 DLR (4th) 321 (ONCA) [*Canada Trust Co*].
3. 2016 ONSC 1143 [*Royal Trust Corp*].
4. *Church Property Trustees, Diocese of Newcastle v Ebbeck*, [1960] HCA 88. Windeyer J noted that public policy has been variously described (citations omitted here) as: "a very unruly horse", "a treacherous ground for legal decision", "a very unstable and dangerous foundation on which to build", a "slippery ground", "a vague and unsatisfactory term" and "calculated to lead to uncertainty and error when applied to the decision of legal rights" at 416. See also *Fender v St John-Mildmay* (1937), [1938] AC 1 (HL (Eng)) [*Fender*]. Per Lord Atkin, the doctrine of public policy was described as a doctrine of last resort that "should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds" at 12.

This is neither sustainable nor desirable. As a doctrine of absolute last resort, public policy provides a fail-safe for extreme circumstances escaping the reach of charity law's traditional doctrinal tools. While the above noted cases fit the mould of unusual circumstances, charity law needs a better answer than 'public policy' to explain when and why discrimination is discordant with charitable status. As we shall see, public policy is undisciplined, establishes little to no transferable principles to guide future decisions, inspires courts to consider irrelevant factors in place of relevant ones, masks the true calculus going on behind the scenes and, inasmuch as it channels into charity law constitutional law principles intended to restrain governmental action, risks moulding charities into the image of the ideal liberal state.

For example, in *Bob Jones* and *Canada Trust Co* virtually none of the sources of law relied upon by the courts as determinants of public policy — *e.g.* civil/human rights legislation, constitutional law principles, international human rights treaties and presidential executive orders — were applicable under the circumstances. Deferring to these sources of law carried with it the disturbing implication that the doctrine of public policy permits courts to universalize context specific rules. Worse yet, deferring to 'public policy' — a doctrine of last resort properly reserved to those instances where all else has failed — implies that charity law — a body of law concerned with "doing good for others"[5] — lacks the normative resources internal to itself to develop a workable solution to the issue of discriminatory charity. If we cannot do a better job of explaining when and why discrimination is discordant with doing good for others, perhaps we are not trying hard enough.

Shifting social attitudes against discrimination, one might say, suggest that these objections to public policy are a tempest in a teapot. As the public's tolerance of discrimination wanes, presumably so too does the prospect of discriminatory charitable trusts being settled, much less funded through voluntary charitable subscriptions. So why not leave 'well enough' alone and allow public policy to resolve questions about

5. Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997) at 146 [*OLRC*].

discriminatory charity if and when they rarely arise? But I see the logic working in reverse. The ascendancy of human rights amplifies rather than mutes the need to better understand the discordance between charity and discrimination. Shifting attitudes against discrimination may well render discriminatory charity less marketable to donors but they also mean that it is increasingly unlikely that discrimination will go unchallenged. Future legal challenges are coming. Answers are needed. Public policy is not up to the task.

Add to this that the legally recognized bases on which discrimination may occur continue to evolve and expand. As the grounds of discrimination have expanded, so too have the prospects of equality conflicting with other values. The thing about diversity is that it is diverse — it wears many hats. Consider, for example, the recognition of sexual orientation and gender identity as prohibited grounds of discrimination.[6] One of the issues here, sharpened by charitableness of religion, is that it is not only experiences of sexuality and gender that are diverse, but also beliefs about the nature of sexuality and gender. With the benefit of charitable status, religions espouse a wide range of beliefs about sexuality and gender. Not all beliefs within this range mesh seamlessly with ascendant human rights perspectives on the matter.

A question will inevitably need to be squarely confronted: what scope for principled disagreement about sexuality and gender (among many other things) is possible within the charitable sector? Buried in this question is a deeper question about the value commitments of diversity. When it comes to respect for difference, what manifestations of difference are deserving of respect? Is diversity of belief a feature of diversity or an anathema to it? At stake here is not just charitable status, but also whether the end game of diversity is to expand the seats at the table (expand the roster of differences seen as enriching the mosaic) or merely to substitute who is invited to the table and by extension who is not (swapping outcasts). If charity law were to marginalize traditional belief systems, what would that reveal about our tolerance for principled dissent within the charitable sector? Far better to squarely confront these

6. See *e.g.*, *Human Rights Code*, RSO 1990, c H.19, s 1 [*HRC*].

issues than to bury them behind the veneer of public policy.

My thesis is that there is a better way to address the topic of discriminatory charity than via public policy. Moving forward, there is no need for courts to refer to the kinds of outside values and considerations — *e.g.* equality norms reflected in constitutional law, human rights law, international human rights treaties and executive orders — that were identified in *Bob Jones* and *Canada Trust Co*. Doing so risks distorting both those values and the legal meaning of charity along with them. Native to charity law are values relevant to solving this problem. As we shall see, as traditionally understood, the charity law touchstones of charitable purposes, charitable activities and public benefit can make it difficult to respond when charities discriminate. But it is nonetheless possible to locate in the public component of the public benefit requirement a principle of inclusion. The truly charitable trust affirms the equal worth, value and dignity of all persons. Trusts manifesting stigmatizing rejection fail this standard.

The difficulty is that not all differential treatment or all exclusions from charitable trusts amount to non-charitable stigmatizing rejection. There will be circumstances in which these will be attributable to benign goals. Charity law affords settlors of charitable trusts a broad discretion to target benefaction at specific sub-populations. When this freedom is exercised to, for example, further affirmative action goals, there are no concerns that settlors are acting non-charitably. Likewise, when differential treatment is the outworking of principled disagreement on matters of conscience, charity law should not intervene. While charity law is concerned with fostering acceptance, it is not concerned with using charitable status to compel agreement. Given the charitableness of religion, it would literally be impossible for charity law to require that all charities share a common set of values. Differential treatment attributable to principled disagreement can be a reflection of, rather than deviation from, the values and doctrines of charity law. Inclusion and diversity of belief co-exist within charity law.

II. Leading Authorities

One might have assumed that the 'problem' of discriminatory charity would be easy to solve. Charitable status is a legally privileged status.[7] It is conferred to enable and endorse charitable purposes, meaning purposes that are of public benefit and within one or more of the 'Pemsel' categories of charitable purposes: the relief of poverty, the advancement of religion, the advancement of education and other purposes of public benefit.[8] The law distinguishes charitable from non-charitable purposes with the singular aim of promoting, enabling and endorsing charitable purposes. The deal is that charities are supposed to go out and make the world a better place. Discrimination seems like a particularly unlikely candidate for the ringing endorsement that is charitable status. Nonetheless, there are doctrinal hurdles to concluding that charitable status is vitiated by literally every manifestation of discrimination.[9] Before elaborating on these, we will briefly consider a few of the leading and recent cases on point.

A. United States

The leading US decision dealing with the public policy against discrimination is *Bob Jones*.[10] In 1970, after a court issued an injunction

7. See *e.g.*, Adam Parachin, "The Role of Fiscal Considerations in the Judicial Interpretation of Charity" in Ann O'Connell, Matthew Harding & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York: Cambridge University Press, 2014) 113; Adam Parachin, "Legal Privilege as a Defining Characteristic of Charity" (2009) 48:1 Canada Business Law Journal 36.
8. *Income Tax Special Purpose Commissioners v Pemsel*, [1891] 3 TC 53 (HL (Eng)) at 97, Lord Macnaghten [*Pemsel*].
9. Assume that a large institutional charity, *e.g.*, a hospital or university, found itself on the wrong end of, say, a pay equity dispute. Would we conclude that the charity needs to make appropriate reparations or that it should also be deregistered as a charity and thereby become exposed to a 100% revocation tax under subsection 188(1.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*], as amended? The extreme response of deregistration is not always the appropriate answer.
10. *Bob Jones*, *supra* note 1.

prohibiting the Internal Revenue Service ("IRS") from awarding tax-exempt status to racially discriminatory schools,[11] the IRS released a revenue ruling indicating that such schools could no longer qualify as charities under US tax law.[12] Further to this revenue ruling, the IRS concluded that two religious schools (Bob Jones University and Goldsboro Christian Schools) could not qualify as educational charities under federal income tax law on the ground that they were discriminatory. These schools engaged in racially discriminatory practices further to religious beliefs against interracial dating and marriage.[13] The matter wound up before the US Supreme Court, a majority of which concluded that neither of these educational institutions could qualify as charities for tax purposes.

Writing for the majority, Chief Justice Burger concluded that the tax benefits set out in paragraph 501(c)(3) and section 170 of the Internal Revenue Code of 1954 ("*IRC*") were contingent upon conformity with the common law standard of charity.[14] Reasoning that racial discrimination in education is contrary to public policy, he found that the discriminatory practices of the schools were likewise against public policy and that the schools were therefore non-charitable at common law.[15] The consequence of this is that the schools were likewise disqualified from the tax benefits for charitable institutions under paragraph 501(c)(3) and section 170 of the *IRC*.[16]

For a judgment that purported to be applying the common law of charity, the majority judgment of Burger CJ in *Bob Jones* had remarkably

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11. See *Green v Kennedy*, 309 F Supp 1127 (DDC 1970).
12. Rev Rul 71-447, 1971-2 CB 230, online (pdf): <www.irs.gov/pub/irs-tege/rr71-447.pdf>.
13. The Goldsboro Christian Schools enforced a racially discriminatory admissions policy. Bob Jones University initially declined to admit any African American students. This policy was changed in the 1970s, when the university began to admit African Americans, but it nonetheless maintained a disciplinary rule that made interracial dating and marriage grounds for expulsion.
14. *Bob Jones*, *supra* note 1 at 585-90.
15. *Ibid* at 591-96.
16. *Ibid*.

little to say about the topic. There was no sustained analysis of charitable purposes, the relationship between charitable activities and charitable purposes or public benefit. To the extent that any of these core pillars of charity law were mentioned, it was only in passing. The judgment instead focussed almost entirely on public policy.

While emphasizing that the public policy doctrine should be applied "only where there can be no doubt that the activity involved is contrary to a fundamental public policy",[17] Burger CJ concluded that this test was met, since there was "no doubt" that a public policy against racial discrimination existed.[18] There are, he observed, "few social or political issues" that have "been more vigorously debated and more extensively ventilated than the issue of racial discrimination".[19] He cited as evidence of this public policy, constitutional equal protection jurisprudence, civil rights legislation and Executive Orders. The problem, of course, is that none of these sources of law were applicable to the context under review.

This is why the public policy analysis in *Bob Jones* is wanting. The judgment implies that legal rules and principles formally inapplicable to charitable private schools can be indirectly applied to them under the guise of public policy. Public policy enabled the majority to conclude against the charitableness of the schools under review without having to explain that conclusion with specific reference to the unique juridical features of charitable trusts or the doctrinal tests for charitable status. The judgment does little to assist understanding as to when and why discrimination is incompatible with charitable status.

17. *Ibid* at 592.
18. *Ibid* at 598.
19. *Ibid* at 595.

B. Canada

1. *Canada Trust Co v Ontario Human Rights Commission*

The leading authority in the Commonwealth on discriminatory charitable trusts is a decision from the Ontario Court of Appeal, *Canada Trust Co*,[20] which dealt with a scholarship fund (the "Leonard Fund") established in 1923 by the late Colonel Reuben Wells Leonard. The recitals in the trust deed shed light on Colonel Leonard's intended purpose for the fund. They state his belief that "the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World", that the "progress of the World depends in the future, as in the past, on the maintenance of the Christian religion" and that "the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire".[21] The terms of the fund provided that a student could qualify for a scholarship only if he or she was a "British subject of the White Race and of the Christian Religion in its Protestant form" and only if "without financial assistance" he or she "would be unable to pursue a course of study".[22] No more than one quarter of the scholarship moneys awarded in any given year could be given to women.[23] The racial and religious restrictions also limited who could participate in the management and administration of the fund.[24]

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20. *Canada Trust Co*, *supra* note 2. For very helpful analyses, see Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (University of Toronto Press, 2000); Jim Phillips, "Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*" (1990) 9:3 Philanthropist 3; and J.C. Shepherd, "When the Common Law Fails" (1988-1989) 9 Estates and Trusts Journal 117.
21. *Canada Trust Co*, *supra* note 2 at para 14.
22. *Ibid* at para 18.
23. *Ibid*.
24. *Ibid* at para 16.

The charitableness of the Leonard Fund eventually came before the courts in 1986 when the Ontario Human Rights Commission filed a formal complaint alleging that the terms of the fund violated the *Human Rights Code*.[25] The trustee of the Leonard Fund sought advice and direction of the Court "as to the essential validity" of the trust.[26] The Court of first instance upheld the validity of the trust, but that decision was overturned by the Ontario Court of Appeal, which unanimously found that the discriminatory provisions of the Leonard Fund were void.

Writing for the majority, Justice of Appeal Robins emphasized that a trust should be found to violate public policy "'only in clear cases, in which the harm to the public is substantially incontestable'".[27] He had no difficulty concluding that this standard was met, reasoning it is "obvious" that "a trust premised on these notions of racism and religious superiority contravenes contemporary public policy".[28] Justice of Appeal Robins referred (without explanation) to the following indicia of this public policy: democratic principles, constitutionally protected equality rights, the multicultural heritage of Canada and the public criticism of the Leonard Fund.[29] The doctrine of *cy-prés* was then applied to remove the eligibility criteria based on race, gender, religion and nationality.

The concurring judgment of Justice of Appeal Tarnopolsky said more about the determinants of the public policy against discrimination. Justice of Appeal Tarnopolsky identified the following sources as relevant to the conclusion that the Leonard Fund was contrary to public policy: (1) human rights codes; (2) the *Canadian Charter of Rights and Freedoms*[30] (specifically, sections 15, 28 and 27); and (3) *Charter* jurisprudence and international human rights conventions ratified by Canada.[31] He emphasized that scholarships exclusively for historically disadvantaged

25. SO 1981, c 53.
26. *Canada Trust Co*, *supra* note 2 at para 30.
27. *Ibid* at para 36.
28. *Ibid* at para 39.
29. *Canada Trust Co*, *supra* note 2 at para 39.
30. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
31. *Canada Trust Co*, *supra* note 2 at paras 92-97.

groups are not contrary to public policy because they are consistent with affirmative action programs constitutionally authorized by subsection 15(2) of the *Charter*.[32] He also made a point of noting that "[o]nly where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void" and by extension that "this decision does not affect private, family trusts".[33]

The conclusion reached in *Canada Trust Co* is eminently supportable, but the public policy analysis in the decision attracts similar criticisms and questions to those raised above in connection with the majority judgment in *Bob Jones*. As one analyst notes, it is "not the light that it [*Canada Trust Co*] shines, that makes the case worthy of study, but rather the complexity that it exposes".[34] What, for example, does the *Charter*, which places constitutional limits on state action, have to do with what charities — non-state actors — can and cannot do? And what of the *Charter's* conflicting values? Equality is a value reflected in the *Charter* but so too is freedom of conscience. According to what norm does the former necessarily trump the latter — which was taken for granted in *Canada Trust Co* — for purposes of charity law? Likewise, what do international human rights conventions have to do with the meaning of charity? And legislated human rights codes? There was no finding in *Canada Trust Co* that the scholarships were prohibited by provincial or federal human rights legislation. So, how are legislated human rights codes at all relevant? As with *Bob Jones*, there is a genuine concern here over public policy being used as a vehicle through which to subject charities to sources of law formally inapplicable to them. Just like the US Supreme Court in *Bob Jones*, the Ontario Court of Appeal in *Canada Trust Co* emphasized formally irrelevant considerations — *e.g.* constitutional restrictions on state action — and deemphasized directly relevant considerations — *e.g.*, purposes and public benefit.

And what of Tarnopolsky JA's express statement in *Canada Trust Co* that the decision's public policy finding does not extend to private

32. *Ibid* at para 104.
33. *Ibid* at para 107.
34. Ziff, *supra* note 20 at 161-62.

family trusts? Both charitable and non-charitable trusts are subject to the doctrine of public policy. So why would the decision's public policy analysis not bode implications for both charitable and non-charitable trusts? Are there two public policies — one applicable to charitable trusts and one applicable to non-charitable trusts? Lest public policy become captive to "the idiosyncratic inferences of a few judicial minds"[35] it is better conceived of as singular — it exists or it does not — rather than as something that varies from context to context (and thus with the length of the Chancellor's foot). But this is ultimately why Tarnopolsky JA's statement that *Canada Trust Co* is confined to charitable trusts is so telling: it suggests that public policy was not the true basis for judgment.

The reason *Canada Trust Co* is inapplicable to private family trusts is not because there are separate public policies for family trusts and charitable trusts, but rather because the judgment was ultimately less concerned with public policy than with the legal meaning of charity. Similar to *Bob Jones*, public policy was resorted to in *Canada Trust Co* as a doctrine of convenience. It conveniently enabled the Ontario Court of Appeal to conclude against the charitableness of the discriminatory trust under review without having to explain precisely how, when and why discrimination is discordant with legal 'charity'.

2. *Re Ramsden Estate* and *University of Victoria v British Columbia (AG)*

Some of the language used in *Canada Trust Co* implied that it is necessarily non-charitable to restrict benefaction on the basis of religious

35. *Fender*, *supra* note 4 at 12.

adherence.[36] But two later decisions, *Re Ramsden Estate*[37] and *University of Victoria v British Columbia (AG)*,[38] reveal a more accommodating stance.

In *Re Ramsden*, the Court considered a scholarship exclusive to Protestants and concluded that there was "no ground of public policy which would serve as an impediment to the trust proceeding".[39] The Court distinguished *Canada Trust Co* on the basis that that case dealt with a trust "based on blatant religious supremacy and racism".[40] Similarly, the Court in *University of Victoria v British Columbia (AG)* upheld a scholarship for practicing Roman Catholics. The Court reasoned that a "scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy".[41] The Court explicitly rejected the idea that only ameliorative trusts can prefer one segment of society.[42] In addition, the Court emphasized that even scholarship funds restricted to persons of particular faiths have social utility inasmuch as they provide educational opportunities to a segment of society.[43] The importance of protecting testamentary freedom from erosion was also identified as a relevant consideration.[44] Similar to *Re Ramsden*, *Canada Trust Co* was distinguished without elaboration on the basis that it dealt with a trust whose provisions were "clearly offensive".[45]

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36. *Canada Trust Co*, *supra* note 2. The religious affiliation requirement was, after all, struck in *Canada Trust Co*. In addition, Robins JA observed that (at para 39):

    > [t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced.

37. [1996] 139 DLR (4th) 746 (PESC) [*Re Ramsden*].
38. 2000 BCSC 445 [*University of Victoria*].
39. *Re Ramsden*, *supra* note 37 at para 13, MacDonald CJ.
40. *Ibid*.
41. *University of Victoria*, *supra* note 38 at para 25, Maczko J.
42. *Ibid* at para 17.
43. *University of Victoria*, *supra* note 38 at para 17.
44. *Ibid*.
45. *Ibid* at para 25.

