The doctrine of political purposes in the Canadian law of charities provides that political purposes cannot attain charitable status. The stated rationale for the doctrine is that courts have no means of judging whether a political purpose is for the public benefit, with the result that courts are unable to determine whether a gift to implement the purpose is a charitable gift.¹ This chapter presents a conceptual analysis of that rationale. Its orientation is conceptual in the sense that it approaches the doctrine of political purposes from the internal point of view of the doctrine’s own presuppositions.

The doctrine rests on two related presuppositions. One is that a coherent distinction between political purposes and charitable purposes, between politics and charity, can be drawn. The other is that a non-political determination of the public benefit is possible.

This chapter attempts to develop two related propositions. One is that a non-political determination of the public benefit is possible only on the basis of a conception of a natural law – comprised of the minimal conditions of human dignity – to which positive laws must aspire to conform. The other is that the doctrine of political purposes can sustain its own coherence only if it lays claim to a standard that, at the very least implicitly, both invokes and evokes the minimal conditions of human dignity.

Thus I am here concerned less with the ways in which the doctrine has been applied than with the logical conditions of its very possibility. My central thesis is that, as a matter of coherence, the justification of the doctrine necessarily involves an appeal to the minimal conditions
of human dignity. The central implication of this thesis is that the doctrine cannot be invoked to deny charitable status to trusts seeking the attainment of those conditions.

I first locate the doctrine of political purposes in the general terrain of the law of charities. I then describe a line of criticism that views the doctrine as incoherent. I respond by analysing the role of the minimal conditions of human dignity in the justification of the doctrine. I conclude with some remarks about the doctrinal adjustments entailed in such a justification and the difficulties that it would encounter.

I

In the law of trusts, the “beneficiary principle” means that a trust, in order to be valid, must benefit a person. “There must be somebody in whose favour the Court can decree performance.” A trust to benefit a purpose, as distinct from a person, is therefore invalid. The absence of a beneficiary amounts to the invalidity of the trust.

Yet within the law of trusts, the law of charities carves out a terrain that suspends the operation of the beneficiary principle: “this doctrine does not hold good with regard to trusts for charity.” The law of charities upholds the validity of purpose trusts provided both that the purposes in question fall within legally recognized categories of ‘charity’ and that the purposes in question are for the benefit of the public.

Generally speaking, the legally recognized categories of charity remain those formulated by Lord MacNaghten in The Commissioners for Special Purposes of the Income Tax v. Pemsel: “‘Charity’ in its legal sense comprises four principal divisions: 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, not falling under any of the preceding heads.” The legal and the popular meanings of “charity” are not the same. Regardless of whether it may be viewed as “charitable” in some extra-legal sense, a purpose, to be charitable at law, must fall within one of the above four heads.

In addition to being charitable, the purpose in question must be of “public benefit.” The requirement is stated by Lord Simonds in Oppenheim: “It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits.”

Thus “a trust established by a father for the education of his son is not a charity.” The trust falls within the “advancement of education”
but it fails as a charitable trust because it lacks the element of public benefit. Similarly, a trust for holding masses in a monastery falls within the “advancement of religion” but lacks the element of public benefit.12

Thus not every purpose falling within the legally recognized categories of charity is necessarily a charitable purpose; the purpose must also be of public benefit. But while a charitable purpose is necessarily a purpose that is of public benefit, not every purpose capable of sustaining a finding that it is of public benefit is necessarily charitable. The purpose must also fall within the legally recognized categories of charity. Thus, for example, even on the assumption that it is of public benefit, a trust – as in Re Astor – for the “improvement of journalism” is not a charitable trust.13

In Bowman, Lord Parker of Waddington captures succinctly the requirements of “charity” and “public benefit” vis-à-vis the operation of the beneficiary principle: “A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term.”14 A trust can avoid the operation of the beneficiary principle only where it satisfies the requirements of charity and public benefit.

Like the “charity” and “public benefit” requirements, the doctrine of political purposes restricts entry into the privileged terrain wherein the law of charities suspends the operation of the beneficiary principle. It further limits the scope of purposes that attract that suspension. It refuses validity to trusts for political purposes. “Political” purposes are not “charitable.”

Lord Parker’s formulation of the doctrine, and of the rationale for it, remains the most widely cited:

The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or if the association be incorporated as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and, therefore, cannot say that a gift to secure the change is a charitable gift.15
Once a given purpose is deemed “political,” it can no longer attract the privileges attendant on charitable purposes. Thus Lord Parker says that a gift for political purposes can be valid as an absolute gift but not as a trust. It must fail as a trust because it would amount to a purpose trust unable to make out the legal requirements of charitable status. The application of the doctrine reinstates, or rather refuses the suspension of, the operation of the beneficiary principle.\(^{16}\)

The line of criticism of the doctrine of political purposes that I want to explore is that the doctrine must founder on the ultimate arbitrariness of any distinction between politics and charity. The central proposition of this criticism is that the doctrine is incoherent because it rests on an untenable distinction between political and non-political determinations of the public benefit – between political and charitable purposes.

In his seminal “Charitable Causes, Political Causes and Involvement,” L.A. Sheridan observes:

Lord Parker of Waddington, quoted with approval by two law lords in the *National Anti-Vivisection* Case, said: ‘ ... the court has no means of judging whether a proposed change in the law will or will not be for the public benefit ... ’ That is true pathos. It is also a strain on credulity. There are few people better qualified than judges to assess whether a change in the law would be for the public benefit. Change of the law so as to prohibit vivisection is not a charitable object because vivisection was proved in court to be for the public benefit. Change of the law so as to reduce cruelty to animals is a charitable object because reduction of cruelty to animals was proved in court to be for the public benefit. In cases where the judge cannot make up his mind whether a change would be for the public benefit or not, he ought to hold the achievement of that change not to be a charitable purpose, for no purpose is charitable unless it is proved to be for the public benefit. But that need not govern, and does not in reality govern, cases where the judge can make up his mind on the issue of public benefit.\(^{17}\)

For Sheridan, the posited difference between politics and charity is “a strain on credulity” because there is nothing specific or distinct about political purposes as such. If a court can determine whether any purpose is of public benefit, then a court can decide whether a political purpose is of public benefit. Political purposes may – more often than other purposes – present evidentiary difficulties preventing judges from making the required determination. Or political purposes
may—more often than other purposes—involve issues in regard to which judges find themselves unable to make up their minds. But if such is indeed the case, then judges ought to say just that—that the requirement of public benefit has not been met, that public benefit has not been proved in court. There is no need to come up with an independent requirement that, in order to be charitable, a purpose must be non-political. There is no need to formulate an independent doctrine of political purposes. Rather, the problem of political purposes is but an aspect of the problem of public benefit. As Sheridan himself puts it, “This analysis is based on the theory that the question of whether a purpose fails to qualify as a charity because it is political is simply one facet of whether it is a purpose which advances the public benefit in a way that is within the spirit and intendment of the Statute of Elizabeth I.”

More recently, in “The Political Purposes Doctrine in Canadian Charities Law,” Paul Michell writes along similar lines: “The rationale he [Lord Parker] advanced to support it—that the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit—is inconsistent with courts’ general assertion of their ability, indeed of their duty, to assess public benefit in the law of charities.” Like Sheridan’s, Michell’s criticism presupposes that political purposes are devoid of any specificity that renders judges genuinely unable to determine whether such purposes are of public benefit. It is only on the basis of some such presupposition that Michell can state that a court’s refusal to determine whether a political purpose is of public benefit is inconsistent with that court’s duty to make determinations of public benefit in accordance with the law of charities. If judges are able to make determinations of public benefit in respect of non-political purposes, then it follows that they must also be able to do so for political purposes. Their ability in regard to the one necessarily entails their ability vis-à-vis the other. Thus whereas the doctrine of political purposes asserts a distinction between political and non-political purposes, Michell—like Sheridan—denies such a distinction.

Sheridan and Michell may well be correct that, as a matter of bare capacity, the ability to decide public benefit in regard to non-political purposes must necessarily entail the ability to do the same for political purposes. But—to anticipate the viewpoint I develop below—the coherence or lack thereof of the doctrine has nothing to do with that proposition. In fact, to suggest that the proposition amounts to a criticism of the doctrine rests on a particular interpretation of that doctrine—namely, that the doctrine is about a judicial inability, as a matter of bare capacity, to make public benefit determinations in
regard to political purposes. Yet the distinction between charity and politics implicit in the doctrine is not one between cases in which judges are able and cases in which they are unable to make such determinations. This line of criticism assumes that the kind of difficulty of which judges speak when they say that they have “no means of judging” whether a political purpose is of public benefit is a difficulty pertinent to the assessment of data – a difficulty present at an evidentiary level. But the difficulty pertains rather to their institutional role. Judges are saying not that they are unable to make such a decision but that it is not their place, as judges, to do so. What Sheridan and Michell criticize, therefore, is not the doctrine itself, but only their own view of it.

In *An Introduction to the Law of Trusts*, Simon Gardner presents a more accurate assessment of the problem:

There is also the special rule that a trust cannot be charitable if its purpose is political. At one time the reason was said to be that judges could not tell whether such a trust’s aim was beneficial to the public. If this was intended to mean that judges were incapable of making such decisions, it was implausible: they are not less capable than anyone else. Moreover, a purpose which the judges thus refuse to consider as beneficial in a political trust may be exactly the same as one which they actually accept as non-political in a non-political trust. For example, a trust to oppose the abolition of private education would not be charitable, since it is political; while a trust to found a (non-profit-distributing) private school would, as advancing education. The latter assumes that private education is beneficial to society; which is the very question which, in the former, the judges say they cannot decide. The difference is simply that the presence of an explicitly political element makes it more awkward than ever for the judges to take on the question: so they refuse to become involved at all. The point, then, is not that judges cannot decide whether such purposes are beneficial, but that they should not: the impediment is constitutional, rather than intellectual. Indeed, this is the explanation nowadays given by the judges themselves: as a matter of not usurping the function of the legislature or executive, or embarrassing the government in its dealings with other governments, or becoming involved in party politics.  

Thus Gardner grasps the doctrine as a matter not of intellectual capacities but of institutional roles.

But even in Gardner’s own view, the distinction between charity and politics does not emerge as forcefully as it might have. This is because Gardner does not himself regard his distinction between the “intellectual” and the “constitutional” in an altogether serious light. When judges invoke that distinction, they presuppose a distinction between
purposes in respect of which they can legitimately make public benefit
determinations and purposes in respect of which they cannot – that is,
between “charity” and “politics.” For Gardner, however, all determina-
tions of the public benefit are political. The only operative distinction
is between “explicitly” and “implicitly” political determinations. The
difference for him “is simply that the presence of an explicitly political
element [in the latter] makes it more awkward than ever for the judges
to take on the question: so they refuse to become involved at all.”21

The doctrine protects judges from the awkwardness of deciding explic-
itly political matters. It does not, however, genuinely or substantively
distinguish arenas of action and judgment characteristic of political
and non-political determinations of the public benefit respectively or
of politics and charity. The difference between charity and politics,
between charitable and political trusts, is merely between trusts in
respect of which judges can avoid the appearance of making political
determinations and trusts in respect of which they cannot. It is almost
as if judges refuse to enter into politics only where and only when they
cannot get away with it.

