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

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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.