3. *Re Esther G Castanera Scholarship Fund*

In *Re Esther G Castanera Scholarship Fund*,[46] the Court considered whether a scholarship for "needy and qualified women graduates of the Steinbach Collegiate Institute [the donor's high school]" majoring in one of several specified science disciplines at the University of Manitoba was contrary to public policy. Concern had been expressed by the University of Manitoba that, since women were no longer underrepresented in the specified fields of study, targeting the scholarship at women might violate public policy. Justice Dewar disagreed. Emphasizing that "[e]very gift requires a contextual assessment" and cautioning against a "one-size-fits-all",[47] Dewar J concluded that the scholarship criteria did not attract the doctrine of public policy.[48]

Three important points emerge from the decision.

First, *Canada Trust Co* does not establish, at least not as a bright-line rule, that racial, religious, gender or ethnic criteria for benefaction under charitable trusts are necessarily contrary to public policy.[49] Second, the settlor's self-avowed discriminatory aims in *Canada Trust Co* are fundamental to understanding the holding in that decision.[50] Third, courts remain predisposed to uncritically accept the charitableness of

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46. 2015 MBQB 28 [*Re Castanera*].
47. *Ibid* at para 42.
48. *Ibid* at para 46.
49. *Ibid* at para 35:

    > I do not interpret their decision [in *Canada Trust Co*] on the characteristic of sex as a conclusion that every gift that discriminates between the sexes will necessarily be contrary to public policy. The cautions expressed by both the majority and minority judges are as applicable to cases where discrimination is based upon sex or gender as it is where the discriminatory characteristic is race, religion, creed, colour or ethnic origin.

50. See *Re Castanera*, *ibid* at para 37 where Justice Dewar implies that *Canada Trust Co*, notwithstanding the decision's outward public policy reasoning, is in reality attributable to the settlor's openly declared non-charitable purpose of perpetuating a racial, ethnic, religious and gender hierarchy:

    > [p]ut very simply, the restrictions which drove the decision in the Leonard Trust case were motivated by a belief that white Anglo Protestant people were superior to all other people of different races and different creeds. It is this notion that a select group of people are superior to others simply because of who they are that makes the restrictions in the Leonard Scholarships so offensive.

programming premised on traditional affirmative action considerations — *e.g.* the desirability of incentivizing women to attain credentials in fields historically dominated by men.

The only hard evidence before the Court in *Re Castanera* suggested that women were no longer systemically underrepresented in the relevant programs of study. But Dewar J nonetheless had little difficulty concluding — unassisted by any further evidence before the Court — that the traditional explanation for gender based affirmative action remained as cogent as ever:

> [c]urrent enrollment numbers do not always tell the whole story. They certainly do not give consideration to what has happened in the past, or recognize a testator's experience which motivates her desire to make a gift. Additionally, enrollment numbers in undergraduate programs may give a false impression of equality within the discipline if there is a large exodus of women from the discipline after graduation or an underrepresentation in leadership positions within the discipline … [E]very situation needs individual assessment, and factors such as the history or motivation of the giftor are factors which merit some examination.[51] …
>
> And if any male graduate feels deprived, so be it. That graduate is not being kept out of the sciences just because he is not receiving this particular scholarship.[52] …
>
> Where the gift can be articulated as promoting a cause or a belief with the specific reference to a past inequality, there is nothing discriminatory about such a gift.[53]

Achievements towards equality notwithstanding, charitable programming exclusive to historically disadvantaged groups is not in any imminent danger of being struck. Current judicial attitudes remain as conducive as ever to such programming being received as quintessentially charitable efforts to help the less fortunate.

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51. *Re Castanera*, *supra* note 46 at para 39.
52. *Ibid* at para 40.
53. *Ibid* at para 44.

4. *Royal Trust Corp of Canada v University of Western Ontario*

In *Royal Trust Corp*,[54] the Ontario Superior Court of Justice considered whether a scholarship trust was contrary to public policy. The terms of the trust specified that male candidates had to be Caucasian, single, heterosexual and enrolled in a science program.[55] Female candidates had to be single, Caucasian, "not a feminist or lesbian" and enrolled in a science program (other than medicine).[56] Special consideration was to be given to any female candidate who "is an immigrant, but not necessarily a recent one".[57] The settlor also specified other idiosyncratic criteria.[58]

Justice Mitchell concluded that the terms of the scholarship were contrary to public policy: "I have no hesitation in declaring that the qualifications relating to race, marital status, and sexual orientation and, in the case of female candidates, philosophical ideology…void as being contrary to public policy".[59]

Little to nothing was offered by way of explanation. After identifying *Canada Trust Co* as the binding authority, Mitchell J acknowledged a crucial difference: the trust under consideration here lacked the discriminatory recitals — and by extension the overtly declared discriminatory purposes — that were present in *Canada Trust Co*. Nonetheless, she had little difficulty concluding that this made no difference *vis-à-vis* the doctrine of public policy:

> [a]lthough it is not expressly stated by [the testator] that he subscribed to white supremacist, homophobic and misogynistic views as was the case in the indenture under consideration in *Canada Trust Co*, the stated qualifications

54. *Royal Trust Corp*, *supra* note 3.
55. *Ibid* at para 8.
56. *Ibid*.
57. *Ibid*.
58. *Ibid*. The additional criteria included the following:
"academic achievement, but not necessarily the highest marks… honest desire to work and achieve… good character… not afraid of hard manual work [as demonstrated] in their selection of summer employment… [e]xtracurricular activities (i.e., non-academic)… shall not be taken into consideration… [and] [n]o awards to be given to anyone who plays intercollegiate sports" (at para 8).
59. *Royal Trust Corp*, *supra* note 3 at para 14.

> in [the will] leave no doubt as to [the testator's] views and his intention to discriminate on these grounds.[60]

The holding in *Royal Trust Corp* contemplates that charitable programming cannot be targeted on the basis of identity markers — *e.g.* Caucasian and heterosexual — associated with historic social and/or economic advantage. But the decision does not even attempt an explanation as to why this is so. Is it because a non-charitable purpose — perpetuating advantage — is inferred from this kind of eligibility criteria? Is it because courts take judicial notice in such circumstances that the harm introduced outweighs the benefits? Is it due to concerns over whether charitable purposes can be meaningfully furthered through discriminatory activities, that discrimination somehow severs the link between means and charitable ends in charity law? Is it because governments are constitutionally forbidden from targeting government programming to white, heterosexual, non-feminists? That public policy avoids the necessity to squarely answer, or even acknowledge, these questions may well account for its appeal to courts. But, again, if we want to truly understand the discordance between discrimination and charity, we need to squarely confront the difficult questions raised by the topic rather than systematically avoid them by resorting to public policy as a doctrine of convenience through which judicial value judgments are masked.

C. Summation

In short, the leading and recent authorities do not precisely explain when and why discrimination fails the common law test for charitableness; they do not establish transferable principles. To the extent that they rely upon public policy, they tend to draw on external sources of law lacking formal relevance to charities. They raise more questions than they answer.

III. The Search For Better Solutions

Given the problems with public policy, a natural question to ask is whether there is a better approach, defined as an approach better

60. *Ibid.*

calibrated to explaining why and when discrimination is discordant with charitable status using the values and doctrines of charity law. I will consider here three alternative lines of reasoning that would naturally occur to charity lawyers: (1) discrimination evidences non-charitable purposes; (2) discrimination evidences non-charitable activities; and (3) discrimination is contrary to the charity law requirement for public benefit. As we shall see, these lines of reasoning engage some significant fault lines in the law of charity, making them more doctrinally difficult to sustain than one might anticipate.

A. Discrimination and Non-Charitable *Purposes*

To be charitable at law, an institution must have exclusively charitable purposes. If an institution has a discriminatory purpose, it is non-charitable notwithstanding that it may also have one or more charitable purposes. Indeed, the most straightforward explanation for the holding in *Canada Trust Co* is that the trust under review had an express discriminatory purpose and therefore failed the common law requirement for exclusively charitable purposes. The recitals to the trust made clear that the scholarships in question were not the means for the charitable end of advancing education but rather the means for the non-charitable end of perpetuating racial and religious hierarchy.[61] There was no guesswork in this regard. The settlor so much as explicitly said that this was the purpose of the fund.

Writing for the majority, Robins JA alluded to this as follows:

> [a]ccording to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation,

61. *Royal Trust Corp*, *supra* note 3. The recitals in the trust deed shed light on the trust's purposes. They stated that "the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World", that the "progress of the World depends in the future, as in the past, on the maintenance of the Christian religion" and that "the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire" (at para 12).

> development and progress of civilization along the best lines, and, second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.[62]

It was therefore open to the Court to conclude that the trust's overtly racist recitals were revealing of a non-charitable purpose, to maintain a society in which white, British Christians remained in positions of social, economic and political leadership. Doing so would have furnished the Court with an uncontroversial basis on which to strike the trust using the logic and conventions of charity law. Since perpetuating racial, ethnic and religious hierarchy is not a charitable end, the trust under review in *Canada Trust Co* was non-charitable.

But very few instances will as readily avail the conclusion that a non-charitable discriminatory purpose is present. The more common problem will be that discrimination manifests not in the ends being pursued but rather in the means (or activities) through which charitable purposes are being pursued. In other words, the more common problem is apt to be that an institution pursues a charitable end but in a discriminatory way. This was essentially the issue raised by the facts and circumstances of *Bob Jones*. The schools in question advanced education but in a racially discriminatory way.

Regulating *activities* through a common law requirement for exclusively charitable *purposes* is a chronic square peg, round hole problem experienced in charity law.[63] Concerns over activities can only take expression as concerns over purposes if activities are understood to evidence purposes, *e.g.* activity X evidences non-charitable purpose Y. But charity law does not typically infer purposes from activities except in such rare instances as where there are no recorded purposes.[64] If we keep faith with this principle, it is difficult to conclude from a discrete

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62. *Canada Trust Co*, *supra* note 2 at para 38.
63. See Adam Parachin "Regulating Charitable *Activities* Through the Requirement for Charitable *Purposes*: Square Peg Meets Round Hole" in Jennifer Sigafoos & John Picton, eds, *Debates in Charity Law* (Oxford, Hart Publishing, 2020) ch 7.
64. See *ibid.*

discriminatory activity (or any other kind of activity) that a non-charitable (discriminatory) purpose is present.

But even if charity law was inclined to construct purposes out of activities, there is a further problem to grapple with. Doing so would involve a process of abstracting something general (the purposes) from something specific (the activities). The analytical process of abstracting the general from specifics necessarily results in some of the specifics being left out of the description of the general.[65]

To be sure, individual charities are necessarily established for specific and particularized manifestations of the general *Pemsel* categories of charitable purposes. A medical school is unlikely to be formally established for the generic *Pemsel* category of advancing education but rather for the more particularized purpose of providing *medical* education. Likewise, a church is unlikely to be formally established for the generic *Pemsel* category of advancing religion but rather for the more particularized purpose of advancing a *particular denomination* of a *particular religion*. But when we assess the charitableness of these institutions, we will abstract their particularized purposes to the level of generality reflected in the *Pemsel* categories of charitable purposes. The medical school will be considered to be advancing education. The church will be considered to be advancing religion. When assessing charitableness, the aim of the exercise is to determine whether the particularized purposes under review can be abstracted to the level of generality reflected in the *Pemsel* categories.

This is among the reasons why the racially discriminatory practices in *Bob Jones* did not oblige the conclusion that there was a non-charitable gloss to the institution's purposes — that the true purpose in *Bob Jones* was not to advance education *per se* but rather to advance *racially segregated* education. Again, the established convention of charity law is to assess charitableness based on an abstract (rather than particularized)

65. As Jonathan Garton notes, purposes are sometimes described in written constitutions so specifically that it becomes difficult to disentangle purposes from activities. See Jonathan Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013) at 82-83.

casting of purposes. This is among the reasons why it can be difficult to frame concerns over a charity's activities as concerns over that charity's purposes.

B. Discrimination and Non-Charitable *Activities*

Even if not all manifestations of discrimination in charitable programming taint an institution's purposes, we are still left with the conundrum of how a discriminatory activity could possibly qualify as a charitable activity. Is it all that difficult for charity law to intervene on the basis that, even if a charity's purposes are charitable, its activities are non-charitable?

The challenge here is that charity law has an established convention of characterizing activities based on the purposes they are carried on to further.[66] This is why courts have recognized that the same activity can be charitable in one context — where it is carried on to achieve a charitable purpose — and non-charitable in another — where it is carried on to achieve a non-charitable purpose.[67] One commentator sums it up as follows: "[a]s the concept of charity is concerned with purposes, or ends and not means, any attempt to characterize the means as charitable or non-charitable without reference to the ends or objects to be achieved is necessarily doomed to failure".[68]

In brief, the principle is this: if an activity is carried on to further a charitable purpose, it is a charitable activity. If an activity is carried on to further a non-charitable purpose, it is a non-charitable activity.

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66. See *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 at paras 52-54, 56, 58-59, 101, 152-54 and 205 [*Vancouver Society*].

67. *Incorporated Council of Law Reporting for England and Wales v Attorney General*, [1972] Ch 73 (CA (Eng)) at 86, per Russell LJ:

> [s]uppose on the one hand a company which publishes the Bible for the profit of its directors and shareholders: plainly the company would not be established for charitable purposes. But suppose an association or company which is non-profit making, whose members or directors are forbidden to benefit from its activities, and whose object is to publish the Bible; equally plainly it would seem to me that the main object of the association or company would be charitable — the advance or promotion of religion.

68. Maurice C Cullity, "The Myth of Charitable Activities" (1990) 10:1 Estates and Trusts Journal 7 at 12.

This principle reveals that charity law is more concerned with whether charitable purposes are being furthered than with how they are being furthered. The advantage of this approach is that it is enabling. Charities enjoy tremendous latitude to determine for themselves how best to further their charitable missions. The disadvantage is that it is at times too enabling and too imprecise. From time to time certain methods of furthering charitable ends are bound to attract legitimate regulatory concerns. But charity law's conventional approach to characterizing activities makes regulatory interventions in relation to activities difficult. If an activity furthers a charitable purpose, it is by definition a charitable activity. It need not be the *best way* to further a charitable purpose. It need merely be *a way* to further a charitable purpose.

Obviously, this paradigm significantly reduces the bases on which the law may intervene in relation to activities. The primary door it leaves open is the possibility for regulatory interventions on the basis that a given activity does not (or does not do enough to) further charitable purposes. But even here courts have surprisingly not described in great detail the nature of the link that must exist between an activity and a charitable purpose in order for that activity to qualify as a charitable activity. In one of the leading cases, *Vancouver Society*, Justice Gonthier seemed to dismiss the need for specific judicial guidance, observing "[t]here is no magic to this process: it is simply a matter of logical reasoning combined with an appreciation of context".[69]

In the same decision, Gonthier J loosely described the nature of the requisite link, saying that charitable activities must have a "coherent relationship" to charitable purposes,[70] have "the effect of furthering the purpose",[71] be "sufficiently related to those purposes",[72] enjoy a "sufficient degree of connection" to charitable purposes,[73] be "sufficiently related" to charitable purposes,[74] be "substantially connected to and in furtherance of"

69. *Vancouver Society*, *supra* note 66 at para 98.
70. *Ibid* at para 52.
71. *Ibid* at para 53.
72. *Ibid*.
73. *Ibid* at para 54.
74. *Ibid* at paras 56 and 63.

charitable purposes and be "instrumental in achieving the organization's goals".[75] Observing that there must be a "direct, rather than an indirect, relationship between the activity and the purpose it serves", he indicated that he was "reluctant to interpret 'direct' as 'immediate'", specifying that "[a]ll that is required is that there be a coherent relationship between the activity and the purpose, such that the activity can be said to be furthering the purpose".[76] In the same case, Justice Iacobucci agreed that charitable activities must "directly further" charitable purposes but likewise did not elaborate on what specifically this entails.[77]

Perhaps predictably, charity law's treatment of activities is a source of sustained conflict in the law of charity. The common law's approach to activities manifests a reductionist assumption: activities either do or do not further charitable purposes, either are or are not charitable. This leaves little to work with in terms of, say, dual character activities that further both charitable and non-charitable ends. Likewise, it supplies few solutions for activities that arguably should be restrained notwithstanding that they further charitable purposes. This is among the reasons why debates over such issues as political activities,[78] business activities[79] and

75. *Ibid* at para 54.
76. *Ibid* at para 62.
77. *Ibid* at para 154.
78. See *e.g.*, Joyce Chia, Matthew Harding & Ann O'Connell, "Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation" (2011) 35 Melbourne University Law Review 353; Matthew Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) [Harding, *Charity Law*], ch 6; Adam Parachin, "Charity, Politics and Neutrality" (2015-16) 18 Charity Law & Practice Review 23; and Adam Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mulé & Gloria DeSantis, eds, *The Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal: McGill University Press, 2017) 33.
79. See *e.g.*, Canada Revenue Agency, *What is a Related Business?* (Policy Statement) CPS-019 (31 March 2003); *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd*, [2008] HCA 55.

tuition fees[80] at independent schools have proven so contentious. Each of these activities can be justified as a method of furthering charitable purposes and yet each of them also raises legitimate policy concerns as to whether they should be restrained in some way.

Discriminatory means of furthering charitable purposes straddle the same fault line in the common law of charity. Inasmuch as they might further charitable purposes, the logic of the common law of charity suggests that they should be labelled charitable activities. My goal at the moment is not to defend this position as the best possible answer so much as to highlight that the common law's stance *vis-à-vis* activities makes it difficult to dogmatically conclude that an activity (including a discriminatory activity), carried on in furtherance of a charitable end, is automatically non-charitable at common law. This is not to deny that there are principled objections to discriminatory ways of furthering charitable ends but rather to recognize that the common law (for better or for worse) is concerned less with how charitable ends are being furthered than with whether they are being furthered. Regulating activities through a body of law focussed on purposes is difficult.[81]

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80. See *e.g.*, *Independent Schools Council v The Charity Commission*, [2011] UKUT 421 (TCC) [*Independent Schools*]; Peter Luxton, "Making Law? Parliament v The Charity Commission" (2009), online (pdf); *Politeia* <www.politeia.co.uk/wp-content/Politeia%20Documents/2009/June%20-%20Making%20Law%3F/'Making%20Law'%20June%202009.pdf >; Mary Synge, *The 'New' Public Benefit Requirement. Making Sense of Charity Law?* (Oxford: Hart Publishing, 2015).

81. Buried in this observation is also a clue as to how best to supplement the common law of charity through legislative interventions. It seems to be a received wisdom that legislated definitions of charitable purposes are the way to go. But legislating a list of charitable purposes is not somehow going to somehow make debates over activities go away. Charities need to know two things: (1) what ends can we pursue? (2) how can we pursue those ends? Addressing the former but not the latter is not going to be particularly helpful.