Gardner’s position implies that all purposes are in the end political.
The question of whether a given purpose is of public benefit requires
reference to value-judgments, which are inherently political:

Presumably, if they [courts and charity commissioners] had to, they could
produce some sort of answer (albeit an incompetent one) about the relevant
social costs and gains, but the business of putting comparable valuations on so
many disparate possibilities, so as to establish the net balance of social advan-
tage, would take them outside their province, and into that of the executive
and legislature. Say we know that the cost of recognizing a particular trust to
build a church as charitable would be the loss of one quarter of a new subma-
rine (though in reality even this would be an impossibly simple equation): the
question that then arises is whether the one or the other is the more desirable
to society. The only way that we have of answering questions like this is
through the electoral process. No doubt, in their personal capacity, the judges
might have opinions on the subject, but our constitution does not leave it to
them.22

Thus there neither is nor can be an arena within which the judiciary
may legitimately make specifically legal, non-political determinations
in respect of the public benefit. To make such a determination is
rather to make a political determination. As Gardner puts it, “it is
improper to expect the judges and Charity Commissioners to assess
putative charities by undertaking a cost–benefit calculus from first
principles themselves. Nevertheless, the law does leave the decision
whether a trust qualifies as charitable with them. So how do they deal with the matter?”

Gardner’s answer reflects his view that all determinations in respect of the public benefit are “political” and therefore not for the judiciary: “The solution has been to insist that whether a trust is charitable or not is to a very large extent decided by rules of law, rather than by the assessment of its merits from first principles in the individual case. So the kinds of objects which are regarded as sufficiently beneficial to be worth the costs involved are defined by a rigid-looking set of rules (mostly developed by the courts themselves, through the system of precedent). The task of the judges or Charity Commissioners in individual cases is to match this definition against the objects of the particular trust in front of them so as to declare it charitable or otherwise, without having to go back to first principles.”

Gardner implies his answer in the very way in which he raises the question. He does not look for the fundamental conditions, if any, for the possibility of a non-political determination of the public benefit. Rather, he asks how judges can deal with an “improper” situation that contradicts their own position as judges. He answers, unsurprisingly, that judges hide behind rules of law, which permit them to make determinations that appear “merely” legal.

This point of view makes the entire jurisprudence of charity a kind of sleight of hand. Charity law is understandable only as an anomaly, as something that, strictly speaking, ought not to be there in the first place. It is a “dealing” with an impossible situation, a minimizing of an awkwardness that is scarcely relieved or hidden by outdated rules of law and rigid precedents. “We can see this phenomenon,” Gardner writes,

in *National Anti-Vivisection v. IRC* and *Gilmour v. Coats*. In both, ... being able to invoke a rule ultimately saved the judges from the awkwardness of having to rest their decision on a contentious value-judgment. In *National Anti-Vivisection Society v. IRC*, the rule in question – that disallowing political purposes – was adventitious in its applicability, but certainly convenient. In *Gilmour v. Coats*, the rule was directly concerned with the question in hand: whether a trust for a cloistered order is charitable. And significantly, the leading judgment contains a prominent appreciation of the role of rules in decisions about charitable status – even if they appear irrational. *The point is that questioning their rationality involves returning to the underlying merits: and that is the very thing that needs to be avoided.*

Thus, in the end, and despite of his fundamental distinction between “intellectual” and “constitutional” impediments, Gardner’s view of the
political purposes doctrine is of the same kind as that of Sheridan and Michell. There is no basic difference – such as that claimed by judges – between charity and politics. Gardner renders the distinction as one between implicitly and explicitly political purposes. The doctrine distinguishes not between charity and politics – since charity is itself a political category – but between more or less inconspicuous or subtle and more or less obvious or crass politics.

I want to begin my response to the line of criticism sketched above by observing that trusts for political purposes are *sui generis*. They are refused charitable status neither because they do not fall within the legally recognized categories of “charity” nor because they are not of “public benefit.” For example, a trust to eliminate poverty by way of the abolition of private property in the means of production is not a charitable trust. It is true, of course, that the alleviation of poverty is a legally recognized category of charity. It may even be true – or at least let us assume it to be true for the purposes of this example – that the abolition of private property in the means of production is of public benefit. None the less, the trust fails as a charitable trust. Its failure is a matter neither of “charity,” nor of “public benefit,” but of “politics.” Political trusts are invalid because they are political. They are *sui generis* in the sense that the grounds of their invalidity cannot be referred to a failure to meet the requirements either of “charity” or of “public benefit.”

The doctrine of political purposes is an independent doctrine. It expresses a third requirement constitutive of charitable status. This emerges clearly in *Anti-Vivisection*. In that case, Lord Wright, having found that the trust at issue failed for lack of public benefit, added: “But there is another and essentially different ground on which in my opinion it must fail; that is, because its object is to secure legislation to give legal effect to it. It is, in my opinion, a political purpose within the meaning of Lord Parker’s pronouncement in *Bowman v. Secular Society*.” The requirement that a charitable trust be *non*-political is “essentially different” from the requirement that it be of public benefit. A trust that fails for being political is not by that token alone a trust that fails for lack of public benefit. The “non-political” requirement is not an aspect of the public-benefit requirement. It is rather a third requirement in its own right, independent from and additional to the requirements of “charity” and of “public benefit.” The doctrine of political purposes is as autonomously constitutive of the legal meaning of charity as are the *Pemsel* categories.
and the requirement of public benefit. Once ascertained, this autonomy of the doctrine allows us to make three observations.

First, the assertion that the court “has no means of judging” whether a political purpose is of public benefit is not a statement about lack of evidence required to make such determination. It is not as if the court, if it had the requisite evidence, would make a determination in respect of whether a given political purpose is of public benefit. On the contrary, even where the court does have the requisite evidence and could make an informed determination, it would still refuse either to make that determination or to use it in order to grant charitable status. The doctrine of political purposes would bar it from so doing.

Thus, in *Anti-Vivisection*, the court did, on the basis of the evidentiary record before it, determine that the purpose was not of public benefit. But, once again, this determination did not decide whether the purpose failed for being political. Had the court in *Anti-Vivisection* found on the basis of the evidentiary record before it that the purpose in question was indeed of public benefit, it would have still had to fail the trust on the essentially different ground of its being a political purpose trust.

The autonomy of the doctrine means that it is in principle possible for a court to determine that a given purpose is of public benefit yet fail that very purpose on the grounds that it is political. The point is that courts are unwilling to make public benefit determinations in regard to any political purpose. In *McGovern*, Justice Slade formulates the matter as follows: “From the passages from the speeches of Lord Parker [in *Bowman*], Lord Wright and Lord Simonds [in *Anti-Vivisection*] which I have read I extract the principle that the court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the function of the legislature.”

In *McGovern*, Justice Slade failed, as political, a purpose that “many will regard as of great value to humanity.” The purpose was – paraphrasing the headnote to *McGovern* – to secure the release of prisoners of conscience and procure the abolition of torture or inhuman or degrading treatment or punishment. This purpose was to be achieved by pursuit of changes in foreign legislation and reversals of
administrative decisions of foreign governments. It is true that Justice Slade does not quite make the finding that the purpose in question is of great value to humanity. Still, his point is quite clearly that, even if he had, he would have still failed the trust for being political.

The doctrine addresses not the court’s ability but the court’s willingness to make determinations of public benefit in respect of political purposes. It addresses not evidentiary but normative concerns pertinent to the proper bounds not of the court’s competence but of its jurisdiction. The point is that the court as court — or as matter of principle, or on penalty of usurping the function of the legislature — ought not to make determinations of public benefit in respect of political purposes.

Second, where a court does indeed make assessments of public benefit, it does not regard these as political determinations. What is public is not by that token alone political. It may be charitable rather than political. The distinction between politics and charity is simultaneously a distinction between politics and publicness. The doctrine of political purposes is in effect a refusal to reduce the public to the political. It represents an effort to differentiate the political from the public.

From the point of view implicit in the doctrine, political life is a particular aspect of public life. The political neither comprehends nor coincides with the public. On the contrary, the public contains the political. The public is wider in scope than the political. The category of the public is of a higher order of abstraction than that of the political. Both politics and charity fall within the scope of the public. The doctrine in fact traverses the public so as to bifurcate it into the terrains of politics and of charity.

Third, the doctrine of political purposes demarcates a terrain — that of charity — that is simultaneously public and non-political. It is only by dividing the public into politics and charity that a charitable trust can be said to be public but not political. To formulate a legal definition of charity is necessarily to insist that there are non-political aspects of public life. The distinction between politics and publicness is thus a condition for the very possibility of the legal concept of charity. Far from being a merely evidentiary aspect of the public-benefit requirement of charitable status, the doctrine of political purposes is rather both a reminder and an insistence that, as a matter of coherence, the law of charities stands or falls with the proposition that there is such a thing as a non-political determination of the public benefit.
The concepts of “non-political” and of “political” in the doctrine of political purposes may be said to reflect a distinction between changes in society and changes of society. For example, whereas a purpose identified as the relief of the suffering of the poor in a given society is a charitable purpose, a purpose identified as the abolition of poverty by way of the transformation of the very structures that produce poverty is a political purpose. “Charity” seeks changes in society. “Politics” seeks changes of society. From this point of view, the doctrine is intelligible as a refusal to grant charitable status to purposes aimed at the alteration of fundamental social structures. The proposition that a court has no means of judging whether a political purpose is or is not for the public benefit is but a way of saying that a court will refuse to enter into what it views as a specifically political mode of argument – a mode of argument not about what is but about what ought to be.

The question of whether a given change in society is for the public benefit is a matter internal to that society itself. The proposed change may or may not be beneficial to the public, and the determination as to whether it is or is not is an exercise that does not require an appeal to standards that do not form part of the society’s own structure. But, by contrast, the question of whether a proposed change of society is for the public benefit is not a question exclusively internal to that society itself. Of course, members of that society can pose the question from within that society. But, albeit from within it, they will be asking a different kind of question. This is because the determination of whether a proposed change of society is or is not for the public benefit requires an appeal to standards that do not form part of the society’s own structure. The question posed after all deals with whether that structure ought to be changed – or about whether a change in that structure is of public benefit. Its determination requires a move from an intra- to an extra-societal standpoint – from a mode of argument about whether certain standards are met to one about what those standards ought to be. It is this move that the doctrine of political purposes opposes. The distinction between charitable and political purposes is thus between evaluation of public benefit via intra-societal standards (charity) and evaluation of public benefit via extra-societal standards (politics).

The proposition that a distinction between changes in and of society is at the heart of the doctrine of political purposes can be illustrated and supported by a brief comparative analysis of McGovern
and Everywoman’s Health Centre Society (1988) v. Minister of National Revenue.\textsuperscript{30} Whereas in McGovern an uncontroversial purpose – the abolition of torture or inhuman or degrading treatment or punishment – is deemed political, in Everywoman’s a controversial purpose – the operation of a free-standing abortion clinic – is found charitable. The juxtaposition of these two cases suggests that a purpose is “political” not so much because it is controversial but rather because it requires extra-societal standards for its evaluation in respect of public benefit.\textsuperscript{31}

Justice Slade concludes his decision in McGovern:

In eloquent passages at the end of their addresses, Mr. Knox and Mr. Hoffman made reference to the classic problem facing Antigone, who believed that there are certain laws of men which a higher law may require them to disregard. Mr. Hoffman, by reference to the various international conventions to which this country has been a party, submitted that it is committed to the elimination of unjust laws and actions wherever these may exist or occur throughout the world.