C. Discrimination and Public Benefit

There remains the fundamental charity law concept of public benefit. It is trite law that all charitable purposes must conform to the public benefit standard. How could an institution with discriminatory practices possibly be said to bring public benefit? Once again, the answers are not as obvious as may be anticipated. As I have dealt with this topic elsewhere in detail, the discussion here will take summary form.[82]

1. Public Benefit and Activities

The charity law concept of public benefit is attendant to the activities versus purposes distinction discussed above. To be sure, it is the purposes, not the activities, of charities that are tested for public benefit.[83] As a result, activities do not need to be independently shown to bring benefit. The benefit of activities is derivative in the sense that it stems from their furtherance of beneficial charitable purposes. Stated otherwise, charity law infers the benefit of activities from their furtherance of charitable purposes.

This approach to public benefit again illustrates why it is difficult for charity law to intervene when charities further their missions in questionable ways. Charity law is a purposes-oriented body of law. As

82. See Adam Parachin, "Public Benefit, Discrimination and the Definition of Charity" in Kit Barker & Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (New York: Cambridge University Press, 2013) 171 [Parachin, *Public Benefit*].

83. See *e.g.*, *Independent Schools*, *supra* note 80 at para 188 where it was concluded that "public benefit as it was understood prior to the 2006 Act [at common law] was also directed to what the relevant trust or institution was set up to do, not on how it operated". See also Luxton, *supra* note 80 at 19; and Garton, *supra* note 65 at 80 observes "[t]he orthodox position is that it is the purposes of an organization, and not the activities undertaken in pursuit thereof, that are relevant to its charitable status". See Synge, *supra* note 80 where Synge similarly observes that "[t]he principle that the charitable status of a trust or organisation depends on its *purposes* (rather than its activities…) is so clearly established, and judicial authority so abundant, that it hardly needs to be cited" [emphasis in original] (at 36).

long as an institution's purposes are charitable and thus of public benefit in the charity law sense, it will enjoy tremendous latitude to determine for itself how best to further those purposes. If we confine ourselves to the norms of charity law, it is no objection to an activity that the activity lacks public benefit. The standard is not that activities must have public benefit but rather that they must further purposes that have public benefit.

In fairness, the position is more nuanced in circumstances where the formal objects of a charity blur the boundary between purposes and activities, *e.g.* 'to advance education by [insert planned activities]'. While still analytically possible, it is more difficult here to insist on a rigid bifurcation between activities and purposes. Short of this kind of circumstance, objections over activities are difficult to ground in the public benefit standard because activities are not directly subject to this standard.

The risk inherent in the common law framework is that charities will abuse the freedom afforded to them by charity law to self-determine how best to further their charitable missions. By vetting purposes but not activities for public benefit, the common law of charity leaves itself with remarkably few doctrinal tools to respond when charities cross the line *vis-à-vis* their activities. Arguably, this is the very mischief to which the doctrine of public policy is the response. Although it is not typically understood as such, the doctrine of public policy is arguably a disguised way for courts to selectively do what they normally do not do — vet activities for public benefit.[84]

If the only concerns that arose in charity law were concerns over purposes, there would be no need for the doctrine of public policy. If a purpose lacks public benefit, courts can transparently say that it is non-charitable using the usual frames of reference employed in charity law. The problem that public policy takes up is that the charity law toolbox is comparatively lean when it comes to activities. Vetting activities for public benefit is not an option. Severing the link between activities and charitable purposes — *e.g.* sustaining the position that activity X is an

84. Parachin, *Regulating Charitable Activities*, *supra* note 63.

implausible way of furthering charitable purpose Y — is easier said than done. Public policy allows courts to circumvent these concerns.

As we have seen, though, public policy is a poor basis for judicial decision-making. The cases dealing with public policy evidence courts grasping at straws, citing inapplicable sources of law — *e.g.* abstract constitutional law principles — as though they are somehow obviously relevant to the legal meaning of charity.

2. Two Components of Public Benefit

In any event, public benefit is not specifically calibrated to address instances of discrimination. Orthodox charity law analyses treat the public benefit standard as consisting of two components: (1) the public component and (2) the benefit component.

The benefit component of public benefit entails a value judgment through which courts consider whether the trust under review makes the world a better place in a way the law regards as charitable. While discrimination sounds like an unlikely candidate for this standard, the benefit component of public benefit is not a requirement for absolute benefit but rather a requirement for net benefit. In other words, charitable status does not require the total absence of potential harm but rather that the good outweigh the harm.[85] It is not obvious as a matter of law that literally every incidence of discrimination will necessarily mean there is

85. In *National Anti-Vivisection Society v IRC*, [1947] 2 All ER 217 (HL), Lord Wright observed at 223 that courts should "weigh against each other" detriment and benefit and that the impact of a trust "must be judged as a whole". In the context of the decision, this meant weighing the material benefits of vivisection against the moral benefits of anti-vivisection. The implication is that benefits can offset detriments (and vice versa) even if they are not of the same nature.

no net benefit.[86] Indeed, anti-discrimination laws themselves recognize that charities may engage in practices that ordinarily would amount to unlawful discrimination.[87] This is not to deny that discrimination in some instances could handily outweigh any offsetting benefit.[88] The point is that it reduces to a contextual assessment rather than a bright line answer.

The public component of public benefit is ultimately concerned with who benefits from a charitable trust. It is not specifically calibrated to police discriminatory exclusions from charitable programming.[89] To be sure, the primary, though not the sole,[90] function of the public component of public benefit is to prohibit persons from being *included* in charitable programming on improper bases (*i.e.* bestowed charitable

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86. In Canada, the *ITA*, *supra* note 9, subsection 149.1(6.21), as amended provides:

    (6.21) Marriage for civil purposes -- For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*.

    The import of the subsection is that a church only solemnizing heterosexual marriages does not thereby jeopardize its charitable registration.

87. See *e.g.*, *HRC*, *supra* note 6, ss 18, 18.1 and 24. These legislative measures allow for differential treatment by charities in relation to membership, marriage ceremonies and employment.

88. See *e.g.*, Matthew Harding, "Charitable Trusts and Discrimination: Two Themes" (2016) 2:1 Canadian Journal of Comparative and Contemporary Law 227; Harding, *Charity Law*, *supra* note 78, ch 7; and Debra Morris, "Charities and the Modern Equality Framework – Heading for a Collision?" (2012) 65:1 Current Legal Problems 295.

89. See Parachin, *Public Benefit*, *supra* note 82.

90. The public component of public benefit also helps to ensure it is clear as to who is intended to benefit from the trust. If it is unclear who benefits from a putative charitable trust, then charitable status will be withheld. See *e.g.*, the trusts in *Keren Kayemeth Le Jisroel Ltd v IRC*, [1932] AC 650 (HL (Eng)) and *Williams' Trustees v IRC*, [1947] AC 447 (HL (Eng)) [*Williams' Trustees*] which failed to qualify as charitable because, *inter alia*, it was not clear what community, if any, the trusts would benefit.

benefaction on the basis of some personal nexus) rather than *excluded* on improper bases. In practice, the public component of public benefit functions as an 'anti-private' standard. Subject to an exception for trusts established for the relief of poverty,[91] the public component of public benefit prohibits private qualifications from being used to determine who is eligible for goods and services from a charitable trust. Persons cannot qualify for membership in the class of potential beneficiaries on the basis that they are known to the settlor and thus specifically named as a potential beneficiary in the trust instrument.[92] Neither can a charitable trust specify that the basis on which persons are included in the trust's class of potential beneficiaries is that they stand in a particular private relationship (*e.g.* familial, employment, associational or friendship).

In *Report on the Law of Charities*, the Ontario Law Reform Commission framed the public component of public benefit as a "stranger" standard

91. For reasons courts have never clearly elucidated, funds established for the relief of poverty have been upheld as charitable even where the class of beneficiaries has been defined on the basis of: (1) familial (see *e.g.*, *Re Segelman*, [1996] Ch 171 (ChD (Eng)) [*Segelman*], *Re Scarisbrick*, [1951] Ch 622 (CA (Eng)) [*Scarisbrick*] and *Re Cohn*, [1952] 3 DLR 833 (NSSC)); (2) employment (see *e.g.*, *Dingle v Turner*, [1972] AC 601 (HL (Eng)), *Re Gosling*, (1900) 48 WR 300 (Ch (Eng)), *Gibson v South American Stores Ltd*, [1950] Ch 177 (CA (Eng)) and *Jones v T Eaton Co*¸ [1973] SCR 635); (3) other private relationships (a trust for the relief of poverty may be limited on the basis of membership in a club) (see *Re Young's Will Trusts*, [1955] 1 WLR 1269 (Ch (Eng)); (4) association (see *Re Lacy*, [1899] 2 Ch 149 (ChD (Eng)); or (5) society (see *Pease v Pattinson*, (1886) 32 Ch D 154 (Eng)). For a discussion of these cases, see Hubert Picarda, *The Law and Practice Relating to Charitie*s, 3d (London: Butterworths, 1999) at 40.

92. See Lord MacKay, Halsbury's Laws of England, 4d, vol 5(2) (London: Butterworths, 2001 Reissue) at paras 8 and 53. For example, in *Re Compton*, [1945] 1 Ch 123 (CA (Eng)) at 137, Lord Greene MR observed that a trust to educate named nephews and nieces of the testator was not charitable. Even trusts for the relief of poverty (which we will see receive relaxed treatment under the public component of the public benefit test) cannot specifically name the end beneficiaries. See *Scarisbrick*, *ibid* at 651 per Jenkins LJ. Also see *Segelman*, *ibid* for a more accommodating stance (and Luxton, *supra* note 80 at 175 for criticisms of *Segelman*).

requiring "emotional and obligational distance" between settlors of charitable trusts and the end beneficiaries of charitable programming:

> [charity] connotes dispositions towards individuals that are more remote in our affection or to whom we are not otherwise obligated. "Strangers" is perhaps too strong a word to express the distance required, but it is helpful because it does emphasize that some such distance is mandatory.[93]

This is not to say that charitable trusts can only benefit persons who are virtual strangers to the settlor, contributors to the trust and to all other potential beneficiaries. It is just that non-strangers have to be on equal footing with strangers. In other words, a person's status as a non-stranger cannot be the qualification bringing him or her within the class of potential beneficiaries. In *Verge v Somerville*, Lord Wrenbury put it this way: a charitable trust cannot be settled for "private individuals, or a fluctuating body of private individuals".[94]

The public component of public benefit is sometimes described as the "personal nexus test",[95] implying that personal nexus cannot be the basis on which anyone qualifies for benefaction under the trust. On balance, what has emerged from the jurisprudence is an approach that generally tests for publicness by ruling out 'privateness'.[96] That is, the public component of the public benefit test functions as less a positive requirement for publicness than as a negative prohibition against 'privateness'. The evident ambition is to differentiate legal charity from private benevolence. In the case of non-charitable private benevolence, a benefactor can target his or her benefaction through trusts and gifts on practically any basis. Most often this entails restricting benefaction to persons connected to the benefactor through family, relationship or

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93. *OLRC*, *supra* note 5 at 150.
94. *Verge v Somerville*, [1924] All ER Rep 121 (PC) at 123.
95. See *e.g.*, Luxton, *supra* note 80, ch 5.
96. Note how Lord Simonds equates public with not private in the following quote from *Williams' Trustees*, *supra* note 90 at 457:

> the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble.

any other bond of significance to the benefactor. The truly charitable act, on the other hand, is restricted to the provision of services or benefits to unascertained persons remote to the benefactor. We can summarize this by saying that charities must be established to provide goods and services to either *the public* (the whole community) or to *a public* (a section of the community delimited other than on the basis of private qualifications).

Where goods and services are being offered to 'the public' at large, there is no concern that charities are somehow being improperly targeted at a sub-population. If anything, our concern here may be that goods and services are being extended too broadly.[97] The questions about improper targeting arise when goods and services are aimed at specific sub-populations carved out from the population at large. This is a difficult topic because the public component of public benefit accommodates some but not all bases on which charitable goods and services may be formally targeted at specific sub-populations.

We have seen that private qualifications cannot be used to determine who is eligible for goods and services from a charitable trust. However, religious affiliation,[98] parental occupation[99] and nationality[100] are among the diverse criteria courts have upheld for educational trusts. Perhaps in some cases these criteria might be positively correlated with a barrier to education and thus related in at least some way to education but by and large they seem to have no inherent or logical connection with education.

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97. For example, a relief of poverty organization should not be extending its poverty relief goods and services to the wealthy.
98. *Pemsel*, *supra* note 8; *Re Ramsden*, *supra* note 37; *University of Victoria*, *supra* note 38.
99. *Canada Trust Co*, *supra* note 2; *German v Chapman*, (1877) 7 Ch D 271 (CA (Eng)) (restricted to daughters of missionaries); *Hall v Derby Sanitary Authority*, (1885) 16 QBD 163 (Eng) (restricted to children of railway workers).
100. *A-G for (New South Wales) v Perpetual Trustee Co Ltd*, (1940) 63 CLR 209 (HCA) (restricted to Australians); *Re Koettgen's Will Trusts, Westminster Bank Ltd v Family Welfare Association Trustees Ltd*, [1954] Ch 252 (ChD (Eng)) (restricted to British subjects).

A similar point may be made of a home for old Christian Scientists,[101] a home of rest exclusive to seamen,[102] a trust exclusive to poor lawyers and their families,[103] a fund to promote marriage among persons of a specified religion,[104] a fund to benefit wounded foreign soldiers of a particular nationality[105] and a fund restricting access to an oyster fishery to freeholders in a particular locality.[106] Whatever else may be said about why courts have upheld these funds (and others like them), it seems apparent that courts are willing to protect the freedom of settlors to target the delivery of charitable goods and services using a wide range of eligibility criteria. While this accommodating stance could be defended on the basis of traditional property rights (settlors of express trusts generally enjoy a very broad freedom to determine the recipients of benefaction), it can also be thought of as a deliberate incentive strategy for encouraging the settlement of charitable trusts. That is, one of the ways charity law incentivizes charitable trusts is to respect the freedom of settlors to choose their target population.

If we stop there, we reach a surprising conclusion about discriminatorily targeted charitable trusts and the public component of the public benefit requirement. A charitable trust can *exclude* persons on discriminatory bases without thereby *including* persons on private bases. That is, charitable programming can be both discriminatory and compliant with the personal nexus rule. It is ultimately for this reason that charitable trusts with discriminatorily defined beneficiary classes do not obviously fall offside the public component of the public benefit standard. Discriminatory eligibility criteria do not result in persons qualifying for participation in charitable trusts on the basis of private relationships (familial, employment or other). A charitable trust can still be a trust

101. *City of Hawthorn v Victoria Welfare Assoc*, [1970] VR 205 (VSC (Austl)); *Re Hilditch*, (1985) 39 SASR 469 (SASC (Austl)).
102. *Finch v Poplar Bourough Council*, (1967) 66 LGR 324 (Ch (Eng)).
103. *Re Denison*, [1974] 2 OR (2d) 308 (ONSC).
104. *Re Cohen, National Provincial and Union Bank of England Ltd v Cohen*, (1919) 36 TLR 16 (Eng).
105. *Re Robinson*, [1931] 2 Ch 122 (ChD (Eng)).
106. *Goodman v Saltash Corp*, (1882) 7 App Cas 633 (HL (Eng)).

for strangers (persons remote to the settlor in affection and obligation) notwithstanding that its goods and services are discriminatorily targeted.

IV. Moving Beyond A Formal Understanding Of Public Benefit

A. General

We have seen thus far that the usual resources in the charity law toolbox — charitable activities, charitable purposes and public benefit — are not ideal contenders for crafting a principled approach to regulating discriminatory charity, at least not as traditionally understood. But the analysis thus far has been purely formal. It is now time to vet these formal charity law concepts — focussing specifically on the public component of public benefit — to discover in them principles that might be relevant to rationalizing the non-charitableness of discrimination. The goal here is to explain when and why discrimination is non-charitable from a perspective internal to charity law so that in future cases it is unnecessary to repeat the misguided practice of grasping at straws — drawing on external sources of law, *e.g.* constitutional law — that are strictly speaking irrelevant to the legal meaning of charity. As we shall see, the stranger requirement reflected in the public component of public benefit arguably manifests a concern over settlor motives that is potentially useful to developing a principled response to discriminatory charitable programming.

I will leave to a future discussion precisely how a motives threshold might be mapped onto the doctrinal test for charitable status. Would it factor into an evolved public policy test, an evolved public benefit test, a separate motive test (doubtful) or something else? To be clear, my goal is not to assist courts in their application of the doctrine of public policy so much as to wean them off of it. And so ideally the ideas developed below would not merely influence how courts approach public policy but rather provide them with an alternative point of reference. Nonetheless, even if all that changes moving forward is that courts 'do public policy' better by substituting tokenistic and superficial references to constitutional values (or any irrelevant sources of law) in their public policy analyses with references to values endemic to the law of charity, the status quo would

be improved.

B. Inclusive Ethic Within Public Component of Public Benefit

The orthodox position of charity law is that a settlor's motives are irrelevant to whether a given trust is charitable at law.[107] But I wonder whether the true position is more nuanced. *All else being equal*, a charitable motive cannot otherwise cure a trust's failure to meet the legal test for charitable status.[108] *All else being equal*, a trust that is charitable on its face is not rendered non-charitable on the basis of motive.[109] There is, though, a sense in which motive might be relevant to whether a given trust meets the legal test for charitable status in the first place.

To be sure, the stranger requirement reflected in the public component of public benefit is in substance a kind of motive requirement. Recall from above that the stranger requirement means charities must benefit persons who are "*remote in our affection or to whom we are not otherwise obligated*".[110] The Ontario Law Reform Commission connected this requirement with motive as follows:

> it is the motives of the donor that we are focusing on in requiring an emotional and obligational distance [through the stranger requirement]. To be purely altruistic, we seem to be saying, an act has to have as its motive, as well as its form and actual effect, the doing of good for strangers.[111]

In other words, through its prohibition against 'privateness', the stranger requirement filters out of the charity camp private benefaction motivated by personal affection or duty. It does this by testing whether the settlor of a would-be charitable trust is truly motivated to benefit strangers in the sense of persons lacking emotional and obligational proximity to him or her. Manifestations of personal affection and discharges of personal

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107. See *e.g.*, Garton, *supra* note 65 at 77; Lord MacKay, *supra* note 92 at para 7.
108. See *e.g.*, *Re Pinion*, [1965] 1 Ch 85 (CA (Eng)).
109. See *e.g.*, *Hoare v Osborne*, (1866) LR 1 Eq 585 (Ch (Eng)); *Kerr v Bradley*, [1923] 1 Ch 243 (ChD (Eng)).
110. *OLRC*, *supra* note 5 at 150 [emphasis added].
111. *Ibid.*

duty — *e.g.* provision for one's children — are non-charitable because they fail this standard. If we stop here, we do not have much to work with to develop a restraint against discriminatory charity. Whatever else might be said of discriminatory charitable trusts, they do not appear to be motivated by personal affection or duty.

But the analysis need not stop here. Rather than express the motive test implicit in the stranger requirement *negatively* — legal charity *cannot* be motivated by personal affection or personal duty — lets instead express it *positively* — legal charity *must* be motivated by a demonstrated willingness to benefit strangers.[112] In its positive formulation, the principle could be understood as going further than merely denying charitable status to trusts conferring benefaction on friends and family and thus motivated by personal affection and/or duty. Requiring a willingness to benefit strangers amounts to a requirement to accept a value judgment about strangers — that strangers are worthy of benefaction notwithstanding their emotional and obligational distance. Implicit in this is an equality ideal of sorts. To be sure, in the stranger requirement we arguably discover two core principles of charity law: (1) strangers are fellow persons with equal dignity, worth and value (this is at least one reason why they are worth benefiting notwithstanding their emotional and obligational distance) and (2) the voluntary choice to benefit strangers through charitable benefaction is something worth celebrating, promoting and incentivizing (this is at least one reason why the law bestows legal and social advantages on charitable trusts). In other words, native to charity law is a human rights project concerned with cultivating and promoting the belief that 'others' are equal and worthy. Through the stranger requirement, charity law advances an inclusive principle of acceptance.

So, what kind of an anti-discrimination doctrine might this support? As we have seen, the stranger requirement allows settlors of charitable trusts to target charitable benefaction more narrowly than at all strangers (the public at large). So, while settlors of charitable trusts must be willing

112. Matthew Harding refutes that motive is useful to regulating discriminatory charity. See Harding, *Charity Law supra* note 78 at 209.

to benefit strangers, they can choose (within limitations) which strangers they wish to benefit. The law needs a reference point for determining when settlors cross the line in a way that contradicts the inclusive ethic implicit in the stranger requirement. The principle could be this: the line is crossed when targeted benefaction discernably manifests stigmatizing rejection working at cross purposes with the 'equal worth' ethic implicit in the stranger requirement. Without expressing a concluded view on the matter, I think there are a number of contextual factors to weigh when considering whether this line is crossed.

C. Guiding Considerations

1. Courts Should Be Hesitant to Intervene

Courts should only intervene where there is a clear case for doing so. This is not only consistent with what courts have said in such leading decisions as *Bob Jones*[113] and *Canada Trust Co*[114] but also with the enabling, indeed remarkably enabling, posture of charity law. As we have seen, while charity law insists upon exclusively charitable purposes, it generally leaves it to charities to determine for themselves how best to advance such purposes. The broad freedom of settlors to advance their charitable missions as they determine — including the freedom to choose a target population — is arguably one of the intentional strategies through which charity law incentivizes the settlement of such trusts. We are not 'doing charity law' unless we are keeping with the enabling posture traditionally followed by this area of law.

2. Expression Can Matter (Exclusionary Versus Inclusionary Criteria)

It makes little difference to the practical operation of a charitable trust whether the eligibility criteria for its goods and services are expressed as exclusionary criteria — *e.g.* no Protestants — or as inclusionary criteria — *e.g.* only Protestants. Since both expressions have the practical effect of

113. See *Bob Jones*, *supra* note 1.
114. See *Canada Trust Co*, *supra* note 2.

including one group(s) to the exclusion of another/others, the validity of eligibility criteria should not be determined solely by whether they take expression as exclusionary criteria (antirequisites) versus inclusionary criteria (prerequisites). A rule specifying that, say, inclusionary criteria are necessarily valid but exclusionary criteria are necessarily void (or *vice versa*) could be gamed. Practically any exclusionary criteria could easily take expression as inclusionary criteria (and *vice versa*) without changing practical results.

That said, it does not follow that expression is altogether irrelevant. Though inclusionary and exclusionary criteria bode identical practical consequences, their communicative differences might matter *vis-à-vis* motive. While both inclusionary and exclusionary criteria can expose a settlor's rejection of the value judgment implicit in the stranger requirement — that strangers are worth benefiting by virtue of nothing more than their status as fellow persons with equal dignity, worth and value — exclusionary criteria are unique in their communication of a possibly suspect motive. Inclusionary criteria communicate the sub-population of strangers the settlor of the trust expressly wishes to benefit. Generally speaking, there is nothing facially suspect about this because settlors of charitable trusts are permitted to target their benefaction at sub-populations. Exclusionary criteria communicate the sub-population of strangers the settlor of the trust expressly wishes *not* to benefit. That is, exclusionary criteria expressly communicate a settled conviction — some strangers should not benefit — that on its face seems discordant with the value judgment implicit in the stranger requirement — strangers are worthy of benefaction. There may very well be benign reasons for an express exclusion, *e.g.* because other charitable trusts are already servicing the needs of that population. Or, there may not be. The problem is that exclusionary criteria directly confront us with something that on its face has the potential to run contrary to the inclusive ethic behind the stranger requirement and thus warrants investigation. Without denying that inclusionary criteria can raise identical concerns over motive, it is for this reason that exclusionary criteria are unique in their potential to raise suspicions of improper motives.

3. Ameliorative Charitable Trusts

Improper motive should not be inferred where charitable benefaction is targeted at populations facing unique barriers to full participation in social and economic life. There is nothing non-charitable about levelling the playing field through the provision of material assistance to the less fortunate. To the contrary, 'charity' is at heart an ameliorative institution. A green light should be given to charitable programming targeted on the basis of identity markers traditionally accepted as legitimate bases for affirmative action. And consistent with the Court's treatment of the 'women only' scholarship in *Re Castanera*, there should be a low hurdle to demonstrate that any given population falls within this category. This is not to deny that an ameliorative trust can be inspired by non-charitable motives. A 'women only' scholarship could very well be rooted in misandry. But charity law should be slow to infer such motives. Openly disclosed discriminatory motives, such as were present in *Canada Trust Co*, is the kind of thing that should properly suspend the benefit of the doubt normally extended to settlors.

4. Avoid a 'Race to the Bottom'

Eligibility criteria for charitable programming should be left to stand if they serve affirmative action goals. But this should not be the minimum standard to which all eligibility criteria should be required to conform. That is, we should not infer an improper non-charitable motive simply because the eligibility criteria employed by a charitable trust lack an affirmative action rationale. To do so would be to accept as a categorical rule that the motive test implicit in the stranger requirement is satisfied *only* where a charitable trust is open to the public at large or targeted at a disadvantaged population.

Going down this path would prove challenging.[115] The distinction between advantaged and disadvantaged can be a problematic distinction to draw. In a simple world, we would have the luxury of conceiving

115. For a discussion, see Miranda P Fleischer, "Equality of Opportunity and the Charitable Tax Subsidies" (2011) 91 Boston University Law Review 601 at 636-43.

of 'advantaged' and 'disadvantaged' as mutually exclusive and binary categories. Reality complicates this taxonomy. Populations can be advantaged and disadvantaged in incommensurable ways making it difficult to singularly categorize them as one or the other. How do we categorize a population that is economically advantaged but socially disadvantaged (or *vice versa*)? Would the social disadvantage outweigh the economic advantage such that this population is on balance 'disadvantaged' and thus a proper population to which charitable benefaction could be directed? Or would we draw the opposite conclusion?

Advantage is also relative. Population A might be advantaged relative to population B and population B might be advantaged relative to population C. Expressed in terms of disadvantage, this means population C is disadvantaged relative to both populations A and B and population B is disadvantaged relative to population A (but not C). So, what happens if a charitable trust is targeted at population B? If 'advantage' versus 'disadvantage' is going to be our frame of reference, how would we best conceive of this trust? Is it a trust that ameliorates the disadvantage of B relative to A or a trust that deepens C's relative disadvantage *vis-à-vis* B? There is no obvious answer. The fact that charity plays out on both a domestic and international scale only complicates things further. If a person who is poor by Western standards is comparatively better off than a person who is poor by a developing nation's standards, a fixation on 'disadvantage' would compel us to resolve whether it is proper for a charitable trust settled for the former to thereby exclude the latter.

And what of intersectionality? Whereas 'advantaged' versus 'disadvantaged' are singular blunt characterizations, identities are in reality intersectional, meaning they combine numerous identity markers, some of which might correspond with advantage and some of which might correspond with disadvantage. In other words, 'advantage' and 'disadvantage' play out not only across populations but also within them. This frustrates our ability to label individual persons as either advantaged or not.

For example, women as a group face social and economic disadvantages that men as a group do not face. We could on that basis conclude that, say, 'women only' scholarship trusts are properly charitable because they

are directed at a disadvantaged population but 'male only' scholarships are non-charitable because they are directed at an advantaged population. However, a person's status as a male or female is but one of that person's identity markers. Would our view of the 'male only' scholarship change if we accounted for socioeconomic status and targeted the scholarship at 'men of limited means'? Would we conclude that women *of any means* are disadvantaged and thus worthy of benefaction in ways that are not true of men *of limited means*? What if we instead accounted for sexual orientation and targeted the scholarship at 'gay men'? Or what if we combined sexual orientation, socioeconomic status and gender and targeted the scholarship at 'gay men of limited means'? Would we still conclude that 'maleness' is not a viable eligibility criterion on the basis that it is *always* a marker of advantage and thus *always* irrefutable evidence of an improper non-charitable motive?

It would be misguided for charity law to even bother taking on these challenges. Requiring that all eligibility criteria be markers of disadvantage would inspire a futile intersectional race to the bottom whereby charitable trusts using multiple targeting criteria — *e.g.* gender, race, class and ability — could only be targeted at populations disadvantaged on every single ground identified. Settlors should, of course, be free to settle charitable trusts for specific target populations disadvantaged in each and every one of these ways (and others). But it should not be the case that every single targeting criterion used by charitable trusts should necessarily have to correspond with some form of demonstrable disadvantage, at least not if our aim is to give expression to values indigenous to charity law.

Charity law has never developed a principle specifying that charities, *if* they target their goods and services, can only do so in favour of the worst off among us.[116] There is a general principle against excluding the poor.[117] However, the recent controversy over the charitableness of fee-charging independent schools exposes what could be described as a surprising tolerance for programming disproportionately benefiting

116. Even in the context of the relief of poverty, charities are not restricted to only serving populations that are destitute. See *e.g.*, *Independent Schools*, *supra* note 80 at paras 173, 179.

117. See *e.g.*, *Independent Schools*, *ibid*.

privileged communities. The holding in *Independent Schools* provides but the vaguest of guidance as to when fee-charging improperly excludes the poor.[118] There is no reason to think charity law is any better equipped to offer practicable guidance as to when charitable trusts improperly exclude populations on the basis of other identity markers (gender, race, sexual orientation, etc.).

Keep in mind that we are testing for motive, looking to see whether a charitable trust's targeting criteria expose the settlor's denial of the equal dignity, worth and value of disadvantaged populations not serviced by the trust. There is no basis to conclude, at least not as a bright line rule, that a charitable motive is absent every single time a trust is targeted other than on the basis of social and/or economic disadvantage. Charitable scholarships for Catholics and Protestants (which, as we have seen, Canadian courts have upheld) do not deny the equal dignity, worth and value of either atheists or adherents of other religions notwithstanding that being Catholic or Protestant is not typically thought to be a marker of disadvantage. An athletic scholarship does not manifest discriminatory ableism notwithstanding that it is targeted at those who are extraordinarily abled. To insist on an across-the-board standard whereby permissible targeting criteria are confined to markers of disadvantage would not be to vindicate values indigenous to charity law but rather to significantly curtail the broad freedom to choose a target population normally extended to settlors of charitable trusts.

5. *Pemsel* Categories of Charitable Purposes Are Not Silos

Courts should resist any approach that treats the *Pemsel* categories of charitable purposes as discrete silos. The common law recognizes four categories of charitable purposes but only one conception of charity. It would be odd if the values that attract charitable status under one category vitiated it in another. Religion provides a good example. While the advancement of religion is a discrete charitable purpose, the formal advancement of religion is not the only placeholder for religious beliefs

118. *Ibid.*

in the realm of charity. Religious values are also reflected in charitable programming outside of the formal advancement of religion. In *Bob Jones*, the positions of the schools relating to interracial dating/marriage were based on sincerely held religious beliefs.[119] Likewise, in *Law Society of British Columbia v Trinity Western University*[120] and *Trinity Western University v Law Society of Upper Canada*[121] (discussed below) a religiously infused law school required its students to abide by a community covenant that (among other things) confined sexual expression to heterosexual marriage.[122]

When confronted with religiously inspired charitable programming outside of the formal advancement of religion, charity law should remain mindful of the claims it makes about religion. In *Gilmour v Coats*, Lord Reid observed that charity law "assumes that it is good for man to have and to practice a religion".[123] In *Neville Estates Ltd v Madden*, Justice Cross observed that "[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none".[124] Likewise, in *United Grand Lodge of Ancient Free & Accepted Masons of England v Holborn Borough Council*, Justice Donovan reasoned that advancing religion entails giving it robust expression:

> [t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.[125]

By extending charitable status to religious institutions, charity law affirms religion as something worthy of what Matthew Harding describes as the "facilitative, incentive and expressive strategies" through which charity law promotes charitable purposes.[126] While charity law stops short of

119. *Bob Jones*, *supra* note 1.
120. 2018 SCC 32 [*LSBC v TWU*].
121. 2018 SCC 33 [*TWU v LSUC*].
122. See *LSBC v TWU*, *supra* note 120 and *ibid*.
123. [1949] 1 All ER 848 (HL) at 862.
124. [1962] 1 Ch 832 (ChD (Eng)) at 853.
125. [1957] 3 All ER 281 (CA) at 285.
126. Harding, *Charity Law*, *supra* note 78 at 44.

endorsing the correctness of individual religious beliefs or the truth of any single religion, it attaches value to the enterprise of religion, the important questions religion asks and the frame of reference religion provides.[127]

Charity law risks incoherence if it simultaneously lauds the advancement of religion as a charitable purpose without also recognizing religious belief as a possible motive for charitable benefaction and thus possible basis for targeting charitable programming. This is not to suggest that all manifestations of religious belief in charitable programming are properly beyond reproach. The point rather is to acknowledge that charity law could potentially find itself in contradiction if a given religious belief could be advanced by, say, a church without threatening its charitable status under the advancement of religion but the identical belief could not be reflected in the terms and conditions of a charitable trust settled by a church congregant under one of the other *Pemsel* categories of charitable purposes. The holding in *Bob Jones* squarely raised this problem. The decision left the religious beliefs of the schools with opposing characterizations. The beliefs were contrary to fundamental public policy in the context of education but presumably remained charitable (and thus of public benefit) in the context of the advancement of religion.

By way of reply, one could say that the advancement of religion is a distinct category of charity concerned not with individual religious beliefs but rather with entire belief systems (specifically those qualifying as 'religious'). It is the religious belief *system* and not the individual religious beliefs, so the argument would go, that is being endorsed through the charitableness of the advancement of religion. In contrast, religiously informed charitable programming under the other heads of charity (such as education in *Bob Jones*) will tend to confront courts not with a religious belief system *per se* but rather with a *specific* religious belief.

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127. Citing the philosopher John Finnis, the *OLRC*, *supra* note 5 at 148 observes that even "the sceptic must admit, at the very least, that whether in fact God exists or not, the question of God's existence is crucially important for everyone".

So if there is a meaningful distinction to be drawn between a religious belief system and the individual religious beliefs comprising that religious belief system, there is no contradiction, so the argument would go, in charity law's endorsement of a religious belief system in one context — the advancement of religion — but its refutation of a specific religious belief in another context — *Bob Jones*. Add to this that charity law has long since recognized a certain degree of differentiation across the *Pemsel* categories of charitable purposes such that what passes as charitable in one category may not in another.[128]

But it strains credulity to reason that charity law's endorsement of religion is solely an endorsement of systematized religious belief. Either the beliefs, practices and rituals cultivated by religion have value or they do not. It cannot be the case that they only have value when systematized unless we accept that systematization somehow sanitizes religious beliefs of the objections they attract as stand-alone beliefs. To go down this path would be to conceptualize religion as systematized mischief. That would be an odd basis on which to rationalize the charitableness of religion, not to mention the fact that such an uncongenial view of religion contradicts the claims charity law makes about religion.

As for differentiation across the *Pemsel* categories of charitable purposes, it is true that the pre-requisites for charitable status vary somewhat across the four "heads" of charity. It does not, though, follow that religion is properly confined to a silo quarantining it from the other heads of charity. And what would be the point of doing so? If religion has to be quarantined, then charity law will find itself in the strange position of promoting religion for the sake of promoting religion. Again, either the beliefs, practices and rituals cultivated by religion have value or they do not. Religious beliefs cannot have value for the sake of cultivating those beliefs through the advancement of religion but not for the sake of anyone actually acting on those beliefs in other contexts. Charity law should not simultaneously endorse and refute religious belief.

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128. The best example of this is that trusts for the relief of poverty are unlike other charitable trusts in that they are permitted to target their goods and services on the basis of private criteria. See *supra* note 98.

D. Application to Specific Targeting Criteria

We will consider the eligibility criteria that came before the Ontario Superior Court of Justice in *Royal Trust Corp*[129] to see which of them contradict the inclusive ethic implicit in the public component of public benefit. Eligible scholarship candidates had to be single, Caucasian, not a feminist (in the female candidates) and heterosexual.[130] Which of these on their face betray a non-charitable motive?

1. Sexual Orientation

In the current milieu, sexual orientation is one of the most challenging identity markers to contend with. There will clearly be circumstances in which differential treatment on the basis of sexual orientation will be attributable to non-charitable discriminatory motives. As we have seen, this was the finding in *Royal Trust Corp* where the Court concluded that expressly restricting a scholarship trust to heterosexuals broadcasted homophobic aspirations.[131] But there will also be circumstances in which the answer is less clear.

A pluralistic society includes not only diverse sexual expressions and identities but also diverse beliefs about the nature of sexuality. Sexual ethics and the nature of human sexuality are contested matters of conscience, experience and/or religious conviction. Not everyone agrees on sexual ideals or even on the ideal of a sexual ideal. In that sense, disagreements about sexuality are themselves an expression and feature of a diverse society. A society committed to diversity can see diverse beliefs about sexuality as more a strength (or at the minimum an inevitability) than a problem to be solved through charity law.

Some will object that certain views — *e.g.* traditional views of sexuality through which heterosexual marriage is cast as the singular manifestation of normative sexual expression — are hostile to sexual diversity and thus not properly welcomed to the table in a pluralistic society. But for

129. *Royal Trust Corp*, *supra* note 3.
130. *Ibid* at para 8.
131. *Ibid* at para 14.

present purposes where would we go with that perspective? Would we, for example, vet religions for their theologies of sexuality before granting charitable status? To go down that path would be to make conformity to a given sexual ethic a precondition to charitable status. The traditional practice of charity law is against assessing individual religious doctrines for benefit. In any event, it is perhaps better for a diverse society to foster acceptance of difference without in the process foreclosing the possibility of principled disagreement. Stated otherwise, *acceptance* (something implicit in the inclusive ethic of the stranger requirement) should not preclude *disagreement* (something that is inevitable with diverse beliefs).