Indisputably, laws do exist both in this country and in many foreign countries which many reasonable persons consider unjust. No less indisputably, laws themselves will from time to time be administered by governmental authorities in a manner which many reasonable persons consider unjust, inhuman or degrading. Amnesty International, in striving to remedy what it considers to be such injustices, is performing a function which many will regard as being of great value to humanity. Fortunately, the laws of this country place very few restrictions on the rights of philanthropic organisations such as this, or of individuals, to strive for the remedy of what they regard as instances of injustice, whether occurring here or abroad. However, for reasons which I think adequately appear from Lord Parker of Waddington’s pronouncement in Bowman’s case \textsuperscript{[1917] A.C. 406}, the elimination of injustice has not as such ever been held to be a trust purpose which qualifies for the privileges afforded to charities by English law. I cannot hold it to be a charitable purpose now.\textsuperscript{32}

The decision rests on the proposition that as a matter of principle – or on penalty of usurping the function of the legislature – the court has no means of judging the public benefit or lack thereof in respect of matters that require an appeal to standards external to the legal order within which it operates. It is this refusal to enter a specifically political mode of argument, or to adopt an extra-societal standpoint, that Justice Slade voices by way of his concluding reference to Antigone’s legendary rebellion against the established order in the name of a higher law. His is a self-conscious refusal to enter into deliberations
about this higher law. As a matter of principle, Justice Slade – as court – will not formulate the public benefit from the point of view of such higher law, and this is true even if we were to assume that he – as a man – himself thinks of this higher law as just and the laws it condemns as unjust.

It is true, of course, that Justice Slade formulates the concluding passages of his decision very carefully. At no point does he expressly say that the laws in question are in fact unjust. He tells us not that the laws that Amnesty International seeks to alter are unjust but rather that “many reasonable persons consider [them] unjust.” Similarly, he refrains from stating unequivocally that Amnesty International (AI) strives to remedy injustices and that, in so doing, it is performing a function of inestimable value. Rather, he writes carefully that “Amnesty International, in striving to remedy what it considers to be such injustices, is performing a function which many will regard as being of great value to humanity.”

Justice Slade’s cautious formulations may raise some doubt as to whether the beliefs of “many reasonable persons” are sufficient evidence “for the court to form a prima facie opinion that a change in the law is desirable.” None the less, even on the abundantly safe assumption that the purposes to which AI devotes itself are thoroughly unquestionable in his own mind, his formulation of political purposes would still hold against its charitable status. As he puts it, “the elimination of injustice has not as such ever been held to be a trust purpose which qualifies for the privileges afforded to charities by English law.” Thus the case must be decided on the “principle that the law is right as it stands.” Justice Slade’s point is that, where it requires a change in the law, not even the most uncontroversial of purposes can survive the application of the doctrine of political purposes in the law of charities.

In *Everywoman’s*, in contrast, a controversial purpose – a purpose certainly more controversial than the abolition of inhuman and degrading treatment and punishment – none the less survives the application of the doctrine. *Everywoman’s* involved the charitable status of a free-standing abortion clinic. The minister of national revenue stated that “there can be no benefit for the public, and therefore no charity, where, all other conditions being fulfilled, the object of the charity is controversial.” In granting the clinic’s charitable status, Justice Decary held that the mere fact that an object is controversial does not thereby deprive it of charitable status:

With respect to the argument that there can be no charity at law absent public consensus, counsel for the respondent was unable to direct the Court
to any supporting authority. Counsel was indeed at a loss to define what she meant by ‘public consensus,’ what would be the degree of consensus required and how the courts would measure that degree. To define ‘charity’ through public consensus would be a most imprudent thing to do. Charity and public opinion do not always go hand in hand; some forms of charity will often precede public opinion, while others will often offend it. Courts are not well equipped to assess public consensus, which is a fragile and volatile concept. The determination of the charitable character of an activity should not become a battle between pollsters. Courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.39

And more explicitly in respect of the doctrine of political purposes, Justice Decary stated: “In the case at bar, according to the evidence before the Court, the ‘trust’ is for dispensation of health care to women who want or need an abortion; it is not a ‘trust’ for alteration of the law with respect to abortion, nor is it a ‘trust’ for the political purpose of promoting the ‘pro-choice’ view. The controversy that surrounds abortion should not deter us from seeking the true purpose of the clinic, which is to benefit women receiving a legally recognized health care service in a legally constituted clinic. The record before us does not contain even the slightest hint that the Society engages or intends to engage in political activities and, as I have already noted, the respondent does not allege political purpose.”40 The holding supports the inference that, had the trust in question been for alteration of the law on abortion, or for the purpose of promoting the pro-choice point of view, then Justice Decary would have denied the clinic charitable status. In other words, the holding is not in favour of a worthwhile social goal such as the availability of abortion to women who need it. It is rather an affirmation of the charitable status of the purpose in question, “which is to benefit women receiving a legally recognized health care service in a legally constituted clinic.”41

Justice Decary’s point is not that the availability of abortion is per se a socially desirable goal. That might or might not be the case. His point is that the controversy surrounding a legally recognized health care service such as abortion is not sufficient to deprive the provision of that service of charitable status. His holding is not that the provision of abortion is charitable because abortion is a socially desirable goal. His point is that, notwithstanding the attendant controversy, it is charitable because it is a legally recognized health service.

Justice Decary states that “courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.”42 This statement does not imply that the
public benefit of a given purpose can be determined by reference to standards external to the society in which the purpose is sought, but means only that the intra-societal standards that orient the determination of whether a given purpose is of public benefit are not to be found in “public consensus.” Justice Decary’s distinction between the question of whether there is an advantage to the public and that of whether the public thinks that there is advantage does not suggest a movement from an intra-societal to an extra-societal standpoint of judgment. At issue is nothing more than a claim about where one looks, within any given society, in order to find the pertinent intra-societal standards. “Public consensus” is not where one finds that standpoint.

Thus, in *Everywoman’s*, Justice Decary looks to patterns of public spending, not to public consensus, to determine whether there is an advantage for the public: “the fact that physicians performing abortions in these clinics are paid with provincial funds spent in accordance with federal legislation, would tend to confirm that the performance of abortions at these clinics does not offend any public policy. Public funds, in my view, are presumed to be spent in accordance with public policy and absent any challenge to the validity of that public spending I am not ready to assume that public funds are not spent for the public good.”

43 It is true that Justice Decary is willing to go against public consensus – or at least to dismiss its relevance – in his determination of the public benefit. But his standpoint does not thereby become extra-societal. He states that the public does not always know what the public benefit is. But this is a far cry from saying that a trust for the alteration of law or for political purposes is or can be a valid charitable trust. Were abortion illegal, then a trust to change that law would itself be a political trust devoid of charitable status. In fact, Justice Decary’s holding is perfectly compatible with the proposition that a trust to promote the pro-choice point of view, even in a society where the provision of abortion is legally recognized as a health care matter, could still be itself viewed as a political trust.

From this point of view, *Everywoman’s* does not deny but rather confirms the doctrine of political purposes as formulated in *McGovern*. There is little in *Everywoman’s* that supports the proposition that trusts for the alteration of laws, whether just or unjust, are charitable in nature. For while *Everywoman’s* widens the field of the charitable by refusing to constrain it to public consensus, it does not suggest that the alteration of law is a charitable purpose. Justice Decary avoids going as far as the proposition that courts, when confronted with a trust for the alteration of law, should ask whether the law in question is patently unjust.
Thus *Everywoman*’s does not challenge the proposition at the heart of *McGovern* – namely, that the court must decide on the principle that the law is right as it stands. Both cases exhibit a self-conscious refusal to enter into determinations of the public benefit at the level of a political mode of argument, focused not on whether the standards of a given social formation are met but on what those standards ought to be. Both cases show that the doctrine proceeds along the lines of the distinction between changes in society and changes of society.

Thus the proposition that a non-political determination of the public benefit is possible admits formulation in terms of a distinction between changes in society and changes of society. The doctrine of political purposes views a purpose as charitable where the determination of the public benefit of that purpose can take place by reference to intra-societal standards; and it views a purpose as political where determination of its public benefit necessitates reference to extra-societal standards. But this distinction, while useful as far as it goes, does not establish the conditions for the possibility of a non-political determination of the public benefit. The problem is that the proposition that intra-societal determinations of public benefit are non-political is only partially true. They are non-political in the sense that they take place within a more-or-less established or settled horizon of fundamental standards, principles, or co-ordinates. Yet they are highly political in the sense that the horizon that orients them is itself a political fact. The appearance of this horizon as a settled non-political set of co-ordinates is nothing more than an indication of the depth of the political victory that this very horizon embodies. From this point of view, there is no such thing as a non-political determination of the public benefit. Intra-societal standards are after all political. They are not non-political merely by virtue of their being intra-societal. À la Gardner, the distinction between charity and politics is itself political.

The central implication of this viewpoint is that the court’s principled refusal to enter into a specifically political mode of argument turns out to be devoid of a principled basis. For the principle that, for fear of usurping the function of the legislature, the court should decide matters on the basis that the law is right as it stands, turns out to be little more than a functional necessity constitutive of a particular view of a legitimate legal and political system. Therefore it is itself a political principle. In the absence of justification, the courts’ “principled” deference to the legislature even in the face of patently unjust
laws is little more than politics masquerading as law. One can hardly justify the distinction between charity and politics by way of an appeal to a particular politics.

The sense that the political purposes doctrine is incoherent is thus explained by the circularity that besets its rationale as currently formulated. The sense of incoherence stems from the fact that while the political purposes doctrine seeks to present itself as a principled refusal to enter into the political arena, this refusal is itself reflective of a particular political viewpoint.

The unveiling of this shortcoming, however, does not by any means necessarily amount to a condemnation of the political purposes doctrine. On the contrary, it raises the fruitful question of whether the justificatory lacuna at heart of its rationale as currently formulated can be remedied. In this regard, the very sense of incoherence surrounding the political purposes doctrine already suggests the direction to be followed.

It may well be the case that, as the current formulation of the political purposes doctrine has it, the court must decide on the principle that the law is right as it stands. But this need not mean that the “law" in question is any and all laws – regardless of how unjust – proclaimed by an absolutely sovereign legislature. There is no other way to say it but simply to insist that the idea of “law" cannot be reduced to that of positive law. There is no conceivable idea of “legality" which recognizes no limits, which suggests that “legality" is compatible with tyranny. Law without boundaries is not law at all. It is true, of course, that the contents and nature of the higher law to which Antigone appeals as against the laws of men are not often, if ever at all, above the fray of political contestation. But the point here is not about the particular content of the limits that legality entails. It is rather about the recognition that such limits, whatever their content, do exist.

What rings hollow about Justice Slade’s judgment in *McGovern* are not the stoic heroics with which he renounces the claims of fundamental normative intuitions in the name of an institutional duty to defer to the pronouncements of the legislature. What rings hollow, rather, is that however problematic the concept of a higher law may be, however politicized may the determinations of what is wrong and what is right may be, *McGovern* is a case where the limits have been reached, where fundamental normative intuitions ought to find expression. To refuse to voice such intuitions in a case involving a *patently* unjust law\(^4\) is entirely to forgo the possibility of a non-political determination of the public benefit. Such failure deprives the doctrine of political purposes of its very ground. Justice Slade cannot
assume, in the name of a distinction between charity and politics, a point of view that, by refusing altogether the operation of non-political normative intuitions, in effect undoes the very distinction that it purportedly vindicates.

The coherence of the doctrine thus calls for an effort to formulate the minimal standards of a natural law that no conceivably civilized community could violate. It goes without saying that even when claimed as minimal standards, the contents of natural law are by no means devoid of controversy. But it also goes without saying that the patently unjust laws at stake in McGovern are violations of those minimal standards. These standards are non-political not in the sense that they are above the relentless fray of political contestation, but rather in the sense that any community that routinely violates them neither has nor deserves the prospects of a lasting existence. They are non-political in that they are fundamental minimal presuppositions of any – to borrow Aristotle’s phrase – “polis which is truly so called.”

They are basic minimal presuppositions of politics rather than violence, of contestation rather than war.

The transformation of society is a charitable act where that society stands in violation of minimal standards of natural law. This may well be the as-yet-unheeded lesson of Antigone: politics and charity coincide where what is at stake is not so much the improvement of the world as the attainment of minimal conditions of human dignity.

The foregoing entails the following adjustment to the doctrine of political purposes – a trust for the attainment of a political purpose is invalid, unless it can be shown to seek to remedy a situation that violates the minimal conditions of human dignity.

This adjustment does not so much modify as complete the doctrine. The adjustment is not externally imposed but rather internally required, as a matter of coherence, by the doctrine itself. The distinction between charity and politics dissolves where even minimal conditions of human dignity are precluded from restricting and defining the legitimate scope of the political. To put it otherwise, the distinction between non-political and political determinations of the public benefit dissolves where even the most fundamental of normative intuitions responsive to the minimal conditions of human dignity are disowned in the name of an absolutely sovereign legislature. Def-erence to an absolutely sovereign legislature even in the face of violations of the minimal conditions of human dignity contradicts the assertion, central to the doctrine of political purposes, that a non-
political dimension of public life can be meaningfully demarcated. The proposition that a court has no means of judging whether the attainment of the minimal conditions of human dignity is of public benefit is at odds with a doctrine that, in asserting a distinction between charity and politics, cannot help but both restrict and define the legitimate scope not only of charity but also of politics. Hence the doctrine cannot sustain its own coherence in the absence of an exception pertinent to the attainment of the minimal conditions of human dignity.

At stake in the doctrine is a definition not only of charity but also of politics. To suggest that the political is what the legislature happens to take as the object of its attention at any given time is to propose that the distinction between charity and politics is itself political. Hence the doctrine cannot afford to leave the demarcation of the scope of the political to the legislature any more than it can afford to vitiate the very possibility of a coherent distinction between charity and politics. On penalty of precluding the possibility of a genuinely non-political aspect of public life, the doctrine cannot leave the definition of politics to politics itself. For to do so is to suggest that the terrain of the non-political is but a contingent concession that politics may undo at will.

In this regard, for the doctrine, the minimal conditions of human dignity delineate – in as innocuous a manner as possible – the minimal features of the non-political. If the minimal conditions of human dignity cannot provide boundaries for the legitimate scope of politics, then nothing can. Politics would in that case be devoid of limits. But if anything is indeed non-political in the sense of amounting to a limit imposed on the legitimate scope of politics, then so are the minimal conditions of human dignity. This does not mean that politics cannot, as a matter of fact, venture beyond its legitimate scope, in violation – as in the case of the patently unjust laws cited in McGovern – of the minimal conditions of human dignity. However, when politics does overflow its legitimate boundaries, the doctrine of political purposes cannot, unless it would concede the very distinction between non-political and political on which it rests, render non-charitable the purpose of (re-)attaining the minimal conditions of human dignity on the grounds of its being political.

The insertion of an exception for “minimal conditions of human dignity” into the doctrine does not so much modify the doctrine as clarify the meaning of “politics” that it presupposes. Once it is clearly ascertained that the doctrine cannot leave the meaning of “politics” to politics itself, then a distinction arises between politics as a matter of fact – comprising what the political sovereign happens to have as the
object of its attention at any given time, including violations of the minimal conditions of human dignity – and politics proper, comprising what the sovereign may have as the legitimate object of its attention at any given time. Where the sovereign overflows its legitimate boundaries, its acts are political as a matter of fact but not properly political. From this point of view, the (re-)attainment of the minimal conditions of human dignity is a political purpose only descriptively, not normatively. But since the doctrine presupposes a normative definition of “politics,” it cannot be invoked in order to deprive that purpose of charitable status.

The exception for “minimal conditions of human dignity” is a clarification and not a modification because it acknowledges that the doctrine must operate on the basis of a normative definition of the political. It is not so much an exception as an adequate formulation of an aspect of what “politics” must mean under the doctrine. The minimal conditions of human dignity are the minimal conditions of any politics truly or properly so-called. No normative view of the political can afford to disown them.

The court’s principled deference to the legislature – i.e., the view that the court must work on the principle that the law is right as it stands – must itself be justified. The institutional differentiation of courts and legislature is but an aspect of the rule of law. Whatever form its justification ultimately assumes, it cannot avoid attentiveness to the minimal conditions of human dignity. For such avoidance would render the rule of law consistent with the violation of the very standards that, minimally, it is intended to protect.

*McGovern* is wrongly decided precisely because it invokes the rule of law as an injunction to defer to conditions that patently violate it. The point is not that the court ought to take an activist stance towards the legislature. The point is only that the court cannot, by way of the doctrine of political purposes, consistently invoke the rule of law in order to deny charitable status to a trust seeking to remedy its violation.

**VII**

The foregoing has sought to establish that the doctrine of political purposes must, as a matter of coherence, incorporate a normative concept such as that of the minimal conditions of human dignity. What about the specific content of that concept? If we grant that courts cannot deny charitable status to efforts to remedy violations of the minimal conditions of human dignity by citing the doctrine of political purposes, how do they identify those violations? What is the specific content of those minimal conditions?
The answer may well be a matter of fact. It pertains to the application, rather than the formulation, of appropriate principles. One might say that the question engages matters of judgment rather than of theory. Nevertheless, we can gain a great deal — and perhaps not only at the level of coherence — by posing the question in the concreteness of the circumstances surrounding any given case. By way of conclusion, I want to illustrate that proposition through a brief comment on *Jackson v. Phillips*.48

*Jackson* involved three bequests: first, “the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and other such means, as ... will create a public sentiment that will put an end to negro slavery in this country”; second, “the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time”; and third, “to secure the passage of laws granting women, whether married or unmarried, the right to vote; to hold office; to hold, manage, and devise property; and all other civil rights enjoyed by men.”49

Justice Gray held that the first two bequests, but not the third, are charitable. As regards the first bequest, he held:

> The authorities already cited show that the peaceable redemption or manumission of slaves in any manner not prohibited by law is a charitable object. It falls indeed within the spirit, and almost within the letter, of many clauses in the Statute of Elizabeth. It would be an anomaly in a system of law, which recognized as charitable uses the relief of the poor, the education and preferment of orphans, marriages of poor maids, the assistance of young tradesmen, handicraftsmen and persons decayed, the relief of prisoners and the redemption of captives, to exclude the deliverance of an indefinite number of human beings from a condition in which they were so poor as not even to own themselves, in which their children could not be educated, in which marriages had no sanction of law or security of duration, in which all their earnings belonged to another, and they were subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as the modern usages of nations will not countenance over captives taken from the most barbarous enemy.50

As regards the second bequest, Justice Gray held: “A bequest for the benefit of fugitive slaves is not necessarily unlawful. ... To supply sick or destitute fugitive slaves with food and clothing, medicine and shelter, or to extinguish by purchase the claims of those asserting a right to their service and labor, would in no wise have tended to impair the claim of the latter or the operation of the Constitution and laws of the United States; and would clearly have been within the terms of this bequest.”51
Yet Justice Gray denied charitable status to the third bequest, on grounds that resemble the doctrine of political purposes: “This bequest differs from the others in aiming directly and exclusively to change the laws; and its object cannot be accomplished without changing the Constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. This bequest, therefore, not being for a charitable purpose, nor for the benefit of any particular persons, and being unrestricted in point of time, is inoperative and void.”

I have argued that the doctrine of political purposes, because its justification involves an appeal to the minimal conditions of human dignity, cannot be invoked to deny charitable status to trusts seeking the attainment of those conditions. In Jackson, the question is whether the alteration of laws denying women civil and political rights enjoyed by men amounts to an attainment of the minimal conditions of human dignity. To be sure, there is no guarantee that, had Justice Gray posed that question explicitly, he would have answered it affirmatively. But its very posing would have at the very least opened that possibility – rescued it from the untenable assumption that, merely because the laws are what they are, it is not charitable to seek to change them.

NOTES

I would like to thank Jim Phillips for his helpful comments on earlier versions of this chapter. Thanks also to Nick Devlin, Jeremy Freiberg, Alkis Kontos, Mia London, and Jill Manny for their comments. The responsibility is all mine.

1 Bowman and Others v. Secular Society, [1916-17] 1 All ER at 18.
2 Morice v. The Bishop of Durham (1804), 32 ER 656 at 658. See also Re Astor’s Settlement Trusts, [1952] 1 All ER 1067. The beneficiary principle permeates the following “familiar definition” of a trust: “A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and anyone of whom may enforce the obligation.” Cited from Underhill’s Law of Trusts and Trustees in D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (Toronto: Carswell 1984), 5.
Thus, for example, in *Re Astor* a trust for the “improvement of journalism” is found invalid.

See, for example, *Morice and Oppenheim v. Tobacco Securities Trust Co. Ltd. And Others*, [1951] AC 297. Keeton and Sheridan’s well-regarded definition of a trust incorporates the possibility that a trust may benefit an “object permitted by law”: “A trust is the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.” See L.A. Sheridan, *Keeton and Sheridan’s The Law of Trusts*, 12th ed. (Chichester: Barry Rose, 1993), 3.

[1891] AC 531 (HL).

At 583. Lord MacNaghten did not fail to mention the Charitable Uses Act, 1601, 43 Eliz. 1, c. 4, known as the Statute of Elizabeth, whose preamble contained a listing of charitable purposes, which was rendered in modern English by Justice Slade in *McGovern and Others v. Attorney General and Another*, [1981] 3 All ER 493 (Ch.D.) at 502–3: “The 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, seaways, 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 payments of fifteens, setting out of soldiers, and other taxes.”