Charity law can foster acceptance without precluding disagreement by asking the following question in instances where there is differential treatment: Is the differential treatment a manifestation of stigmatizing non-acceptance (discriminatory rejection) or a manifestation of principled disagreement (a sincerely held sexual ethic). A predictable objection is that this is a misguided question; since stigmatizing non-acceptance on the basis of sexual orientation originates in (and is enabled by) heterosexual sexual ethics, charity law cannot both live out its inclusive ethic and welcome into the charity realm traditional sexual ethics. But again if we acknowledge diversity of belief as a welcome feature of charity law, particularly diversity of religious belief, then we just have to live with the fact that the various beliefs welcomed to the table will be in tension with one another. Charity law cannot simultaneously foster diversity of belief and make conformity to a singular sexual ethic (or any other ethic) a precondition for charitable status. To go down that path risks charitable status becoming a tool through which to induce conformity with orthodoxy. Prohibiting stigmatizing non-acceptance while allowing for principled disagreement is possibly the least undesirable way to balance charity law's inclusive ethic with diversity of belief.

So, what might this look like in practice? The facts of *Royal Trust Corp* fit the category of stigmatizing rejection on the basis of sexual orientation. Sexual ethics are at best peripheral in the context of a scholarship trust. As such, there is nothing about the context of an academic scholarship to suggest that the blunt exclusion of LGBTQ persons is likely anything but discriminatory rejection. Add to this that prohibiting settlors

of scholarship trusts from excluding LGBTQ persons is in no way tantamount to forcing conformity with any given sexual ethic. Doing so does not compromise charity law's commitment to diversity of belief so much as it contemplates that an academic scholarship is an unlikely outlet for expressing a belief on sexuality. The transferable principle is that exclusions on the basis of sexual orientation in contexts in which beliefs about sexuality are peripheral (where requiring acceptance neither requires agreement nor frustrates disagreement) are prime candidates to be characterized as stigmatizing non-acceptance.

At the opposite end of the continuum is a church teaching a heterosexual theology of marriage and only solemnizing heterosexual marriages. These facts entail an exclusion of same-sex couples from a service — marriage — that is otherwise available to heterosexual couples. But the exclusion is directly and unmistakably attributable to a religious belief. The only way to require equal access to the service here is to require that the church as a condition for maintaining its charitable status perform marriage services in contravention of its beliefs. This is the kind of situation where a principle against using charitable status to compel agreement will militate in favour of allowing differential treatment on the basis of sexual orientation.[132] Even though there is differential treatment, there is not a targeted attempt to stigmatize and exclude. Sexual orientation is only one of many topics that a church's theology of sexuality would address. The trappings of principled disagreement are present and thus we have ample reason to not view the differential treatment as merely stigmatizing rejection.

In between these are instances in which religious belief will be brought to bear in circumstances outside the formal advancement of religion but still within circumstances in which sincerely held beliefs about sexuality could be engaged. Consider, for example, the facts and circumstances behind the recent litigation over the accreditation of a religious law school. Trinity Western University is a Christian university

132. *ITA*, *supra* note 9, s 149.1(6.21) expressly provides that charities organized for the advancement of religion will not jeopardize their charitable registration.

that recently sought accreditation from provincial law societies for its law school.[133] The law societies in British Columbia and Ontario declined accreditation (meaning graduates of the law schools would not be eligible to practice law in these provinces) due to the law school's religiously inspired 'community covenant'. The covenant was mandatory for staff, faculty and students. It covered a wide range of behaviour including but not restricted to sexuality (*e.g.* honesty, theft, plagiarism, entertainment, alcohol, drugs and tobacco, etc.). In relation to sexuality, the covenant required that staff, faculty and students agree not to use pornography, to observe modesty and to reserve sexual intimacy for heterosexual marriage. Relying upon their 'public interest' statutory mandate, the law societies denied accreditation due to concerns over the discriminatory character of the covenant (its differential treatment of heterosexual and same-sex married persons). In a 7-2 decision, the Supreme Court of Canada concluded that the law societies did not exceed their authority in declining accreditation.[134]

In the wake of the decision, Trinity Western University modified the community covenant so that it was no longer mandatory for students (though it remains mandatory for staff and faculty). But what if the covenant was still mandatory for students? Would this compromise the charitableness of Trinity Western University? Should it?[135]

A charity law argument (although not a strong one) could be made against the covenant using the touchstones of "acceptance" and "agreement". If a law school had to admit students without any regard to sexual orientation as a precondition to charitable status, the law school would not thereby in any meaningful way be made to facilitate or condone the sexual orientation of the law students. Indeed, we might say that disallowing the differential treatment implicit in the covenant without

133. *LSBC v TWU*, *supra* note 120; *TWU v LSUC*, *supra* note 121.

134. *Ibid*.

135. For an argument that charitable status should be withdrawn from Trinity Western University see Saul Templeton, "Trinity Western University: Your Tax Dollars at Work" Case Comment on *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, online (pdf): <ablawg.ca/wp-content/uploads/2015/03/Blog_ST_TWU_March2015.pdf>.

going as far as to prohibit the law school from imbuing its curriculum with the belief system reflected in the covenant is a balanced way for charity law to require acceptance (to disallow the exclusion occasioned by the covenant) without prohibiting disagreement (to allow the value ethic implicit in the covenant).

But there is a better argument in favour of the position that the covenant should not vitiate charitable status. The framework I have suggested here means that the covenant compromises charitable status only if it meets the standard of stigmatizing rejection (non-acceptance). It is not obvious that the covenant meets that standard. Even though the covenant achieved differential treatment on the basis of sexual orientation, it was not specifically targeted at LGBTQ persons, nor was its singular effect to exclude such persons. The covenant outlined a holistic sexual ethic proscribing a broad range of sexual expression (including many forms of heterosexual sexual expression). Its terms also excluded from the law school community all unmarried sexually active persons, all users of pornography and all married persons engaging in extramarital sex. Its differential treatment was ultimately only in relation to married persons. Whereas persons in heterosexual marriages were in compliance with the covenant, those in same-sex marriages were in contravention of it. Nonetheless, the sheer breadth of the covenant supports the conclusion that its differential treatment was not attributable to stigmatizing rejection of LGBTQ persons but rather to a sincerely held sexual ethic limiting a broad array of sexual expression. In other words, the covenant is amenable to the interpretation that it manifests principled disagreement rather than stigmatizing rejection of a targeted group.

A predictable objection to this is that it gives the greenlight to discrimination on the basis of sexual orientation provided the discrimination is packaged as part of a holistic sexual ethic. But this objection merely highlights the inevitable conflict between charity law's inclusive ethic and its commitment to diversity of belief. Charity law can be inclusive and also foster diversity of belief but it cannot always do both at the same time. The two come into conflict whenever a belief system (as in Trinity Western University relating to sexuality) leads to differential treatment. In theory, a rule could be adopted whereby inclusion takes

priority whenever the ideal of inclusion comes into conflict with belief systems countenancing differential treatment. In a context like Trinity Western University, such a rule would mean that the covenant jeopardizes charitable status because of its non-inclusive effects.

But if inclusion is the top priority why stop at merely prohibiting the covenant in Trinity Western University? At the end of the day, objections to the covenant are presumably objections to the value commitments — the view of sexuality — reflected in the covenant. So what, if anything, would be achieved if charity law merely prohibited the covenant — *i.e.* stopped the law school from making conformity with the covenant a condition of membership in the law school community — but did not prohibit the law school from imbuing its curriculum with the values reflected in the covenant? In that event (as has actually happened) the law school curriculum would continue to be informed by the very beliefs about sexuality that made the covenant controversial in the first place. If the covenant is problematic due to those beliefs, then perhaps it is not merely the covenant that should vitiate charitable status but also the perpetuation of the beliefs reflected in the covenant too, or so the argument would go.

But if we go down that path, we are back to the problem of charity law inducing conformity of belief (in this circumstance, conformity to a particular sexual ethic) in the name of inclusion. In that event, charity law's commitment to inclusion would crowd out the possibility of principled disagreement within the charitable sector. Either we accept that there is value in diverse beliefs being welcomed into the charitable sector or we do not. If we do (which we should), then we must be prepared to live with the fact that some views represented in the charitable sector will prove controversial.

2. Marital Status

Restricting eligibility to single persons discriminates on the basis of marital status. This kind of discrimination is constitutionally prohibited for state actors under the *Charter*.[136] Likewise, it is prohibited for private

136. *Charter*, *supra* note 30 s 15(1).

actors in contexts in which human rights codes apply.[137] Nonetheless, there was no finding in *Royal Trust Corp* that a person's marital status was an improper basis on which to determine eligibility for charitable benefaction. I agree with this. The exclusion of married persons from the trust did not stigmatize them. It did not on its face signal the settlor's denial of the equal worth, value and dignity of married persons. This is not at all the kind of eligibility criterion for which a benign explanation seems unlikely.

The fact that the exclusion of married persons in *Royal Trust Corp* did not even attract judicial comment, notwithstanding that marital status is a prohibited ground of discrimination under the *Charter* and human rights codes, alerts us to an important principle. The common law of charity is not captive to equality norms under constitutional law and human rights codes. A non-charitable motive need not be inferred simply because the settlor draws a distinction that might be considered discriminatory in the context of either constitutional law or human rights codes.

3. Caucasian

While a charitable scholarship trust for 'singles only' is facially similar to one for 'Caucasians only', courts need not and should not ignore that facially similar criteria can be differently stigmatizing. Given the history and present realities of race relations, 'Caucasians only' practically cannot avoid being interpreted as a denial of the equal worth, value and dignity of non-whites. This kind of criterion is a paradigmatic example of where a non-charitable motive may be inferred. It is difficult to identify situations in which a 'Caucasians only' stipulation is not stigmatizing.

4. Not a Feminist

The Ontario Superior Court of Justice in *Royal Trust Corp* concluded that the 'no feminist' stipulation was misogynistic and discriminatory on the ground of ideology.[138] I think this goes too far. While I agree that the stipulation 'no feminists' was properly struck, I take issue with

137. *HRC*, *supra* note 6.
138. *Supra*, note 3 at para 14.

it having been struck on the express ground that it was ideologically discriminatory. The stipulation 'no feminists' was instead arguably void for vagueness. By voiding the trust on the express basis that it was ideologically discriminatory, the Court opened the door to ideological conformity becoming a touchstone for charitable status.

As reasoned, the judgment takes for granted that feminism is the singular and incontestable ideological expression of the equal worth, value and dignity of women, that settlors of charitable trusts cannot manifest dissenting views on feminism without thereby unmistakably broadcasting that women are inferior. While no doubt well-intentioned, this aspect of the judgment sets a misguided precedent whereby non-charitable motives could in future cases be reflexively inferred from principled ideological dissent. Where a settlor uses a person's belief system as a qualifying or disqualifying criterion, we can interpret that as signalling more about the settlor's view of the belief system than about the settlor's view of the person espousing the belief system. That is, this kind of targeting criterion does not necessarily signal that the excluded persons are less worthy persons.[139]

E. Summation

It is possible to discover in the public component of public benefit an ideal useful to regulating discriminatory charity. Through the stranger requirement reflected in the public component of public benefit, charity law broadcasts the conviction that strangers are worth benefiting by virtue of their equal worth, value and dignity. While stigmatizing rejection contradicts the inclusive ethic implicit in this conviction, not all differential treatment amounts to stigmatizing rejection. I have offered some considerations as to when the line is and is not crossed. An important consideration will be for charity law to require acceptance (disallow stigmatizing rejection) without thereby requiring agreement (disallowing principled disagreement).

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139. This is one of the bases on which the religiously conditioned scholarships were upheld in *Re Ramsden*, *supra* note 37 and *University of Victoria*, *supra* note 38.

V. Conclusion

This paper has taken up the following question: Can we regulate discriminatory charity while 'doing charity law'? That is, can we regulate discrimination by charities while confining our frame of reference to the logic, values and doctrines of charity law and the unique juridical features of charitable trusts? The question is apt because the leading cases — *e.g.* *Bob Jones* and *Canada Trust Co* — have arguably looked outside of the law of charity for relevant values. These cases have, via the doctrine of public policy, imported into charity law values developed in and for other contexts, *e.g.* constitutional law principles. For a variety of reasons — *e.g.* it universalizes context specific rules — this is a problematic line of reasoning. If we want to truly understand when and why discrimination is discordant with legal charity we need to be able to explain the non-charitableness of discrimination from a perspective internal to the common law of charity.

As we have seen, though, this is a surprisingly difficult task. While discriminatory purposes are clearly non-charitable at common law, this does not help in contexts where charities pursue charitable purposes through discriminatory activities. Explaining why discriminatory methods of pursuing charitable purposes is non-charitable at law is challenging when we confine our frame of reference to the core pillars of charity law — *e.g.* the charity law distinction between activities and purposes and public benefit. In that sense, discriminatory activities expose a fault line in the common law of charity. Charity law's remarkably enabling posture means it is compromised in its ability to intervene (without invoking the problematic concept of public policy) when charities pursue their charitable missions in objectionable ways. To be sure, given that charity law (1) categorizes activities with reference to the purposes they advance and (2) vets purposes but not activities for benefit, it is possible (however counterintuitive it may seem) that an objectionable method of furthering a charitable purpose can qualify as a charitable activity. Likewise, the public component of public benefit is not formally applied as an anti-discrimination rule so much as a 'stranger requirement'.

It is nonetheless possible to discover in the stranger requirement an inclusive ethic useful to the regulation of discrimination. That is, native to charity law is an ideal that helps to explain and operationalize the non-charitableness of discrimination from a perspective internal to the common law of charity. The framework I have provided does not answer all questions nor eliminate the role for difficult value judgments. But it at least provides a frame of reference from within charity law for refining our understanding of the non-charitableness of discrimination. In that sense, it is an improvement on the resort to public policy.

When is the Advancement of Religion Not a Charitable Purpose?

Pauline Ridge*

This article addresses the question of why religious groups receive charitable status in relation to religious activities by considering when the current law does not grant charitable status to purposes that advance religion. The jurisdictional focus is upon Australian law, with some reference to other jurisdictions whose law also derives from the English common law of charity. After an overview of the charity law landscape in Australia, this article explains and critically evaluates the grounds upon which charitable status may be refused to purposes that advance religion. This article then considers two issues that have emerged in twenty first century charity law and that are relevant to the charitable status of religious groups. These concern human rights, particularly the right to freedom of religion, and the use of charity law to regulate religious activity.

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I. Introduction

The charitable status of religious purposes has come under public scrutiny in the twenty-first century. Whilst some faith-motivated activities traditionally undertaken by religious groups, such as health care, aged care and welfare services, are of obvious benefit to society as a whole, why does the manifestation of religious faith through purely religious activity, such as worship, prayer and ritual (described in

charity law as the 'advancement of religion') also qualify for the valuable reputational, legal and fiscal privileges associated with charitable status? This question has been brought into sharper focus by radical changes to the law in some jurisdictions. In England and Wales, for example, all charitable purposes must now be of demonstrable 'public benefit'; this has placed the question of the public benefit of the advancement of religion particularly in the spotlight.[1] Changes in the public perception of religion are also a contributing factor. In Australia, for example, the public respect and deference traditionally accorded to religion appears to be waning. Public trust in institutional religion was shaken by the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse[2] and this has been exacerbated by the disjuncture between general public sentiment and conservative religious groups' vocal opposition to the same sex marriage reforms of the Commonwealth of Australia ("Commonwealth Government") in 2017.[3]

Eligibility for charitable status in relation to purely religious activities is of profound importance to religious groups, for whom the predominant sources of funding in common law countries such as Australia are the gifts of group members, investments and commercial activity.[4] The value of almost all of these sources of funding is boosted by the legal and fiscal privileges conferred by the state upon religious groups and religious purposes through the mechanism of charitable status.[5]

The question whether purposes for the advancement of religion are charitable is most often framed in terms of the public benefit element of charity law. Legal scholarship to date has focused upon clarifying the relevant law in this respect (is there a presumption of public benefit at common law in relation to the advancement of religion and what does public benefit entail in that doctrinal context?) or upon the public benefit rationale for conferring charitable status for the advancement

of religion.[6] The latter question has elicited philosophical, doctrinal and instrumentalist responses in favour of maintaining the charitable status of the advancement of religion.[7] My objective in this article is to contribute to the existing scholarship by exploring the legal question from a different perspective. The question that this article explores assumes that the purposes of the religious group constitute 'advancement' and that the beliefs and canons of conduct of the group constitute a 'religion' and asks: when will charitable status nevertheless be denied? In other words, when is the advancement of religion *not* a charitable purpose? Framing the question in this way encourages consideration of factors that are not necessarily framed in terms of public benefit and yet which may help clarify why charitable status is given or withheld.

The jurisdictional focus is upon Australian law, although some reference is made to jurisdictions whose law also derives from the English common law of charity, such as England itself, Ireland and Canada.[8] The jurisdictional comparisons are offered with caution; differences in the role and place of religion in each of those societies, the legislative schemes that have either replaced or overlaid the common law of charity, and their respective regulatory oversight of charities, make it difficult to generalise. Australian law provides a useful focus, however, because it retains the common law definition of charity for the purposes of trust law, but overlays this with statutory definitions of charity for various legislative purposes. It also has a dedicated charity and not-for-profit regulator. It thus embodies at least some elements of the charity law in each of the related jurisdictions referred to in the article. Hence, a study of Australian law may offer insights for lawyers in other jurisdictions.

After a brief overview of the sources of charity law and the regulatory landscape in Australia (Part II), the grounds upon which charitable status may be refused in relation to purposes for the advancement of religion are described and critically evaluated from an internal legal perspective as to whether they are coherent and defensible (Parts III to V). Parts VI and VII consider two more recent issues relevant to the conferral of charitable status for religious purposes. These concern the intersection of human rights law with charity law and the advantages to the state in securing regulatory power over religious groups in relation to their

religious activity.

II. Overview Of The Law And Regulatory Landscape In Australia

In Australia, the common law of charity, rather than legislation, still determines the validity of a trust for religious purposes. Broadly speaking, pursuant to that body of equitable principles, the 'advancement of religion'[9] is a charitable purpose unless shown otherwise.[10] This means that public benefit (an essential feature of a charitable purpose) is assumed in relation to religious purposes, unless brought into question.[11]

The common law of charity is overlaid by state, territory and federal legislative schemes.[12] These generally accept the common law definition of charity, but then modify and/or expand upon it for the purposes of the particular statutory jurisdiction.[13] Of most significance for religious groups, for reasons of income tax exemption and regulatory oversight, is Australia's *Charities Act 2013*[14] which applies to all charitable entities and provides a definition of charity for the purposes of all Commonwealth legislation. This article will limit its consideration of charity legislation to the *Charities Act* because of its scope and practical significance. Although, the preamble of the *Charities Act* states that it will ensure continuity "by utilising familiar concepts from the common law", some changes are made to the charitable head of advancement of religion.[15]

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9. See Part III, below.
10. *Commissioners for Special Purposes of Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) at 583.
11. See Ridge, "Religious Charitable Status", *supra* note 6 (the relevant law evolved during the nineteenth century). The public benefit element of religious charitable purposes is discussed in Parts IV and V, below.
12. See Matthew Harding, "Recent Reforms to Australian Charity Law" in Ron Levy et al, eds, *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra: Australian National University Press, 2017) 283.
13. *Ibid* (referring to "definitional proliferation" at 283).
14. *Charities Act 2013* (Cth), 2013/100 (Austl) [Austl *Charities Act*].
15. *Ibid*, preamble.