The Supreme Court of Canada adopted the *Pemsel* categories in *Guaranty Trust Company of Canada v. Minister of National Revenue*, [1967] SCR 133. Debate abounds regarding the appropriateness of the *Pemsel* categories, as well as that of the preamble of the Statute of Elizabeth. In *Re Laidlaw Foundation* (1984), 48 OR (2d) 549 (Div. Ct), Justice Southey, favouring “a more liberal definition of charity,” (at 586) stated: “... I think it is highly artificial and of no real value in deciding whether an object is charitable for courts in Ontario today to pay lip-service to the preamble of a statute passed in the reign of Elizabeth I” (at 582). See also *Incorporated Council of Law Reporting for England and Wales v. Attorney General*, [1972] Ch. 73. For discussion of the issues involved, see Phillips, chapter 7 in this volume; Moran, chapter 8 in this volume; Ontario Law Reform Commission (OLRC), *Report on the Law of Charities*, 2 vols. (Toronto 1996),
The Supreme Court of Canada’s most recent case dealing with the definition of charity – Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue, [1999] 1 SCR 10 – retains the traditional framework.

9 See also National Anti-Vivisection Society v. Inland Revenue Commissioners, [1947] 2 All ER 217 (HL); Gilmour v. Coats, [1949] AC 426 (HL); Re Scarisbrick, [1951] Ch. 623 (CA).

10 Oppenheim, 305.

11 Ibid., 306.

12 See Gilmour. At 454-5, Lord Reid states: “The question for decision is whether or not the purposes of that community are charitable in the legal sense of that word. It is admitted, and properly admitted, by the appellant that it is not enough to make this gift charitable in the legal sense that it is a gift for religious purposes: the appellant can only succeed by showing that the gift involves a benefit to the public.”

13 In Anti-Vivisection, Lord Wright writes at 220: “It is not necessary at this time of day to observe that not every object which is beneficial to the community can be regarded as charitable. The legal significance is narrower than the popular. ... Even if the object were in some sense beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth. Healthy and manly sports are certainly in fact beneficial to the public, but apart from special concomitants are not generally entitled to qualify as charitable objects.” Thus it is a commonplace of the law of charities that a purpose must benefit the public in a way that is “within the spirit and intendment” of the Statute of Elizabeth.

14 Bowman, 18.

15 Ibid., 18 (emphasis added).

16 In McGovern, at 509, Justice Slade states that trusts for political purposes include “(inter alia) trusts of which a direct and principal purpose is either – (i) to further the interests of a particular political party, or (ii) to procure changes in the laws of this country, or (iii) to procure changes in the laws of a foreign country, or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country, or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.”

Recently, in Human Life International of Canada v. Minister of National Revenue, [1998] 3 FC 202, leave to appeal dismissed, 21 Jan. 1999, Supreme Court Bulletin, 1999, 102, the Federal Court of Appeal included “advocacy of opinions on various important social issues” as a political
purpose. Justice Strayer stated: “The same \textit{Bowman} rationale leads me to conclude that this kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely, what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?”

18 Ibid., 16 (emphasis added).
22 Ibid., 102.
23 Ibid., 105.
24 Ibid., 105.
25 Ibid., 105–6 (emphasis added).
26 \textit{Anti-Vivisection}, 224 (emphases added). The judgments in \textit{Anti-Vivisection}, including Lord Porter’s dissent, clearly distinguish between the public benefit and the non-political requirements. They posit that the question of whether a given purpose is of public benefit is distinct from the question of whether that purpose is political.

Lord Porter writes (at 226): “The difficulties of the present case arise firstly in determining what is of benefit to the public and who is to determine that question, but a not less difficult, though perhaps less subtle, question is whether the objects of the society are political within the meaning of that word as used by Lord Parker in \textit{Bowman’s} case.”

Similarly, Lord Normand (at 240), having found that the National Anti-Vivisection Society is an association for political purposes, discusses the “other question” at issue in the case: “This [other] question, which in my opinion only arises on the assumption that the society is held not to be a political body, is in brief whether it is sufficient for it to prove that its purpose is to alleviate or prevent the suffering of animals or whether it must prove that on balance its purpose is beneficial to mankind.”

And Lord Simonds (at 232), with whom Viscount Simon concurs (at 218–19) in a brief note to that effect, cites with approval – and with the express intention of elaborating on the meaning of Lord Parker’s pronouncement in \textit{Bowman} – a passage from \textit{Tyssen on Charitable Bequests}. Apart from the question of whether it provides a flawless interpretation of the position formulated by Lord Parker in \textit{Bowman}, this passage
clearly differentiates the issue of public benefit (i.e., whether the proposed change in the law is desirable) from that of political purpose (i.e., whether it is proper for the court to make the public benefit determination in question): “It is a common practice for a number of individuals amongst us to form an association for promoting some change in the law, and it is worth our while to consider the effect of a gift to such an association. It is clear that such an association is not of a charitable nature. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands.”

Thus in her recent text *The Law of Trusts* (Concord: Irwin Law, 1997), 64, E.E. Gillese lists the absence of political purpose as a requirement of a charitable trust.

27 *McGovern*, 506 (emphases added).

28 Ibid., 519.


31 Ibid., 519.

32 Ibid. (emphasis added).

33 Ibid. (emphasis added).

34 Ibid., 506.

35 Ibid., 519.

36 Ibid., 506 (emphasis added).

37 Ibid., 506 (emphasis added).

38 *Everywoman’s*, 67.

39 Ibid., 68 (emphasis added).

40 Ibid., 70 (emphasis added).

41 Ibid. (emphasis added).

42 Ibid., 69.

43 Ibid., 68.


46 The fact that *McGovern* involved an effort to change law and policy in a foreign jurisdiction is not relevant to this aspect of the argument. The minimal conditions of human dignity are not geographically specific.
Because its justification involves an appeal to the minimal conditions of human dignity, the doctrine of political purposes cannot be invoked to deny charitable status to trusts seeking the attainment of those conditions. *McGovern* is wrongly decided because that is exactly what it does.

This view is indebted to but different from that adopted by the *OLRC*, *Report*. In the view of that document, “the distinction between politics and charity parallels the distinction between politics and law [in a liberal democracy]: the debate about the content of the good and a determination of the good itself are two different things” (153). Hence *McGovern* is a “special case” in that “there is truly no debate” about the validity of its purpose: “advocating and acting lawfully to aid and abet the release of prisoners of conscience and the cessation of torture are obviously valid determinations of the good, even if they involve trying to persuade others and are therefore also political” (at 221).

In my view, the purpose in *McGovern* is best grasped not as an obviously valid determination of the good itself but as a *sine qua non* of any meaningful debate about the content of the good. The release of prisoners of conscience and the cessation of torture are not a necessary conclusion but a presupposition of truly political debate. *McGovern* is a special case not because its purpose is good from the point of view of some external standard but because the doctrine of political purposes itself both posits and presupposes a view of “politics” as necessarily respectful of the minimal conditions of human dignity. This way of framing the matter would make it more difficult to suggest, as does the *OLRC*, *Report* (210), that seeking “to benefit others through the removal of legal or social obstacles to the full recognition of their human dignity” is not a charitable purpose. For commentary on this aspect of the *OLRC*’s report, see Moran, chapter 8 in this volume.

This does not mean that the purpose is necessarily charitable. It means only that the purpose cannot be denied charitable status on the grounds of its being political under the doctrine of political purposes.

47 (1867), 96 Mass. 539.
48 *Jackson*, 541–2.
50 Ibid., 568.
51 Ibid., 569–70.
52 Ibid., 571.
This chapter examines the relationship between the law of religious charity in Canada and the Charter of Rights. Specifically, it asks whether three doctrines of charities law in the area of religion may violate sections of the Charter. Because the Charter applies only to governments and to legislatures, I pose these questions in the context of the registration of charities under the Income Tax Act.

The chapter has two sections. The first looks at two definitional matters – the definition of religion in Canadian charities law and that of “public benefit” in religious charity. This analysis is a prerequisite to the second section, which assesses these definitions against two provisions of the Charter – the guarantee of freedom of religion and conscience in section 2(a) and the equality provision, section 15.

While I am not the first to write on this subject, it is remarkable how little Canadian academic writing or case law exists in the area of religion as charity, and perhaps even more so that there has been so little serious attention paid to the constitutional issues discussed here. This situation will soon change, however, as the issue of definition is presumably currently front and centre in the Canada Customs and Revenue Agency’s (ccra) continuing consideration of the Church of Scientology’s application for registration, and the department, and perhaps the courts as well, will have to grapple with the question.
THE DEFINITION OF RELIGION
IN CHARITIES LAW

The Meaning of “Religion” in the Advancement of Religion

Because of the dearth of Canadian cases on the meaning of religion I assume in this section that its meaning, for the purposes of charitable registration under the Income Tax Act, is that given to the term by the (largely English) case law. The Income Tax Act, of course, does not define even “charity,” let alone religion. But two reasons suggest that English law is the right place to look. First, the Federal Court of Appeal, which ultimately decides the meaning of charity for the purposes of the act, has invariably looked to English law for the meaning of charity generally, including, of course, the fact that “the advancement of religion” is one of the particular categories of charity. The Supreme Court of Canada has recently approved this approach. While neither court has said anything about religion, there is no reason to suppose that either would depart from that guidepost in this area.

Second, the definition employed by the CCRA, laid out in its pamphlet Registering a Charity for Income Tax Purposes, effectively reproduces the principal aspects of the English-derived definition: “This category refers to promoting the spiritual teachings of a religious body, and maintaining the doctrines and spiritual observances on which those teachings are based. There has to be an element of theistic worship, which means the worship of a deity or deities in the spiritual sense. To foster a belief in proper morals or ethics alone is not enough to qualify as a charity under this category. A religious body is considered charitable when its activities serve religious purposes for the public good. The beliefs and practices cannot be what the courts consider subversive or immoral.” The key aspects of this definition, which I elaborate on below, are two-fold: there must be a deity, and religion means something different from the inculcation of “morals” or “ethics.”

I turn then to the English and, to a much lesser extent the Canadian, cases on the definition of religion. Most commentators assert that English law on charities is marked by a large measure of “toleration” in this area – that the law of charity has not, at least for some time, preferred one religion to another. Subject to what I say in the next section about the problem of public benefit, this is largely true. All varieties of Christianity have been held to qualify as charitable within the category of the advancement of religion, including sects very much on the fringe of the faith, as have all the world’s other
major religions. There is some older authority to the effect that the
religion must be monotheistic, although a leading text argues that
the law no longer draws a distinction between monotheism and poly-
theism and the charity commissioners have recently confirmed this.
Only religions that are in some way harmful to the public interest or
clearly “bogus” would now be excluded.

English law, however, has drawn two clear lines to demarcate the
meaning of “religion.” It has held both that a “religion” requires the
presence of a god and worship of that god and that religion is funda-
mentally different from what might be termed “ethical systems of
belief.” The first point can be traced back to Bowman v. Secular
Society, in which the House of Lords said that religion must include
some form of deism. This view was upheld in the more recent case of
Regina v. Registrar-General, Ex Parte Segerdal. Although this was not a
charities case, it was closely related, for the Church of Scientology
wanted one of its English properties to be registered as a place of reli-
gious worship under the Places of Worship Registration Act. All three
judges of the Court of Appeal held that Scientology was not operating
a place of religious worship. Although there were gatherings of
people and services according to the creed of Scientology were held,
a “place of meeting for religious worship” was one “where people
come together as a congregation or assembly to do reverence to
God.” The court stated that it need not be the Christian God – it may
be another, or “an unknown God.” But “it must be reverence to a
deity.” Scientology did not qualify, for it was “more a philosophy of
the existence of man or of life, rather than a religion,” for “religious
worship means reverence or veneration of God or of a Supreme
Being.”

There are other cases to the same effect. The leading modern
case, which stands both for the proposition that a god is required
and for the distinction between “religion” and “ethics,” is Re South
Place Ethical Society. At issue was an organization whose stated
objects were “the study and dissemination of ethical principles, and
the cultivation of a rational religious sentiment.” The organization
was committed to “the discovery of truth through intellect,” not a
supernatural being, although its members were agnostics, not athe-
ists. The court held that not only did there need to be a God, but that
religion included the notion of worship of that God: “two of the
essential attributes of a religion are faith and worship; faith in a god
and worship of that god.” Thus even if it was possible to substitute
something else for belief in the supernatural, it was hardly likely that
that something else would be worshipped. Justice Dillon stated:
“Religion, as I see it, is concerned with man’s relation with God, and
ethics are concerned with man’s relation with man. The two are not the same, and are not made the same by sincere inquiry into the question: what is God? If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities, such as truth, beauty and love, ... their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion.” The court did, however, find the organization to be charitable, on the grounds that it advanced education and was beneficial to society in general.16

The only exception to the need for a god appears to be Buddhism. Perhaps to avoid debates about whether Buddhists do recognize a god, or more likely because it would be invidious to exclude one of the world’s major religions, the charity commissioners have accepted Buddhism as qualifying, and in R. v. Registrar-General, discussed above, Lord Denning would have made an exception for a Buddhist temple as being a place of worship, whether or not Buddhists could be said to believe in god. The charity commissioners have recently held that religion necessarily requires belief in a “supreme being” and worship of that supreme being, although they have also said that that does not mean a “god” in the Western sense of the term.17

Not all common law jurisdictions have taken the same approach. American law is somewhat confusing, because of the constitutional protection of religion and because the term has been defined in a variety of contexts. But overall the definition used for the purposes of the Internal Revenue Code is broader, especially given the fact that Scientology is considered a religion, which it is not in Britain.18

More centrally to the common law definition, the courts in both Australia and New Zealand have not insisted on the need for faith in, and worship of, a God, although they have (probably) defined religion as distinct from humanism.19 There is no evidence, however, that Canadian law has departed from the English standard. Canadian courts, though like their English counterparts upholding a variety of forms of religion as charitable,20 have said very little indeed about the meaning of religion in charities law. There is a hint in Re O’Brien21 that religion entails the worship of a god, although the court was considering there the meaning of bequests “to each and every church in the Town and County of Yarmouth.” Chief Justice Ilsley of Nova Scotia held that the testator meant “a congregation ... associated together for the worship of God”. In the more recent case of Re Russell22 the issue was whether a bequest to the Edmonton Lodge of the Theosophical Society created a charitable trust. Justice Stevenson simply followed the English case of Berry v. St Marylebone Borough Council23 in holding that theosophy was not a religion. He
did not say why it was not: the entirety of the judgment on this point states that “[t]he evidence before me shows that the society, and theosophy, is not a religion.” We are left to assume that he adopted the reasons in Berry – namely, that theosophy did not involve worship of a god and was “the teaching of a doctrine ... of a philosophical or metaphysical conception.”

The Canadian jurisprudence on the meaning of religion in charity law is therefore scanty and tells us very little. But if we can discern anything, it is that, as in English law, “religion” for these purposes requires a god and worship of that god and that religion is different from other forms of ethical belief. Religion has been defined as involving faith and worship in non-charities cases also. The Ontario Law Reform Commission has recently approved this notion. Following a review of much of the case law canvassed here, it suggests an “outline” of a definition, as follows: “the worship and knowledge of God, the pastoral and missionary propagation of an established theology, and observances and practices.” Finally, as we saw above, the CCRA clearly bases its practice on the dominant themes enunciated in the English cases – the need for a god and worship of that God, and a distinction between religion and ethics. The only exception seems to that, again as in England, Buddhism is accepted, whether or not one can say that Buddhists believe in a God.

Public Benefit and Religion

Having established that existing case law, and the CCRA’s practice, suggest some limitations on what constitutes “religion” in the law of charities, I turn now to consider which religious practices do not qualify as charitable on the grounds that they do not provide a public benefit. Here again I rely largely on English cases, given the paucity of Canadian ones. Although Canadian law is probably different from English in one major respect, the general question of whether some practices do not provide a public benefit remains a live issue, certainly in the content of the Income Tax Act.

There is not space here for a general discussion of public benefit and religion. But before I examine the problem at issue here, I note that the courts have been shy about articulating why it is that religion per se provides a public benefit. Most cases deal with whether some particular purpose advances religion; thus there is ample case law on what one might call the infrastructure of religion. I am not myself religious: I was raised in the Church of England and later became an atheist, and neither designation makes a person religious! But I do understand that infrastructure is hardly the essence of religion; that
must be located in beliefs and practices. One would therefore assume that if the law of charity accepts the utility of religion it would do so on the basis that all religious beliefs and practices have public benefit. And that must be an assumption – a matter not to be proved but, if I may be excused the expression, to be taken on faith. As the Ontario Law Reform Commission (OLRC), which strongly supports the inclusion of religion in the lists of charity as a universal human good, has succinctly noted, “depending on how one values the good of religion, few or none of the benefits of a gift for the advancement of religion will have practical utility.”

Donovan Waters has made the same point, noting that “there is essentially nothing in religion which can be proved objectively in court to promote the observable well-being of persons or to be for the observable benefit of the public.”

Despite the apparent logic of the notion that all purely religious practices should be treated equally, it is not the case that the law of charities, at least the English version, accepts all religious observances and practices as providing a public benefit and therefore charitable. The leading English case, *Gilmour v. Coats*, says otherwise. At issue was a gift to a Roman Catholic priory of Carmelites – contemplative nuns who did nothing outside the priory but lived a cloistered life of prayer and devotion. The House of Lords held that the gift was not charitable because it lacked any element of public benefit. The religious services held at the priory were not open to the public, and the nuns provided no other “services” to the community. There was no “infrastructure” aspect to provide public benefit, and the court held that the purpose was therefore not charitable. Along the way it rejected an argument that it should accept Catholic views on the value of intercessory prayer and that that would provide sufficient public benefit. Lord Reid held that while the law treated all religions alike, it could show “no preference ... to any church” and must “remain neutral.” He stated: “The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.”
Thus the court found that while all religions qualified as charitable for the purposes of the “advancement of religion,” not all religious purposes provided a public benefit. Whether a purpose did so was for the court to decide on the evidence before it, and it could not simply accept the Catholic church’s view that intercessory prayer was beneficial. Nor could it accept an alternative argument – that the convent provided a public benefit in the form of edification to those outside. While edification may in some cases constitute public benefit, “there must be some limit to the kind of indirect instruction or edification which will constitute a public benefit,” and in this case “the public benefit is too remote.”

The essential message from *Gilmour v. Coats* is that while providing the infrastructure of religion is charitable, and while holding religious services in public provides a public benefit which makes them charitable also, religious practices carried out “privately” do not count in the law of charity, for there is no way to establish that they provide a public benefit. The case is often cited as settling the issue of whether or not public benefit is assumed for religion. But whatever it resolved doctrinally, the decision is obviously open to much criticism.32 There are two major problems with the reasoning, one of logic and the other of practical common sense. First, logically, the judgment in *Gilmour* is entirely self-contradictory. How can charities law assert that public benefit from religion is a thing to be proved rather than assumed and that not all religious purposes are charitable, and then concede that such matters are beyond legal proof and steadfastly ignore the issue of benefit in the vast majority of cases?

The second problem is equally obvious. By accepting without question the public benefit from, and thus the charitability of, a host of “infrastructural” projects, while at the same time saying that there will be occasions when the public benefit of prayer or other ritual will be questioned, the law prefers means to ends, trappings to essentials. It is charitable to build churches, to support missionaries, or to publish religious works, and none of this requires that the law accept a single tenet of the beliefs underlying the activity. Yet those beliefs are what motivate the activity, and thus the law supports the cosmetic apparatus of religion and not its essential purpose. The OLRC’s views are surely right: “if one accepts that the advancement of religion is charitable per se, as Lord Reid ... seems to, then one does not value religion mainly as a means to some other good or for its by-products.”33

No matter how wrong the *Gilmour* decision seems to be, however, it lives on in English law. Two recent cases have applied it. In one the charitability of masses for the souls of the dead was at issue, and the court decided that they were acceptable, because they were held in
public and because the money paid for the mass helped to support the clergy who officiated. Another case concerned a small Protestant sect that met in private houses. The court argued that this fact rendered it non-charitable, although it also held that the religious services were an ancillary purpose to the sect’s more public faith-healing work, which was held to be charitable. In addition, the charity commissioners have recently used the fact that Scientology’s observances are essentially private as a ground for holding it not to be charitable.

*Gilmour v. Coats* has never been the subject of judicial consideration in Canada, although there is a line in the Supreme Court of Canada’s judgment in *Cameron v. Church of Christ Scientist*, a pre-*Gilmour* case, that seems to be in accord with it. It is unlikely that the Canadian courts would follow it down the road of declaring private masses to be non-charitable, for there is a line of cases accepting them. Some of these cases argue that whatever adherents think advances their religion is good enough to prove public benefit, while others refer to the special position of the Catholic church in Quebec. Donovan Waters has suggested that there is some uncertainty in this area because the court decided the leading case on masses, *Re Hallisy*, on the basis that it was following an earlier English case, *Bourne v. Keane*, which had held gifts for masses to be charitable. In fact *Bourne* merely said that they were legal. However, one much more recent Canadian decision has followed *Hallisy*, and it is difficult to think that a Canadian court today would have a problem with private masses.

This does not mean, however, that Canadian law clearly accepts all forms of religious observance as charitable. The CCRA’s definition of religion, quoted above, asserts: “A religious body is considered charitable when its activities serve religious purposes for the public good,” and this suggests that the agency, and the courts, would not assume, but would inquire into, public benefit. More important, the CCRA does apply *Gilmour v. Coats* when adjudicating claims for registration, even though it is not required to do so often. We should also note that the agency’s definition, laid out above, includes examples of particular purposes which advance religion that are examples of activity “in the world” – “promoting ... spiritual teachings,” “maintaining ... doctrines and spiritual observances.” And the general definition is followed by examples of “other activities which advance religion” of the same nature – “organizing and providing religious instruction,” “performing pastoral and missionary work,” and “establishing and maintaining buildings for worship and other religious use.”

Given that *Gilmour* is good law in Canada, it is subject to a third criticism in addition to those noted above, which could be consid-
ered internal to charities law. What *Gilmour* effectively does is to express a preference for religions that do not include private observance. Its effect is to draw distinctions between religions. The *Gilmour* doctrine may therefore be susceptible to public law challenges that it discriminates between religions. And that is the subject to which I now turn.