In brief, the *Charities Act*'s definition of "charity" encompasses not-for-profit entities pursuing purposes for the advancement of religion and for the public benefit so long as such purposes are not 'disqualifying purposes' within the meaning of the act.[16] Advancing religion is presumed to be of public benefit for the purposes of the act,[17] except where "the entity is a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public".[18] In the latter case there is no public benefit requirement.

Since December 2012, Australia has had a national regulator of charities and not-for-profit entities — the Australian Charities and Not-for-profits Commission ("ACNC") — and a comprehensive national regulatory scheme, the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ("*ACNC Act*").[19] Registration pursuant to the *ACNC Act* is a prerequisite for Commonwealth tax concessions[20] and is dependent on an entity providing financial reports[21] and meeting certain governance and external conduct standards.[22] However, there are substantial exemptions from regulatory compliance for 'basic religious charities' ("BRCs"): that is, those pursuing purposes for the advancement of religion (pursuant to the *Charities Act*) and who meet certain other criteria.[23] A charity's registration may be revoked by the Commissioner.[24]

In summary, the source and content of charity law in Australia differs according to whether a religious group seeks to ensure the validity of a trust for religious purposes, or to secure charitable status in relation

16. *Ibid*, s 5.
17. *Ibid*, s 7.
18. *Ibid*, s 10(2).
19. *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/168 [*ACNC Act*]. See generally Susan Pascoe, "A Regulator's View" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 570 [Pascoe].
20. *ACNC Act*, *ibid*, part 2-1, s 20-5(2).
21. *Ibid*, part 3-2.
22. *Ibid*, part 2-1, ss 20-5(3), 35-10 (dealing with registration and revocation of registration), part 3-1 (governance and external conduct standards).
23. See below Part VI.B.
24. *ACNC Act*, *supra* note 19, part 2-1, ss 20-5(1), 35-1, 35-10.

to its religious activities for taxation or other purposes in relation to Commonwealth legislation, although there are common elements and overlap between the common law and legislation. The tenor of both the common law and the *Charities Act* is favourable towards purposes for the advancement of religion in that both assume that such purposes are charitable, unless proved otherwise. The *ACNC Act* provides comprehensive, national regulatory oversight of charities and not-for-profit entities, but exempts basic religious charities from some regulatory requirements. In the following Parts this brief overview is expanded upon by way of a discussion of the grounds upon which charitable status may exceptionally be refused.

III. Definitional Barriers To Charitable Status

A. Introduction

An obvious and immediate barrier to charitable status for purposes that advance religion is definitional. Definitional questions to do with the meaning of 'religion' are particularly difficult. Two challenges arise in formulating a legal definition of religion in the context of charity law. The first concerns legal neutrality. Religious pluralism is integral to the liberal democratic state[25] and this requires that there be neutrality towards religion, including in relation to definitions of religion. Formulating a neutral definition requires a judge to recognise, and then put to one side, personal religious acculturation.[26] An example of such acculturation occurred in English charity law where, prior to the enactment of the *Charities Act 2006*,[27] the charity law definition of religion reflected a

25. *Kokkinakis v Greece*, No 14307/88, [1993] ECHR 20 at para 31.
26. *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)*, (1983) 154 CLR 120 (HCA), Mason ACJ (as he was then) and Brennan J (as he was then) ("the acculturation of a judge in one religious environment [will] impede his understanding of others" at 133) [*Church of the New Faith*].
27. *Charities Act 2006* (UK), c 50.

Western religious paradigm of "belief in a god or gods".[28]

A second challenge with legal definitions is in distinguishing true definitional concerns to do with the meaning of terms from normative questions concerning whether a resulting claim or defence should be available. When does definition end and substantive consideration of the merits of a claim begin? Applying this to charity law, there is an important conceptual distinction between the definitional question of whether purposes fall within the meaning of 'advancement of religion' and the normative question of whether such purposes should be granted charitable status.[29] If the two questions are confused or conflated, transparency in legal decision-making is compromised. Accordingly, a definition of the advancement of religion should:

(i) so far as possible, be neutral as to religious world view; or

(ii) be confined to true definitional matters.

As will now be explained, these standards are not always met and the definition of 'advancement of religion' has been used in some jurisdictions to exclude (arguably) religious purposes from charitable status. However, Australian charity law provides a model for best practice and is discussed first.

B. The Definition of 'Advancement of Religion' in Australian Charity Law

In Australia's common law of charity, 'advancement of religion' refers to the practice and propagation of religious belief itself; it does not

28. *In re South Place Ethical Society*, [1980] 1 WLR 1565 (Ch (Eng)) at 1572 (noting Buddhism as a possible exception at 1573). See UK *Charities Act*, *supra* note 1, s 3(2)(a). See also *R (Hodkin) v Registrar General of Births, Deaths and Marriages*, [2013] UKSC 77.

29. This does not mean that the legal context of the definition should be ignored. See *Church of the New Faith*, *supra* note 26, Mason ACJ and Brennan J ("[i]t is in truth an inquiry into legal policy" at 133). In addition, principles of statutory interpretation must be adhered to if the definitional context is legislation.

encompass faith-motivated conduct that is not itself religious,[30] or even purposes that are 'conducive to the good of religion'.[31] The purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it.[32]

This is despite the fact that, for some members of some religious groups, all aspects of life are a manifestation of their religious beliefs and would be described by them as religious purposes.[33]

For the purposes of the *Charities Act*, the relevant terminology is that of 'advancing' religion and 'advancing' is defined to include "protecting, maintaining, supporting, researching and improving".[34] This raises questions of statutory interpretation because 'researching' clearly goes beyond the common law meaning of advancement in the religious context. The issue is moot to the extent that researching religion may fall within the charitable purpose of advancement of education; but there may be pragmatic advantages to securing charitable status on the ground of religion (as a basic religious charity, for example) that mean the question may be tested.

The meaning of 'religion' for the purposes of Australian not-for-profit law, including charity, was determined by the High Court in 1983 in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*.[35] The agreed issue in that case was whether Scientology was a religion.[36] If so,

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30. *Roman Catholic Archbishop of Melbourne v Lawlor*, (1934) 51 CLR 1 (HCA) at 32 [*Roman Catholic Archbishop of Melbourne*].
31. *Dunne v Byrne*, [1912] 16 CLR 500 (HCA).
32. *Roman Catholic Archbishop of Melbourne*, *supra* note 30 (Dixon J (as he was then) paraphrasing *Keren Kayemeth Le Jisroel, Ltd v Commissioners of Inland Revenue*, (1931) 2 KB 465 ((CA) Eng) at 469, 477 (Lord Hanworth MR)). See also *Radmanovich v Nedeljkovic*, [2001] NSWSC 492l (Austl) at paras 147-51.
33. See generally *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*, [2014] VSCA 75 (Austl) at paras 559-62 [*Christian Youth Camps*].
34. Austl *Charities Act*, *supra* note 14, s 3(1) (definition of "advancing").
35. *Church of the New Faith*, *supra* note 26.
36. *Ibid*.

it was assumed by the parties that the Church of the New Faith would be a 'religious institution' within the meaning of the *Pay-roll Tax Act 1971*[37] and entitled to a pay-roll tax exemption.[38] The Court's approach reflects the suggested criteria for a legal definition given above, in that (i) it is explicitly neutral in its definitional objectives, and (ii) it puts aside issues of the legality of the religious activities in question as a matter for regulation, rather than definition. It is therefore solely definitional. In both of the joint judgments, as well as in Justice Murphy's single judgment, the definition is articulated in deliberately inclusive terms; if limitations on the practice of a religion are warranted, they are to be applied at a later stage of the analysis, but do not exclude a set of beliefs and practices from constituting a 'religion' per se.[39] Accordingly, Mason ACJ and Brennan J, listed two essential criteria that will assume varying importance, depending on the facts "first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief …".[40]

C. The Definition of 'Religion' in English Charity Law

Conversely, the Charity Commission of England and Wales' definition of 'religion' for the purposes of the UK *Charities Act* conflates the meaning of 'religion' with questions concerning whether a religious group should qualify for charitable status.[41] The UK *Charities Act* states only that a religion may involve "belief in more than one god" and need not "involve belief in a god".[42] In its decision on the application for registration of the

37. *Pay-roll Tax Act 1971*, 1971/8154 (Austl).
38. *Church of the New Faith*, *supra* note 26 (Mason ACJ and Brennan J noted, at 128-29, that it did not necessarily follow from a finding that Scientology was a religion that the Church of the New Faith (a corporation) was a "religious institution"; see also Wilson J and Deane J at 165).
39. *Ibid*.
40. *Ibid* at 136 (Wilson and Deane JJ, at 173, preferred to list a set of non-exclusive "indicia or guidelines" as to the meaning of 'religion' that was based upon "empirical observation of accepted religions").
41. UK *Charities Act*, *supra* note 1, s 3(2)(a).
42. *Ibid*.

Temple of the Jedi Order as a charitable incorporated association, the Commission formulated a definition of 'religion', which begins:

> religion in charity law is characterised by belief in one or more gods or spiritual or non-secular principles or things, and a relationship between the adherents of the religion and the gods, principles or things which is expressed by worship, reverence and adoration, veneration, intercession or by some other religious rite or service.[43]

To this point, the definition reflects the essential criteria identified by Mason ACJ and Brennan J in *Church of the New Faith*, namely, beliefs and associated canons of conduct.[44] This should suffice to determine whether the purposes in question are for the advancement of 'religion'. However, the Commission continued "that it must be capable of providing moral and ethical value or edification to the public and characterised by a certain level of cogency, seriousness, cohesion and importance".[45]

These requirements go beyond definitional issues to the normative question of whether the religious purposes in question *should* qualify for charitable status. They are also difficult to apply in a neutral manner as they require a judgment on the merits of the beliefs in question.[46]

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43. *The Temple of the Jedi Order — Application for Registration: Decision of the Commission* (16 December 2016) at para 13, online (pdf): Charity Commission for England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578931/Temple_of_the_Jedi_Order_FINAL_DECISION.pdf> [*Temple of the Jedi Order*]. The Temple of the Jedi Order's application was unsuccessful.
44. *Church of the New Faith*, *supra* note 26.
45. *Ibid* (footnotes omitted).
46. *Cf. Thornton v Howe*, (1862) 31 Beav 14 (Ch (Eng)) [*Thornton*]. On the sources for the Commission's definition, see Pauline Ridge, "Not-for-profit Law and Freedom of Religion" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018) 284 ["Not-for-profit Law and Freedom of Religion"].

D. The Definition of 'Advancement of Religion' in Irish Charity Law

An egregious example of a definitional barrier being used to exclude certain purposes from the advancement of religion comes from the Republic of Ireland. Section 3(10) of the *Charities Act 2009*[47] states:

> [f]or the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult—
>
> (*a*) the principal object of which is the making of profit, or
>
> (*b*) that employs oppressive psychological manipulation—
>
> (i) of its followers, or
>
> (ii) for the purpose of gaining new followers.[48]

The provision was the result of an amendment to the original Bill to "ensure dubious organisations that pose as religious but whose motive is making money or which use inappropriate psychological techniques in recruiting or retaining members will not attain charitable status".[49]

The provision is problematic for the same reasons as the *Temple of the Jedi Order* decision of the English Charity Commission: substantive questions concerning whether or not particular religious activities should be facilitated by the state are dealt with as a definitional matter.[50] It is also not clear that the provision will be straightforward to interpret and apply. Such concerns could instead have been dealt with by the provisions of the Irish *Charities Act* concerning exclusion from charitable status on

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47. *Charities Act 2009* (Ire) [Ire *Charities Act*].
48. *Ibid*, s.3(10), ("[i]t shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit" at s 3(4)). Section 3 came into force on 16 October 2014: *Charites Act 2009 (Commencement) Order 2014* (Ire).
49. Ireland, Seanad Éireann Deb (11 December 2008) vol 192, no 16 (Deputy John Curran), online: Tithe an Oireachtais Houses of the Oireachtas <www.oireachtas.ie/en/debates/debate/seanad/2008-12-11/5/#spk_126>.
50. *Temple of the Jedi Order*, *supra* note 43.

illegality and public policy grounds.[51]

In summary, the definitions of 'religion' and 'advancement of religion' should not be used to impose non-definitional barriers to charitable status. The question of what constitutes a religion is conceptually distinct from the question of whether the manifestation of a religion through religious purposes should qualify for charitable status. Keeping these two questions separate aids the clarity and transparency of legal reasoning as well as ensuring neutrality towards religion.

IV. Disqualification Based Upon The 'Public' Element Of Charity

A. Introduction

At common law, charitable purposes must be 'public' in nature. This entails that they benefit the public, or an inclusive section of the public, rather than an exclusive, private group.[52] Paragraph 6(1)(b) of Australia's *Charities Act* reflects the common law position:

> 6 [p]urposes for the public benefit
>
> (1) A purpose that an entity has is for the *public benefit* if: …
>
> (b) the purpose is directed to a benefit that is available to the members of:
>
> (i) the general public; or
>
> (ii) a sufficient section of the general public.[53]

This is the 'public' aspect of the requirement that charitable purposes be for the 'public benefit'. It is difficult to disentangle entirely from the

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51. See Ire *Charities Act*, *supra* note 47, s 2(1) (definition of "excluded body").
52. *Verge v Somerville*, [1924] UKPC 6 [*Verge*]; *Oppenheim v Tobacco Securities Trust Co Ltd*, [1950] UKHL 2 [*Oppenheim*]; *Thompson v Federal Commissioner of Taxation*, (1959) 102 CLR 315 (HCA) at 32122 [*Thompson*].
53. Austl *Charities Act*, *supra* note 14, s 6(1)(b) [emphasis added] (see also ss 6(3), 6(4)).

aspect of benefit. Purely religious purposes may be disqualified from charitable status on a number of overlapping grounds (discussed in the following parts) because they are not sufficiently 'public' in this sense. Not all of these grounds are consistent, and their rationales are not always clear. A recurring question concerns whether the communal religious activity of a private religious group may still convey sufficient indirect benefit to the wider public to justify charitable status or, in the words of the *Charities Act*, whether that activity conveys a benefit that is available to "the members of the general public".[54]

There is a further aspect of the 'public' nature of charity that is also discussed in this Part, namely that 'private advantage' must not accrue to entities other than those naturally benefitting from pursuit of the charitable purposes.[55]

B. Restrictions on Public Access to Worship

The religious purposes of a religious group may not satisfy the public requirement of charity because of restrictions on public access to places of worship or to spaces within a place of worship. But this is not always the case and it is difficult to discern a consistent rationale in the case law.

It is clear that religious purposes concerning places of worship with no public right of access at all and where the exclusion of the public does not relate to the religious beliefs in question are not charitable.[56] The reason is that a benefit that could be publicly available (namely, the "edifying and improving effect" from participation in religious rites) is confined to a private group.[57]

The law is more difficult to state where the public are not as comprehensively excluded from the place of worship and/or where the exclusion is based upon the tenets of the religion in question. The

54. *Ibid*, s 6(3)(a).
55. *Thompson*, *supra* note 52 at 322 (Dixon CJ).
56. *Hoare v Hoare*, (1886) 56 LT 147 (Ch (Eng)) (private chapel in country house); *Power v Tabain*, [2006] WASC 59 (Austl) (family church on private land in Croatia).
57. *In re Hetherington Decd*, [1990] Ch 1 (Eng) at 12 (Sir Nicolas Browne-Wilkinson VC) [*Hetherington*].

difficulty is due in part to charity law sometimes being confused with the separate jurisprudence concerning a common and long-standing legislative exemption from property rates for religious groups in relation to places of 'public worship'. In the latter English jurisprudence, 'place of public religious worship' has been defined narrowly for reasons of history and public policy.[58] However, the same approach is not taken when determining charitable status — where courts are more willing to accept some limits on public access to worship spaces.

An example of the disjuncture is the House of Lords decision in *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints*.[59] The respondent Church, a charitable entity, failed to gain a complete rate exemption on its Preston Temple because the innermost section of the Temple was closed to all but a small group of Mormons holding a 'recommend' and hence did not fall within the meaning given to place of 'public religious worship' in the *Local Government Finance Act* 1988.[60] The House of Lords based its decision on both statutory interpretation principles (Parliament had not amended the UK *Local Government Finance Act* to change this interpretation when it had the opportunity to do so) and, in response to a human rights claim, on public policy. Publicly visible religious worship, it was said by Lord Scott, helped dispel prejudice and suspicion towards religion and contributed to a healthy, religiously plural society.[61] Interestingly, the Australian case law on rates exemptions for places of public worship relies on a different policy rationale (the need to uphold freedom of religion) in order to support a much wider application of the exemption.[62]

58. See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) at 14758.
59. [2008] UKHL 56 [*Gallagher*]. The Church appealed unsuccessfully to the European Court of Human Rights: *Church of Jesus Christ of Latter-Day Saints v United Kingdom*, No 7552/09, [2014] ECHR 227 [*Church of Jesus Christ of Latter-Day Saints*].
60. *Gallagher*, *ibid*; *Local Government Financial Act 1988* (UK) [UK *Local Government Finance Act*].
61. *Gallagher*, *ibid* at para 51.
62. *Canterbury Municipal Council v Moslem Alawy Society Ltd*, (1987) 162 CLR 145 (HCA).