**THE DEFINITION OF RELIGION AND THE CHARTER OF RIGHTS**

*State Action*

The Charter of Rights applies to governments and legislatures in Canada. While this requirement has been interpreted to mean that it does not apply directly to the common law or equity when either is being used to decide private disputes, and thus not to the law of charitable trusts, the fact that the federal government, in its administration of the charity provisions of the Income Tax Act, uses common law definitions of charity brings those definitions within the scope of section 32 of the Charter. The exemption from taxation of the income of charitable organizations, and their ability to issue receipts for donations, is therefore sufficient “state action” to engage the Charter.

**Violations of Sections 2(a) and 15**

What follows is an assessment of the kinds of arguments that might be offered for why the issues of definition and public benefit discussed above may create a problem in the context of the Charter. I do not believe that there is enough case law on either section 2(a) or 15 to make definitive statements. But there is enough to suggest that the issues would be taken seriously.

The relationship between the Charter and the law of religious charity involves three distinct, albeit related, inquiries. First, does a definition of religion that requires the presence of a god and worship of that god contravene either or both of the guarantees of freedom of religion and equality? Would the courts find that “religion” for the purposes of the Charter had a wider meaning than religion in charities law and that the failure to adopt that wider meaning represents an invalid distinction in the provision of tax privileges? Second, would the doctrine that excludes private devotion from religion in charities law similarly contravene either section of the Charter? Third, would the preference for “religion” at all over other forms of belief, including
overtly non- or anti-religious belief, violate either section? This third inquiry might appear to be not too different from the first – the line between “religious” belief that did not involve a god and non-religious belief might be too fine to worry about – but I wish to keep it separate because it arguably makes charity law’s preference for religion an invalid form of “establishment” of religion.

While I consider the effect of both sections 2(a) and 15 here, I concentrate on the former. That is the section that most clearly engages “religion,” and some of the definitional questions, particularly the meaning of “religion” in the constitution, are common to both sections. Before one could decide whether there was a violation of the right to equal treatment irrespective of religion, one would need to decide what the meaning of “religion” in section 15 is. There is no requirement that the meaning given to the term in section 2(a) be the one adopted for section 15, but it seems very likely that the courts would want to achieve substantial consistency between the two.

First, let us look at what the Supreme Court of Canada has said about the scope and meaning of section 2(a), which provides: “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.” The Court has considered this right in a number of cases, but the most relevant one remains its first decision on the subject, R. v. Big M Drug Mart. In defining “freedom of religion,” Chief Justice Dickson’s judgment for the Court began by saying that its “essence” is “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.” Clearly there is nothing in charities law that interferes with such rights.

However, the Court went on to find that freedom of religion includes more than simply the right to hold religious beliefs and exercise religious practices. It also means “the absence of coercion or constraint,” because if a person is pushed one way or another he or she is not choosing freely. And such coercion includes “indirect forms of control which determine or limit alternative courses of conduct.” Thus freedom of religion means “both the absence of coercion and constraint, and the right to manifest beliefs and practices”; that is, “no one is forced to act in a way contrary to his beliefs or his conscience.” Chief Justice Dickson then applied this principle to the statute at issue, the federal Lord’s Day Act: “To the extent that it binds all to a sectarian Christian ideal, the Lord’s Day Act works a form of coercion inimical to the spirit of the Charter and the dignity
of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the State, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture” (emphasis added). And the chief justice added: “The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.”

The Court therefore made two moves that appear to implicate two of the questions about charities law raised above: public benefit and the definition of religion as requiring deism. First, the Court defined freedom of religion as more than the right to exercise one’s religion; it defined it to include the absence of coercion. Second, the Court’s notion of what coercion entails is broader than legislation which compels one form of belief; it includes a prohibition of, in the words just quoted, “[t]he protection of one religion and the concomitant non-protection of others.” Such government action “imports disparate impact destructive of the religious freedom of the collectivity.” Coercion was clearly present in the case of laws on Sunday observance at issue in Big M Drug Mart. And while coercion simpliciter seems the wrong term to apply to the preference for deistic religions and the effects of discrimination against religious practices that fail the test of public benefit, the wider meaning of coercion – protection of one religion and non-protection of another – seems engaged by charities law.

It is not difficult to argue that financial support that favours some forms of religious belief over others violates the rights of those left out. If, for example, the Income Tax Act were to include in its definition of religion only Christianity, or only Protestantism, then surely we would find this to violate the religious freedom of the excluded adherents. The state sends a clear message to those not preferred – that their religion is less worthy than others. Adopting to the Income Tax Act what Chief Justice Dickson said in the passage above from Big M Drug Mart, we can say that charities law “creates a climate hostile to, and gives the appearance of discrimination against,” those religions that are excluded. While this is obviously the case in the hypothetical examples used here, the distinctions drawn by the law in its definition of religion and in its understanding of public benefit are different only in degree, not in principle.46
Some admittedly limited support for this argument comes from *Adler v. Ontario*, in which it was contended that Ontario’s provision of public funding for Catholic schools violated both the freedom of religion and the equality rights of Jewish and Christian fundamentalist parents. The Supreme Court found that it did not. But Justice Iacobucci premised his conclusion for the majority of the Court entirely on the fact that section 93 of the Constitution Act, 1867, mandated the funding of Catholic schools in Ontario, and was itself part of the historical political compromise that brought about Confederation. Section 93 thereby formed a “comprehensive code of denominational school rights,” which admittedly gave special status to some and denied it to others. To allow the arguments based on the Charter would be both to expand the scope of the historical compromise in an unacceptable way and to allow one part of the constitution to trump another.

Justice Iacobucci’s judgment in *Adler* does not overtly discuss the question of whether, without the existence of section 93, such government action would violate the Charter. Indeed he said that section 93 is “immune from Charter scrutiny.” But the judgment seems, if anything, to see it as self-evident that there would otherwise have been a violation. On two occasions Justice Iacobucci quoted a phrase from Justice Wilson’s judgment in *Reference Re Bill* to the effect that special status for one religion “sits uncomfortably with the concept of equality embodied in the Charter,” but he insisted that “it must nonetheless be respected.” In addition, he noted at the end of his section on funding of religious schools that it was only the fact of government expenditures on Catholic schools that was protected; other legislation – presumably that which drew distinctions on Charter-protected grounds not covered by section 93 – would invoke scrutiny.

Thus, to the extent that charities law prefers certain religious practices within its own definition of religion by offering a benefit only to them, it discriminates against other practices. It does so, of course, not directly, but through the meaning of “public benefit.” But this fact would not matter, for the Court has consistently said, and indeed said in *Big M Drug Mart*, that both the purpose and the effect of legislation should be looked at to see if it contravenes the Charter.

However, if we are also to conclude that the deism requirement is a violation of the *Charter* under section 2 (a), there is one more hurdle to overcome. We must also find that the definition of religion in that section is broader than the one in the Income Tax Act. If it was not, charities law would simply be congruent with constitutional law. This, however, should not be a difficult task. There is nothing in the
Charter which suggests that religion means deism. And in Big M Drug Mart the Court discussed the purpose behind the provision on freedom of religion. It recognizes “the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation.” According to Chief Justice Dickson, “[t]he values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates.” Religious beliefs are, “in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter.... Whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.”

This approach to the purposes underlying the religion clause surely suggests that the Court would not restrict the meaning of religion in the Charter to deistic beliefs. The section protects “whatever beliefs and opinions” a person’s “conscience dictates”; it does not protect them only when they have their foundation in deism.

Does the preference for “religion” at all over other forms of belief also violate section 2(a)? Obviously if this argument were accepted it would render otiose the preceding discussion; that is, if a distinction between religion and non-religion is unacceptable, then surely so is that between religions, based on deism. We might make two arguments here. The first, and easiest and strongest, is that the special status of religion elevates it over “conscience” in an unacceptable manner. In Big M Drug Mart Chief Justice Dickson held, as part of his discussion of the underlying purposes of section 2(a), that “[e]qually protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.”

Thus if one accepts all of the arguments made above – that the section is about more than free exercise of beliefs and prohibits compulsion and that state support for religion is a message of preference and a form of compulsion, then the distinction between religion, with or without deism, and non-religion, or “conscience,” is as invalid as that between different forms of religion. Indeed, Chief Justice Dickson came close to saying this in Edwards Books: “The purpose of s. 2 (a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perceptions of oneself, humankind, nature, and in some cases, a higher or different order of being” (emphasis added). A belief in “a higher ... order” is thus only one of the forms of belief protected by the section.
A second, alternative argument, albeit related, is that the preference for religion, especially as it involves government spending, is an invalid form of “establishment.” Unlike the American Bill of Rights, the Charter contains no “establishment clause.” But there are some hints in the cases that section 2(a) would capture at least some forms of establishment. In *Big M Drug Mart* the Court did essay a somewhat inconclusive discussion of establishment. On the one hand, Chief Justice Dickson noted that “preferential treatment of, or State financial support to, particular religions or religious institutions” constituted perhaps a type of establishment. On the other hand, he conceded that section 29 of the Charter (nothing to derogate from other constitutional rights of denominational schools) and section 93 of the Constitution Act, 1867 (protecting denominational school rights existing at the time of Confederation), might show that there was no anti-establishment principle. He left it that “[t]he acceptability of legislation or governmental action which could be characterised as State aid for religion or religious activities will have to be determined on a case by case basis.” Thus state aid might be unacceptable. There is not space here for a full discussion of establishment, which I leave to the constitutional experts. In any event, the issue can be avoided by sticking with the first argument – that the preference for religion over conscience is a form of compulsion clearly excluded by section 2(a), whether or not it is also “establishment.”

I have devoted a good deal of space to section 2(a), but it seems likely that at least some of the aspects of charity law discussed here would also involve violations of section 15 of the Charter – equality rights. Section 15 provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” An analysis of section 15 would first decide what the relevant comparison groups are and then ask whether there has been unequal treatment. In the case of public benefit, the analysis seems straightforward: religions that charities law itself considers within the definition of religion are treated differently, with private observances not receiving the equal benefit of the law.

In the case of the requirement of deism, one would have to deal with the argument that like is being treated alike: all deistic religions receive charitable status, all non-deistic ones do not. Thus a non-deistic “religion” denied registration is being treated like all other non-deistic religions. The response to this must be that the defini-
tion of religion in section 15 is broader than its meaning in charity law, and the arguments for doing so would be the same as those discussed above with reference to section 2(a). As I noted above, while there is nothing in the constitution which requires that the meaning of religion in section 15 be the same as in section 2(a), it seems highly likely that the Court would want to make the definitions consistent and would look to section 2(a) jurisprudence to guide it. If it did, it would find that some religions are indeed treated differently from others.

The distinction between religious and non-religious forms of belief is perhaps less easy to deal with under section 15. It seems unlikely that the Supreme Court would say that “religion” in section 15 means “religion and conscience,” for while both terms appear in section 2(a), only one is present in section 15. Thus the law does not provide unequal treatment within an enumerated ground, but unequal treatment between an enumerated and an unenumerated ground. The way forward might be to use the fact that the grounds in section 15 are not exhaustive and include “analogous grounds” to those enumerated. Presumably “conscience” is a closely analogous ground to “religion,” especially as both terms appear in section 2(a). If that were accepted it would set up what I think is a unique situation to date with regard to section 15 – a law that prefers one ground in that section to another. One would then argue that there cannot be unequal treatment between grounds. Defenders of the law, of course, would argue either against inclusion of an analogous ground or that when the government prefers an enumerated category to an unenumerated one, whether analogous or not, it does not violate the Charter. Opponents of the current law might be forced to rely on section 2(a) for this part of the challenge.