What is of interest here however is why the Church in *Gallagher* was still entitled to *charitable* status (and, consequently, an 80% rates exemption). That question was not at issue in the litigation.[63] The public aspect of public benefit as it applies to scenarios of restricted access to places of worship was alluded to by Cross J in the influential case of *Neville Estates Ltd v Madden*.[64] The case concerned a Jewish synagogue in London; members of the public had no right to enter the synagogue, although in practice entry would not be refused.[65] Justice Cross appeared to accept that the members of the synagogue were a private group, but held nonetheless that a trust for its purposes was charitable, suggesting that there were historical and political reasons why the law was not as strict in relation to the 'public' requirement for religious trusts.[66] Another possible justification for charitable status in *Gallagher* is that Mormons holding a 'recommend' constitute a sufficient section of the public which any member of the public can aspire to join, rather than a closed and exclusive group. However, religions may place conditions on who may enter particularly sacred spaces that are less amenable to this approach.[67] A justification that would avoid this problem is to accept that the subsequent interaction of members of a religious group with members of the general public conveys sufficient public (albeit indirect) benefit.[68]

63. *Gallagher*, *supra* note 59.
64. [1962] Ch 832 (Eng) [*Neville Estates*].
65. *Ibid*.
66. *Ibid* at 853-54. See also *Joyce v Ashfield Municipal Council*, [1975] 1 NSWLR 744 (Austl) at 751-53 [*Joyce*].
67. Such as gender-based restrictions.
68. *Cf.* the reasoning of Hutley JA in *Joyce*, *supra* note 66. *Preston Down Trust: Application for Registration of the Preston Down Trust Decision of the Commission* (3 January 2014), online: Charity Commission for England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336112/preston_down_trust_full_decision.pdf> (the public aspect of public benefit in relation to public access to worship services was raised in discontinued test litigation by the Charity Commission of England and Wales against the Plymouth Brethren Christian Church in 2012; the Commission refused to register the trust of a Brethren meeting hall for reasons that included limited public access to the hall) [*Preston Down Trust*].

C. Members Linked by Blood or Other Private Association

Religious purposes will contravene the public requirement for charity where they are limited to a private, exclusive group of persons.[69] This is particularly so where the excluding factor bears little relationship to the purposes in question.[70] Thus, a trust for the religious education of a man's grandchildren is invalid because of the requisite blood relationship.[71] As with the example of religious purposes relating to a private place of worship, the rationale for exclusion from charitable status is clear.

But the justification for exclusion is not as self-evident in relation to the purposes of religious groups connected by familial ties due to the precepts of their religion and hence that necessarily exclude the public at large. Such purposes appear to involve a private and exclusive group, rather than a section of the public, but the disqualification is problematic due to its potentially discriminatory impact upon religious groups, particularly those of Indigenous and/or Asian origin.

The *Charities Act* does not deal explicitly with this scenario and case law authority is sparse. The Privy Council in an 1875 appeal from the Straits Settlement in *Yeap Cheah Neo v Ong Cheng Neo*[72] held that a testamentary trust for a building in which to perform "religious ceremonies [of ancestor veneration] to my late husband and myself" was not charitable because it would only benefit the testatrix's family.[73] An analogy was drawn with trusts for the saying of masses for souls of the departed, but such (formerly superstitious) trusts can be charitable under modern English law[74] and were always viewed more favourably in Australia.[75] The issue was considered in Hong Kong in 1990 in relation

69. *Verge*, *supra* note 52; *Oppenheim*, *supra* note 52; *Thompson*, *supra* note 52.
70. See *e.g. Davies v Perpetual Trustee Co (Ltd)*, [1959] AC 439 (PC (UK)) at 456 (trust for religious education of the children of the descendants of Presbyterian from Northern Ireland who settled in New South Wales).
71. *In re Coats' Trusts*, [1948] 1 Ch 340 (Eng) at 345.
72. (1875) LR 6 PC 381 (UK) at 383 [*Yeap Cheah Neo*].
73. *Ibid*.
74. *Hetherington*, *supra* note 57.
75. *Nelan v Downes*, (1917) 23 CLR 546 (HCA) [*Nelan*].

to trusts for purposes supporting the ancestor worship of a testator's clan in China, founded in the fifteenth century.[76] Despite the much larger size of the religious group who would be involved in such worship, compared to that in the 1875 case, the Hong Kong Court of Appeal followed *Yeap Cheah Neo v Ong Cheng Neo* and found that the trusts contravened the public requirement.[77] A different view appears to be taken in Singapore.[78]

The Commonwealth of Australia in its *Charities Act*[79] could have followed the example set by New Zealand in its legislative definition of charitable purpose in the *Charities Act 2005*:[80]

> the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.[81]

When applied to religious purposes, the New Zealand approach shifts the inquiry to whether there is an indirect public benefit from such religious activities. An argument could be made (similar to that with respect to restrictions on access to worship) that members of an exclusive religious group provide benefit to society through their subsequent interactions with the public at large (or simply that religious pluralism is of public benefit in and of itself).

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76. *Ip Cheung Kwok v Sin Hua Bank Trustee Ltd*, [1990] 2 HKLR 499 (CA).
77. *Ibid* (the court did not accept that there was a legally significant distinction between Chinese lineage ancestral worship, which may go back centuries, and essentially private ancestral worship of an immediate testator).
78. See GE Dal Pont, *Law of Charity*, 2d (Chatswood: LexisNexis Butterworths, 2017) at para 3.12 note 75 [GE Dal Pont]; *Cheang Tew Muey v Cheang Lean Neo*, [1930] SSLR 58 (SC (SG)); *Attorney-General v Lim Poh Neo* [1974-1976] 1 SLR(R) (SGHC) 782.
79. Austl *Charities Act*, *supra* note 14.
80. *Charities Act 2005*, 2005/39 (NZ).
81. *Ibid*, s 5(2)(a) (the wording of the New Zealand provision is not limited to religious (or indigenous) groups and appears to have the radical effect of overruling *Oppenheim*, *supra* note 52; but see GE Dal Pont, *supra* note 78 at para 3.13 (public benefit must still be present)).

D. Private Profit

Finally, the public nature of charity is reflected in its not-for-profit character. Individual members of the religious group (or others) cannot receive a personal gain from the implementation of the religious purposes that is not available to the general public.[82] The generation of profit by the group itself, whether or not in furtherance of the advancement of religion, is not problematic in Australian law so long as all such profit is expended on the charitable purposes of the religious group.[83] And reasonable remuneration for services undertaken in implementing those charitable purposes is allowed.

Whilst it is clear as a matter of principle that personal wealth generation by a religious leader is incompatible with charitable status, there is ambiguity as to when the line will be crossed in this respect. In Ireland, the religious purposes of groups or leaders whose 'principal object' is the 'making of profit' are not eligible for charitable status.[84] Conversely perhaps, the High Court of Australia has noted that religious activity is not inconsistent with commercialism and "the amassing of wealth" from which religious leaders may benefit financially.[85] Would the leader of a Christian group espousing prosperity theology who maintained an expensive lifestyle, consistent with the group's religious beliefs, contravene the not-for-profit element of charity? It would seem so, however there are no reported instances of the denial of charitable

82. *Cf.* Austl *Charities Act*, *supra* note 14, s 6(3).
83. *Federal Commissioner of Taxation v Word Investments Ltd*, [2008] HCA 55.
84. Ire *Charities Act*, *supra* note 47. See also United Kingdom, Charity Commission for England and Wales, *The Advancement of Religion for the Public Benefit* (December 2008, as amended 1 December 2011), online (pdf): Government of the United Kingdom <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf> ("[i]f the purpose of an organisation is to enhance the wealth of the leader or leaders of a religion, this would not be charitable" at 16).
85. *Church of the New Faith*, supra note 26 at 16061 (Murphy J).

status on this basis.[86]

Another question in this area concerns religious groups with an internal economy pursuant to which all personal property is relinquished to the group and members' worldly needs are met from income generated by the group as a whole.[87] In economic terms, such arrangements may significantly advantage group members over members of the general public engaged in similar income-generating pursuits.[88] Do such arrangements contravene the not-for-profit nature of charitable purposes? A New Zealand High Court decision found that benefits comprising accommodation, food, clothing and payment of NZ $1 per week to members of a religious community who lived and worked together were merely incidental to, and in furtherance of, the trust's primary purpose of advancement of religion.[89] It was relevant that the members had relinquished all personal property to the group; hence, the personal benefits received through board and lodging were necessary and incidental to the religious purposes of the group.[90]

V. Disqualification Due To Public Detriment

A. Introduction

The religious purposes discussed in Part IV are not necessarily detrimental to the public; they simply do not confer sufficient, or exclusively, public benefit. In principle, religious purposes may be disqualified from charitable

86. *Cf.* UK Charity Commission, *The Advancement of Religion for the Public Benefit*, *supra* note 84 at 17 (examples of where private benefits to a religious leader would not be considered incidental to executing the charitable purposes, including where a private jet is provided for travel).
87. See *e.g. Centrepoint Community Growth Trust v Commissioner of Inland Revenue*, [1985] 1 NZLR 673 [*Centrepoint Community Growth Trust*]. See further GE Dal Pont, *supra* note 78 at para 3.29.
88. See *e.g.* Alvin J Esau, *Courts and the Colonies: Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at 910 (describing the communal economies and related prosperity of Canadian Hutterite communities).
89. *Centrepoint Community Growth Trust*, *supra* note 87 at 700.
90. *Ibid.*

status because, broadly speaking, they cause, or have the potential to cause, detriment to the public. Although the alleged detriment caused by particular religious groups is the issue that generates most heat in public discourse, in practice, and subject to one qualification, it is highly unlikely that religious purposes would be disqualified from charitable status on this basis unless the religious group itself, its purposes or its activities are unlawful. The qualification relates to a line of English cases involving (Roman Catholic) enclosed religious orders, in which the courts became mired in evidential questions concerning how one demonstrates to a secular court that religious purposes are beneficial. The question whether lawful purposes for the advancement of religion should ever be denied charitable status on the basis of public detriment is difficult.

B. Unlawful Purposes

At common law and pursuant to the Australian *Charities Act*, if a religious group, its purposes or activities are illegal, then charitable status, in relation to those purposes, is refused.[91] There are many instances in the history of trusts law of illegal (superstitious) purposes either being denied charitable status altogether or of the trust fund being diverted to lawful religious purposes.[92] Twentieth century examples of unlawful religious groups in Australia include Jehovah's Witnesses and Scientology.[93] In this century it is more likely to be the case that a religious group is proscribed pursuant to anti-terrorism legislation or regulations. Alternatively, a religious group's religious purposes and/or activities may fall foul of the general law; as would be the case, for example, with a religious group whose central act of worship involved taking an illegal drug.

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91. Austl *Charities Act*, *supra* note 14, s 11(a).
92. In relation to superstitious (that is, 'false' and unlawful) uses, the courts might still find a general charitable intent and order a cy-près scheme. See further Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge, UK: Cambridge University Press, 1969) at 11, 143; Harding, "Trusts for Religious Purposes", *supra* note 6 at 161-62.
93. See Renae Barker, *State and Religion: the Australian Story* (Abingdon: Routledge, 2019) at 195-201.

C. Evidential Questions

Two questions arise in relation to proving public detriment in relation to religious purposes. The first concerns how courts and regulators are to balance possible detriment against benefit in scenarios in which the public benefit of a religious group's purposes is called into question and therefore can no longer be assumed. For example, how should evidence of psychological harm to members or ex-members of a religious group be balanced against benefits to the general public provided by the group's worship facilities? That question remains unresolved, but is far from a moot point.[94] And when considering possible detriment, should the decision maker rely only upon the doctrines and teachings of the group (whether or not universally adhered to) or upon empirical evidence of group members' actual practice?

The second evidential question concerns how decision makers are to treat religious beliefs in determining benefit or detriment. The English courts have not accorded charitable status to the religious purposes of enclosed religious orders on the ground that any perceived public benefit (through intercessory prayer, for instance) depends upon one's religious belief and is thus incapable of proof in a secular court.[95] Thus, in the leading English decision a trust for the purposes of a Carmelite Priory whose members engaged in intercessory prayer for the public, but did not physically interact with the public, was held not charitable.[96] The Commonwealth of Australia has put the matter beyond doubt for its legislative purposes by removing the public benefit requirement altogether in relation to purposes of an entity that is "a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public".[97]

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94. See *Preston Down Trust*, supra note 68 (similar issues arose in the Preston Down litigation commenced by the Charity Commission of England and Wales and subsequently settled). See generally GE Dal Pont, *supra* note 78 at para 10.41.
95. *Gilmour v Coats*, [1949] AC 426 (HL (Eng)).
96. *Ibid*.
97. Austl *Charities Act*, *supra* note 14, s 10(2).

The legislative intervention was probably unnecessary given that the High Court of Australia has long accepted the value of Roman Catholic religious practices.[98] Given the prominent Irish-Catholic strand in Australian history, it is likely that, should the particular issue arise in the common law of charity, Australia will follow the Irish courts' endorsement of the public benefit of such purposes.[99] In any event, if public benefit is conceptualised at a more general level of abstraction such as the benefit to society of flourishing religious pluralism — as is the likely direction of the law in this area — rather than focusing upon the specific beliefs in question, then the issue becomes redundant.[100]

D. Can Lawful Religious Purposes be Disqualified on Public Detriment Grounds?

The leading common law statement on public detriment that will disqualify religious purposes from charitable status is that of Sir John Romilly in the 1862 case of *Thornton v Howe*.[101] The statement appears after an affirmation of the law's neutrality towards religion and general acceptance of religious purposes as charitable.[102] Sir John Romilly continued:

> [i]t may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void…But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.[103]

98. See *e.g. Nelan*, *supra* note 75.
99. In Ireland, see *e.g. Re Howley*, [1940] IR 109 (HC (Ire)). In Australia, see *Crowther v Brophy*, [1992] 2 VR 97 (VSC (Austl)).
100. See further Harding, "Trusts for Religious Purposes", *supra* note 6; Ridge, "Religious Charitable Status", *supra* note 6.
101. *Thornton*, *supra* note 46 at 1920. See further Pauline Ridge, "Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of *Thornton v Howe*" (2010) 31:2 Journal of Legal History 177.
102. *Thornton*, *ibid*.
103. *Ibid* at 20.

It is difficult to envisage purposes that could meet this extreme description yet still be lawful; furthermore, determining whether this was the case would involve a court in challenging normative questions.

Moving to legislative conceptions of detriment, the concept finds expression in two ways in the Australian *Charities Act*. The first is 'public detriment'. In relation to the requirement that a charitable entity's purposes must be for the public benefit, there is reference in section 6(2) to:

> (b) any possible, identifiable detriment from the achievement of the purpose to the members of:
>
> (i) the general public; or
>
> (ii) a section of the general public.[104]

The meaning of 'detriment' in this context is not elaborated upon (and raises the problem of balancing benefit with detriment alluded to above). The second expression of detriment in the *Charities Act* is 'disqualifying purpose'. An entity will not be charitable if it has a "disqualifying purpose" and this is defined in section 11 to include:

> (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy.[105]

The 'contrary to public policy' disqualification in section 11 of the *Charities Act* goes further than the common law as expressed in *Thornton*.[106] Examples of public policy are given in section 11(a):

> Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.
>
> Note: Activities are not contrary to public policy merely because they are contrary to government policy.[107]

These examples concern fundamental matters going to the democratic nature and existence of the secular state; however, the language of

104. Austl *Charities Act*, *supra* note 14, s 6(2)(b).
105. *Ibid*, s 11.
106. *Ibid*; *Thornton*, *supra* note 46.
107. Austl *Charities Act*, *ibid*.

'includes' suggests that less fundamental clashes with public policy may also be disqualifying. But again, it is difficult to envisage what will suffice, absent illegality.

The uncertain scope of the 'disqualifying purpose' provision came to the fore in the wake of legalisation of same-sex marriage by the Commonwealth of Australia in 2017. Religious groups advocating a 'traditional' view of marriage (restricted to heterosexual couples) were concerned that they would lose charitable status. This seemed unlikely given that section 11 specifies that activities contrary to government policy are not necessarily contrary to public policy for its purposes.[108] Nevertheless, the Commonwealth Government agreed to amend the *Charities Act* to allay such concerns.[109]

The judgments of the US Supreme Court in *Bob Jones University v United States*,[110] albeit written in a very different constitutional context, are illustrative of the problematic nature of a public policy justification for refusing charitable status. The majority judgment, delivered by Burger CJ, held that the federal taxation authority was justified in refusing charitable (and thereby tax exemption) status to Bob Jones University because its racially discriminatory admission policies, although not unlawful at the time, contravened a fundamental national policy against racism.[111] This was justified by the majority in terms of balancing public detriment and benefit stating "[t]he institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit

108. *Ibid*.

109. See Austl, Commonwealth, Attorney-General's Department, *Australian Government Response to the Religious Freedom Review* (Canberra: Attorney-General's Department, December 2018) at 9-10, online (pdf): Attorney-General's Department <www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf> (accepting Recommendation 4 of the Expert Panel's *Religious Freedom Review*) [*Australian Government Response to the Religious Freedom Review*]. See further *Religious Freedom Review*, *supra* note 3 at paras 1.18-71, 1.200. See *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149(1)(f) (Canadian charity law is to the same effect).

110. (1983) 103 S Ct 2017 (USSC) [*Bob Jones University*].

111. *Ibid*.

that might otherwise be conferred".[112]

But Powell J, although concurring in the outcome, strongly disagreed with this rationale, finding that it ignored the "important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints".[113] In other words, a public policy restraint on lawful charitable purposes risks imposing majoritarian views on minority groups. A concern that is evident in all three judgments is that Congress had not legislated against racially discriminatory education at the time; that is, the University's conduct was not illegal.[114] Justice Reinquist (as he was then) dissented for this reason.[115]

The Australian *Charities Act* definition of 'disqualifying purpose' goes some way towards meeting such concerns by giving as examples of public policy concerns "the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security".[116] But the definition is inclusive; hence other, possibly less fundamental, public policy concerns might disqualify religious purposes from charitable status. Furthermore, it is difficult to envisage scenarios where a religious group or its purposes were contrary to "the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public [or] national security" and yet not illegal.[117] For all these reasons, it is suggested that only purposes for the advancement of religion that are unlawful should be denied charitable status.

So far, the discussion in Parts II to V has concerned doctrinal and legislative grounds upon which purposes for the advancement of religion might be refused charitable status. The following two Parts consider the effect of two recent developments in charity. The first concerns the application of human rights jurisprudence to charity law and the second concerns state regulation of the charity sector.

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112. *Ibid* at 2029.
113. *Ibid* at 2038.
114. *Ibid* at 2030-32, 2036, 2039.
115. *Ibid* at 2039, 2043.
116. Austl *Charities Act*, *supra* note 14, s 11(a).
117. *Ibid*.

VI. Human Rights Considerations

A. Introduction

A relatively untested consideration in deciding when the advancement of religion will not be charitable concerns human rights law. Section 116 of the Australian *Constitution*[118] has not proved significant in this respect.[119] It does not preclude government funding of religious groups or the facilitation of religious activity through conferral of charitable status,[120] but it has not always been effectual in protecting freedom of religion[121] and it does not constrain the Commonwealth's ability, through legislation, to refuse charitable status for the advancement of religion. Australia's international human rights obligations are likely to be of greater significance to charity law.

Australia is a signatory to the *International Covenant on Civil and Political Rights* ("*ICCPR*").[122] Comprehensive implementation of its provisions in domestic law has been patchy,[123] although Commonwealth legislation making it "unlawful to discriminate on the basis of a person's

118. *Commonwealth of Australia Constitution Act*, 1900, s 9.
119. *Ibid* ("[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth", s 9(116)).
120. *Attorney-General (Vic); ex rel Black v Commonwealth*, (1981) 146 CLR 559 (HCA) at 582 (Barwick CJ); at 616 (Mason J).
121. See *e.g. Adelaide Company of Jehovah's Witnesses Incorporation v The Commonwealth*, (1943) 67 CLR 116 (HCA).
122. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified by Australia 13 August 1980) [*ICCPR*].
123. The Australian Capital Territory, Victoria and Queensland have implemented the *ICCPR* provisions relating to freedom of religion: *Human Rights Act 2004* (ACT), 2004/5 (Austl); *Charter of Human Rights and Responsibilities Act 2006* (Vic), 2006/43 (Austl); *Human Rights Act 2019* (Qld), 2019/05 (Austl). See also *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), 2011/186 (Austl).

'religious belief or activity'" is imminent at the time of writing.[124] Other common law countries with a shared charity law heritage tend to have more comprehensive human rights protection and a maturing jurisprudence, although direct comparison can be difficult.[125] Bearing this in mind, some general observations follow on how human rights considerations may affect a claim for charitable status based on the advancement of religion, with Australian and English law as the focus. England's *Human Rights Act 1998*,[126] implemented the *European Convention on Human Rights*[127] ("*Convention*") and requires that domestic legislation be interpreted so as to be compatible with *Convention* rights[128] and that a public authority (such as the Charity Commission) not act incompatibly with *Convention* rights.[129] The jurisprudence most relevant to English charity law, apart from that of the English courts, and which must be taken into account by

124. See *Australian Government Response to the Religious Freedom Review*, *supra* note 109 at 17 (accepting Recommendation 15 of the *Religious Freedom Review*, *supra* note 3).
125. See *Christian Youth Camps*, *supra* note 33 at para 411. See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (Canada has constitutionally entrenched human rights protections in this *Charter* and there is a growing body of case law on *Charter* claims relevant to religion). See *e.g. Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.
126. *Human Rights Act 1998* (UK) [UK *Human Rights Act*].
127. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*Convention*].
128. UK *Human Rights Act*, *supra* note 126, s 3.
129. *Ibid*, s 6 (see also s 13 requiring courts to have particular regard to the right to freedom of religion). See generally Ridge, "Not-for-profit Law and Freedom of Religion", *supra* note 46 (on the right to freedom of religion in England not-for-profit law).

them,[130] is that emanating from the European Court of Human Rights.[131] The provisions of the *ICCPR* will be used in the following discussion (the *Convention* rights relevant to religion are broadly similar). The *ICCPR* provisions most relevant to religious charitable status concern the right to freedom of religion (Article 18),[132] the right to freedom of association (Article 22)[133] and the right not to be discriminated against on the ground of, inter alia, religion (Articles 2(1) and 26).[134]

Human rights are a two-edged sword for religious groups claiming charitable status. Whilst a state *may* be in breach of the right to freedom of religion and/or associated rights if it withholds charitable status from a religious group, it has also been suggested that religious groups should forfeit charitable status if they contravene the human rights of others. These two perspectives are now discussed.

B. Reliance on Human Rights by Religious Groups in Relation to Advancement of Religion

Article 18(1) of the *ICCPR* protects the right "in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching".[135] Religious groups may claim the

130. UK *Human Rights Act*, *ibid*, s 2(1)(a).

131. The European Court of Human Rights' decisions should be treated with caution when relied upon in non-*Convention* States such as Australia because the Court allows a wide margin of appreciation to member States in determining whether restrictions on human rights are permissible; in addition, it is not a court of common law.

132. *ICCPR*, *supra* note 122 ("[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching", art 18(1)). *Convention*, *supra* note 127 (the equivalent provision is art 9).

133. *ICCPR*, *ibid*, art 22.

134. *Ibid*, arts 2(1), 26 (see also art 24 (children) and art 27 (ethnic, religious or linguistic minorities)).

135. *Ibid*, art 18(1).

protection of Article 18 and its equivalents on behalf of their members.[136] The concept of manifestation of religion 'in community' encompasses the charity law concept of 'advancement of religion'.[137] Thus, in principle, Article 18 applies to a religious group's claim that the refusal of charitable status and concomitant fiscal benefits interferes with the communal manifestation of religious beliefs by its members so as to breach their right to freedom of religion.

Nonetheless, such a claim seems unlikely to succeed. Courts in various jurisdictions have found that the refusal of charitable status and associated tax privileges does not infringe the right to freedom of religion for the simple reason that lack of charitable status does not preclude group members from manifesting their religious beliefs, although it may make it more expensive to do so.[138] Charitable status has a privileging, rather than legalising, function.

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136. *Ibid*, art 18. See *e.g. Church of Jesus Christ of Latter-Day Saints*, *supra* note 59.

137. See Part IV, above. See also UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)*, HRC, 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4, 1993 (the Human Rights Committee has elaborated on the meaning of 'manifest' in the context of the right to manifest religion collectively "in worship, observance, practice and teaching" at para 4).

138. *Application For Registration as a Charity by the Church of Scientology: Decision of the Charity Commissioners for England and Wales* (17 November 1999) at 10, online (pdf): Charity Commission of England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324212/cosfulldoc.pdf>; *Bob Jones University*, *supra* note 110 at 2035. *Cf. Canada Without Poverty v Attorney General Canada*, 2018 ONSC 4147 (Morgan J accepting the claimant's argument that it could not continue to operate without the tax benefits associated with its charitable status and that this 'cost burden' infringed its right to freedom of expression under s 2(b) of the Canadian *Charter*; see especially "[a]ny burden, including a cost burden, imposed by government on the exercise of a fundamental freedom such as religion or expression can qualify as an infringement of that freedom if it is not 'trivial or insubstantial'" at para 44).

A more promising argument is that refusal of charitable status may infringe the right not to be discriminated against on the ground of one's religion (for example, where other religious groups are not similarly affected).[139] However, there is then a further hurdle that must be overcome given that the right to manifest one's religious beliefs is never unqualified. Hence, Article 18(3) states:

> [f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[140]

That is, the right to manifest religious beliefs through purposes for the advancement of religion may be qualified by the state, even where this is discriminatory, in the same way that the assumed charitable status of such purposes may be removed by a "disqualifying factor" as defined in section 11 of the *Charities Act*.[141] The most analogous case to date is *Gallagher*, discussed above, concerning the refusal to grant a full rates exemption to a Mormon temple because of public access restrictions.[142] Only Lord Scott in the House of Lords found that there was an element of discrimination on the facts, but he held that this was justified on national security grounds because of the need for openness in religious practices in a pluralist society.[143] The European Court of Human Rights dismissed the Church's appeal, referring to the "wide margin of appreciation" accorded to states in this jurisprudence.[144]

Interesting questions arise in the Australian context if Article 18 of the *ICCPR* is implemented at the Commonwealth level so as to apply directly to Commonwealth legislation. Could the definition of

139. See *e.g. Gallagher*, *supra* note 59 at paras 49-50; *Church of Jesus Christ of Latter-Day Saints*, *supra* note 59 ("if a State sets up a system for granting tax exemptions on religious groups, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner" at para 29 [footnote omitted]).
140. *ICCPR*, *supra* note 122, art 18(3).
141. Austl *Charities Act*, *supra* note 14, s 11.
142. *Gallagher*, *supra* note 59. See Part IV.B, above.
143. *Ibid* at para 51.
144. *Church of Jesus Christ of Latter-Day Saints*, *supra* note 59 at para 18.

'disqualifying purposes' in section 11 of the Australian *Charities Act*, discussed above,[145] particularly the inclusive definition of public policy for the purposes of establishing public detriment, be challenged as being wider than the permissible qualifications on the right to manifest religion stated in Article 18(3),[146] for example? Absent the margin of appreciation accorded to European states by the European Court of Human Rights, would a *Gallagher*-style claim succeed in Australia? And would the 'public' aspect of the public benefit requirement in its application to members of a religious group connected by familial ties due to the precepts of their religion withstand a human rights challenge based on discrimination and freedom of religion?[147] Such questions suggest that the growing human rights discourse concerning freedom of religion in Australia, if it has any impact on charity law at all, will make it more, rather than less, difficult to deny charitable status to purposes that advance religion.

C. Should the Advancement of Religion be Subject to Human Rights Standards?

Religious groups are not subject to international human rights obligations; such obligations are imposed on states and the organs of government. However, they may become subject to such obligations through domestic legislation. Kathryn Chan has documented a trend in English charity law towards making the charitable status of faith-based charities dependent upon compliance with human rights standards, particularly anti-discrimination norms.[148] The issue has arisen in the context of religious groups with faith-motivated purposes that fall under heads of charitable

145. See Austl *Charities Act*, *supra* note 14, discussed in Part V.D, above.

146. *ICCPR*, *supra* note 122, art 18(3).

147. See Part IV.C, above.

148. See *e.g.* Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at 6670. See also Charity Commission for England and Wales, "Equality Act: Guidance for Charities" (22 February 2013), online: Charity Commission for England and Wales <www.gov.uk/government/publications/equality-act-guidance-for-charities/equality-act-guidance-for-charities> [Charity Commission, "Equality Act: Guidance for Charities"].

purpose other than the advancement of religion. Conversely, under English law, religious groups whose purposes concern the advancement of religion are exempted from anti-discrimination obligations 'on the basis of religion or belief or sexual orientation'.[149] In all other respects, however, a religious charity for the advancement of religion in England must justify prohibited discrimination. A failure to do so will be viewed as undermining its public benefit.[150]

The imposition of human rights obligations upon religious groups in relation to their *religious* activity, other than where such activity is unlawful under the general law, raises similar concerns to those relating to the public policy-based exclusions from charitable status discussed above in Part V and should not be countenanced:

> [h]uman rights do not exist to decontaminate religions, nor to cleanse society of religion. They exist to serve, by effective guarantees, those who believe – no matter *what* they believe – and to regulate only the excesses of religious practice on the basis of necessity and in accordance with the objective standards of a democratic society.[151]

VII. Charitable Status As A Means Of Securing Regulatory Control Over Religious Groups

A feature of twenty-first century charity law is the increasing regulation of charities, generally by means of a statutory regulator and comprehensive regulatory scheme.[152] In Australia, this commenced in 2013 with the

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149. See *e.g. Equality Act 2010* (UK), Schedule 23, para 2. See further Charity Commission, "Equality Act: Guidance for Charities", *ibid* at para 8.5.
150. Charity Commission, "Equality Act: Guidance for Charities", *ibid*, at para 7.2.
151. Paul M Taylor, "Controversial Doctrine: The Relevance of Religious Content in the Supervisory Role of International Human Rights Bodies" in Rex Ahdar, ed, *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar Publishing Limited, 2018) 309 at 330 [emphasis in original].
152. See generally Oonagh B Breen, "Redefining the Measure of Success: A Historical and Comparative Look at Charity Regulation" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 549.

establishment of the ACNC.

The *ACNC Act* gives the ACNC and its Commissioner extensive information-gathering and monitoring powers in relation to registered entities[153] and enforcement powers.[154] The Commissioner may also suspend[155] or remove[156] the 'responsible entity' (including company directors and trustees)[157] of a registered entity in certain circumstances and appoint entities to act in their stead.[158] The *ACNC Act* provides for a public register of information (including financial records and governance information) pertaining to registered entities to be maintained by the Commissioner.[159] It has been observed that "the practical effect of the *ACNC Act* has been to transform the charity sector from being one of the least regulated to one of the most highly regulated sectors in Australian society".[160]

The *ACNC Act* deals with 'basic religious charities' differently to other registered entities.[161] A BRC must be an unincorporated[162] registered

153. *ACNC Act*, *supra* note 19, part 41. A registered entity is a charity.
154. *Ibid*, part 42.
155. *Ibid*, s 10010.
156. *Ibid*, s 10015.
157. *Ibid*, s 20530 (defining 'responsible entity').
158. *Ibid*, s 10030 (the Commissioner may also determine the terms and conditions of such appointment, s 10040). See Austl, Commonwealth, The Treasury, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission: Legislation Review 2018* (Canberra: the Treasury, 2018) at 12, online (pdf): Australian Government the Treasury <treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf> (a review of the *ACNC Act* has recommended that this power be removed, recommendation 5) [*Strengthening for Purpose*].
159. *ACNC Act*, *ibid*, s 405.
160. Nicholas Aroney and Matthew Turnour, "Charities are the New Constitutional Law Frontier" (2017) 41:2 Melbourne University Law Review 446 at 457.
161. See further *Strengthening for Purpose*, *supra* note 158 at 64-70 (suggesting at 65 that respect for the right to freedom of religion may have motivated the BRC exemptions).
162. See *ibid* at 67 (this has been criticised for discriminating against incorporated religious groups, see also at n 166).

entity with the charitable purpose of advancing religion, not a deductible gift recipient (except in some circumstances) and not in receipt of more than a minimum level of government funding.[163] At the time of writing, BRCs are exempted completely from compliance with the financial reporting[164] and governance standards[165] of the *ACNC Act*.[166] Nor does the Commissioner have power to remove and replace the responsible entity of a BRC.[167] A 2018 review of the operation of the *ACNC Act* by Treasury recommended that the exemptions for BRCs could be removed, but that this be subject to other recommended reforms that limit the ACNC's overall powers.[168]

Although religious groups with purposes for the advancement of religion are not obliged to register as charities, the Commonwealth tax incentives and enhanced reputational status that charity registration brings suggest that most will do so. Commonwealth tax exemptions are predicated on registration with the ACNC. Through registration by the ACNC, the state secures regulatory control over the activities of charities for the advancement of religion. Such control brings with it the potential for the state, through the regulator, to mould the operation, purposes and activities of religious groups to align with public goals and values. This has always been the function of charity law, of course, most obviously through the public benefit requirement of charity. Furthermore, in Australia, the regulator is an independent statutory body. Hence the state's increase in control over religion should not be exaggerated (particularly whilst the BRC exemptions from regulatory intervention remain). Nevertheless, the presence of a regulator exercising ongoing oversight over the operation of religious charities and with the power to intervene in their affairs greatly enhances this controlling aspect of charity law. This brings with it clear risks regarding religious freedom and the separation of religion

163. *ACNC Act*, *supra* note 19, s 205-35.
164. *Ibid*, s 60-60.
165. *Ibid*, s 45-10(5).
166. *Strengthening for Purpose*, *supra* note 158 at 65.
167. *ACNC Act*, *supra* note 19, s 10-05(3).
168. *Strengthening for Purpose*, *supra* note 158 at 70 (Recommendation 16).

and state.[169]

An obvious context in which the ACNC's powers can be used to control religious activity is counter-terrorism, particularly the prevention of financing or incitement of religiously motivated terrorist activity.[170] The English Charity Commission's counter-terrorism interventions in Islamic religious charities in this respect are well-documented and have included removing trustees.[171] Another factual context in which the English Charity Commission has intervened regularly concerns sexual abuse within religious groups.[172] The recommendations of Australia's Royal Commission into Institutional Responses to Child Sexual Abuse emphasised that Australian religious charities be subject to greater scrutiny in this respect; it has been suggested that the ACNC should have a role here.[173]

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169. See Aroney and Turnour, *supra* note 160; Peter W Edge, "Hard Law and Soft Power: Counter-Terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam" (2010) 12:2 Rutgers Journal of Law and Religion 358 (arguing, at 359, that after 7/7, the Charity Commission was used by the British Government to exercise "soft power, in particular financial power, to effect theological change in Islamic religious communities").
170. See Pascoe, *supra* note 19 at 581-82. Breen, *supra* note 152 at 550 (suggests that this has been one of the prime motivators for increased charity regulation).
171. See Edge, *supra* note 169 at 363-68.
172. See *e.g.* Charity Commission for England and Wales, Press Release, "Charity Commission Disqualifies Trustee from Rigpa Fellowship" (13 June 2019), online: Charity Commission for England and Wales <www.gov.uk/government/news/charity-commission-disqualifies-trustee-from-rigpa-fellowship>; Charity Commission for England and Wales, "Decision: Manchester New Moston Congregation of Jehovah's Witnesses" (26 July 2017), online: Charity Commission for England and Wales <www.gov.uk/government/publications/manchester-new-moston-congregation-of-jehovahs-witnesses-inquiry-report/manchester-new-moston-congregation-of-jehovahs-witnesses> (Charity Commission's statutory inquiries with respect to safeguarding concerns in charities for the advancement of religion).
173. *Strengthening for Purpose*, *supra* note 158 at 65.

Minds will differ on the relative merits and dangers of increasing regulatory power over religious activity through charity law. The argument being made here, however, is simply that the potential for such regulatory oversight and control increases the attractions to the state of conferring charitable status upon groups advancing religion. That is, charitable status for the advancement of religion is an effective vehicle for greater state scrutiny, regulation and, ultimately, control of religious activity. There is thus a clear incentive for the state to encourage and support religious groups to acquire charitable status for their religious purposes and this makes it even more likely that charitable status will be conferred.

VIII. Conclusion

An analysis of charity doctrine and legislation suggests that it is rare for purposes for the advancement of religion not to be granted charitable status. Furthermore, several instances where charitable status could be refused are highly questionable and unlikely to withstand legal challenge, particularly on human rights grounds. For example, the use of the definition of religion to exclude certain groups at the threshold stage of a charity inquiry, as is the case in Ireland and England, is unprincipled and obfuscates the otherwise legitimate inquiry into whether such purposes should be excluded on substantive grounds. The exclusion from charitable status of religious groups whose members are necessarily linked by familial ties due to their religious precepts, or who restrict public access to sacred spaces on religious grounds, clearly raises concerns regarding equality of treatment. Of most concern, however, is the issue of whether a religious group can be denied charitable status on public policy grounds for its lawful religious activities. In principle, this is possible both at common law and under the Australian charities legislation. But for a court or regulator to do so surely raises highly problematic evidential questions as well as undermining the very pluralism and diversity of viewpoints that charity law generally promotes. Parliament seems a more appropriate forum for the determination of such questions. Indeed, the sorts of public policy concerns could generate such refusal are so severe as inevitably to render illegal the purposes in question. The

communal aspects of the right to freedom of religion coupled with the right not to be discriminated against on the ground of religion have the potential to remove some of the restrictions on religious activities just outlined. Given Australia's increasing domestic protection of the right to freedom of religion, it is therefore even more likely that the advancement of religion will secure charitable status in the future. Finally, an analysis of the availability of charitable status for the advancement of religion highlights the important regulatory function of charity law in mediating the relationship between state and religion. There is a clear incentive for the state, through law, to facilitate the conferral of charitable status on purposes that advance religion. How that regulatory role is to be managed, including what checks and balances are necessary in order to protect religious groups from undue state interference, remains to be seen (and minds will differ on this question); however, it seems clear that human rights law will have a part to play. The ability — in principle, at least — of religious groups to choose not to seek charitable status and hence forgo the benefits on offer will also act as a constraint on such regulation.

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