Section 1

If a violation of either section 2(a) or section 15 were found in each of the ways discussed, it is unlikely that the distinctions drawn by the law of charity would be saved by section 1 of the Charter, which provides that the rights guaranteed are subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The test laid down by the Supreme Court for analysing section 1 is two-pronged. First, it must be established that “the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right” – it must represent a “pressing and substantial concern.” Second, “the
means chosen to attain those objectives must be proportional or appropriate" to the ends. This proportionality test has three components: “the limiting measures must be carefully designed, or rationally connected to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective ... is outweighed by the abridgment of rights.”

I assume that each of the three violations discussed above has been found and deal in turn with how the courts might engage section 1 in each case. First, in the case of “public benefit,” the government would presumably argue, with reference to the first part of this test, that the law of charities assumes that the courts must be satisfied that there is indeed a public benefit to every charitable purpose and that that requirement could function as a valid legislative objective. Even if that were good enough for the first part of the Oakes test, however, the government could not hope to prove that “the limiting measure” was “rationally connected to the objective.” It might be rationally connected in the abstract, but no proof could be offered, for the simple reason that, as the courts have stated on numerous occasions, including in Gilmour v. Coats, there is no way of proving in court the efficacy of any religious belief, whether or not it is carried out in public.

The second violation is the preference for religions that worship a god over those that do not. Here the obvious problem for section 1 is that once it has been decided that the right itself is infringed, it is very difficult to see what the pressing and substantial concern is – other than distinguishing between types of religions, the very objective which infringes the right. One cannot hold out a constitutionally invalid distinction as the objective that permits a limitation of rights under section 1.62

The government might try to go further, and offer as an objective the need to distinguish “true” religion from “sham” operations. Assuming that this was sufficient to pass the first stage of the Oakes test, there would be all kinds of problems with proportionality. Requiring deism is not a rational connection, for it has nothing to do with whether the religion is genuine or not, and at the same time it impairs rights substantially, for it excludes much more than “sham” religions. While it would not be the job of the court to develop a constitutionally valid definition of religion for purposes of charity law that would deal with the problem, the one offered by the Australian High Court in Church of the New Faith would eliminate most, if not all, sham religions.63 More important, charities law has other internal devices to deal with essentially commercial operations or colourable religions –
most obviously, the political purposes doctrine and the requirement
that there not be private benefit.

The third violation – the invalid distinction between religion and
other forms of conscience – creates the same difficulty with respect to
section 1 as the second. That is, the objective would be to prefer reli-
gion – the same thing as the violation. Here the government might try
to situate the objective in fiscal policy. It might say that the striking
down of the distinction it now uses will leave it without any way of
denying special tax status to a large number of applicants. That is,
every applicant that has as its principal purpose the propagation of a
view about how people should live is entitled to special tax status, with
the courts having effectively converted “the advancement of religion”
into “the advancement of beliefs and values.”

An obvious difficulty with this argument is that “fiscal” concerns jus-
tifying limitations on rights have not been received very favourably in
previous cases. As important, it would be a mistake to believe that
for practical reasons the court should somehow use section 1 to pre-
serve some form of distinction in the administration of tax privileges.
The “floodgates” problem is either a red herring or proof of the unac-
ceptability of the distinctions that the law now draws. It seems quite
unlikely that large numbers of organizations will be created devoted
to new religions or to ethical societies just because it is now possible
to do so. Even if some were, the government subsidy is not a direct
dayment to registered organizations, but a tax credit for donations
that they receive. It thus rewards success with a kind of matching
grant. To get the tax subsidy the organization would have to persuade
people to give to it. And if it did so, then would that not suggest that
the current law is indeed invalid, discouraging some people from sup-
porting their preferred form of belief? In short, it is not likely that any
great change will occur through a broadening of preferred cate-
gories, but if it did, that would be a good thing. And if the govern-
ment decided that it could not afford to give credits for donations to
too many organizations, it could treat all forms of belief equally by
supporting none.

Charter Values

To this point I have assumed that we are dealing with the Income Tax
Act. But the principles of charities law that I elucidated above and
tested against the provisions of the Charter emerged, of course, largely
in the context of charitable trusts. If a trust for an apparently religious
purpose failed the test of public benefit, or was not considered to
come within the definition of religion, it was deemed a non-charitable
purpose trust and was therefore void under the general rule that purpose trusts are invalid. While these rules of law, as common law (or, more accurately, equitable doctrines) governing disposition of private property, would not be directly affected by the Charter, they might be indirectly influenced by it. The route to this is the idea, stated first by the Supreme Court in *Dolphin Delivery*, that the common law should be interpreted in a manner consistent with Charter values. In that case the Court, after holding that the Charter does not apply to the common law when it governs a dispute between private parties, went on to say: "I should make it clear ... that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative." 65

It is arguable that this doctrine could be invoked so that some or all of what I have said above about the Charter and the Income Tax Act could apply to the law governing which trusts were charitable and which were not. I am straying somewhat from my principal subject here and will not repeat the arguments made above. I simply make two points about their application in this context.

First, the limited indications that we have about the application of “Charter values” suggest that the courts would be reluctant to take on every aspect of the Charter analysis sketched above and apply it to the common law. That would be effectively to achieve by the back door the same result that might be accomplished through the front door in the context of the Income Tax Act. In *Hill* Justice Cory limited the ambit of this doctrine to “incremental revisions to the common law” and urged caution in its use. Charter “rights” were different from Charter “values,” and an assessment of the common law in the light of the latter required a flexible balancing of the principles underlying the common law with the values of the Charter. 66

Second, and related, the likelihood of the doctrine’s being employed will perhaps increase as one moves along the continuum of issues discussed above. That is, the argument about Charter values would surely have particular force in dealing with public benefit. This seems a particularly egregious distinction between otherwise “valid” religions, and one that would be hard to justify by opposing religious equality with underlying common law principles, precisely because those underlying principles about public benefit are not coherent and have been much criticized. Conversely, the doctrine would perhaps have least force when dealing with the preference for religion over other forms of ethical belief, for that preference is a deeply embedded part of the law of trusts and represents an expres-
sion of charity law’s historical preference for religion, and thus amendment should perhaps be achieved by legislative intervention. To use Charter values in this context would not be to “develop” the common law but to change it fundamentally, and in Hill Justice Cory said that “far-reaching changes to the common law must be left to the legislature.”

The deism requirement perhaps sits somewhere in the middle, more of an “incremental” development than doing away with the public benefit distinction between religions but less of a fundamental reorientation than equating religion and non-religious forms of belief. And here the courts could perhaps draw not just on the Charter value of religious equality but also on judgments of the Australian and New Zealand courts to suggest that there is no longer any reason for the distinction. And there would be concomitantly little principled justification underlying the common law rule. Dealing fully with this issue requires much more space than I have here. But the problem may affect the law of religious charitable trusts in the future.

**Conclusion**

Certain long-standing principles of the Anglo-Canadian law of religious charity are now, at the very least, constitutionally suspect. There are doubtless observers who find in this fact a source of regret, yet a further example of the baneful effects of the “rights culture” that has so dramatically entered into Canadian law in the last two decades. In response to such sentiments, I would make two points.

First, whether one likes it or not, the issues discussed in this chapter represent neither the first nor the last occasion on which “public” law has invaded, or will invade, what has traditionally been seen as a matter of purely “private” law, immune from constitutional or similar considerations. Nearly a decade ago the Ontario Court of Appeal struck down discriminatory provisions in a charitable trust as offensive to public policy, a decision with which few people would take issue, given the content of those provisions. And it is very likely that in the future the Charter will at least form the basis of challenges to other aspects of charities law. For example, it has been argued unsuccessfully that the political purposes doctrine offends the right to freedom of expression, and while that position is unlikely to be accepted by the courts, the CCRA’s uneven application of the doctrine may lead to a successful challenge. Another example of the possible reach of the public law is provided by Mayo Moran’s chapter (8) in this volume, which argues that a modernization of the Canadian def-
inition of charity must take account of Charter values. In short, it is unlikely that the tide of public law’s intrusion into charities law will slow.

Second, I see no reason to treat the “advancement of religion” with any great tenderness. If a constitutional challenge effectively collapses “religion” into “belief systems,” and the state then removes religion per se from the catalogue of favoured purposes,72 neither the law nor the policy on charities would be much the worse off. In law, religion has always been something of an anomaly. As I noted above in relation to Gilmour v. Coats, the courts have never effectively articulated why it is that religion is favoured; they have simply accepted it on the basis of precedent. Nor have they resolved the inconsistency of saying that public benefit is required for charitability while asserting that the public benefit from religion cannot be proved. Indeed, some see religion as the quintessential example of an area in which the benefit is private. People hold sincere beliefs about the world, and religious organizations allow them to affirm, practise, and propagate those beliefs. That is certainly a good thing, but it is no more the provision of a public benefit than many other ways in which individuals spend their time or find meaning in their life. In a secular age, there seems little justification for the state to assist the expression of that preference.73 Such a reform would not, of course, remove from charitable status those activities, of which there are many, carried out by religious groups and that otherwise qualify.74 Indeed, because we are hearing increasing demands for expansion of the definition of charity, we may need to face the fact that expansion alone is not the best policy. We may need to rationalize the definition – expand it in some areas and contract it in others – to ensure that the state’s not-unlimited subsidy for charitable activity is put to the most effective use.

NOTES

I thank my colleagues Dick Risk and Carol Rogerson for discussions of the constitutional aspects of this chapter. I also thank Stephanie Marrie for research assistance.

2 rsc 1985, c. 1 (5th Supp.).

The courts have dealt even less with the problem. There has been no reported case on the meaning of religion in charities law since Re Tufford (1984), 6 DLR (4th) 534 (Ont. CA) – a bequest for the maintenance of a cemetery was ruled a valid charitable trust. There are, of course, recent and important cases implicating religious charities – Re Christian Brothers of Ireland in Canada (2000), 47 OR (3d) 674 CA – and limiting settlors’ abilities to make distinctions on, among other things, religious grounds – Re Canada Trust and Ontario Human Rights Commission (1990), 69 DLR (4th) 321 (Ont. CA). But these cases do not deal with the issue of definition.

4 See the discussion in Sossin, chapter 12 in this volume.


6 This is the current publication that accompanies T2050, Application for Income Tax Registration for ... Canadian Charities. For a more extended treatment of the CCRA’s position, see an unpublished paper by Carl Juneau, assistant director, Charities Division, “Is Religion Passé as a Charity?,” delivered to the Church and the Law Seminar, Bramalea, Ont., Feb. 2000.

7 “As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none”: Neville Estates v. Madden, [1962] Ch. 832 at 853. The following brief summary of the tolerant approach of English law is derived from, among other sources, G. Keeton and L.A. Sheridan, The Modern Law of Charities, 4th ed. (Chichester, 1992), 64–5; Waters, The Law of Trusts, 569-71; OLRC Report, 1: 191–4.
See Thornton v. Howe (1862), 54 ER 1042, where the court upheld a trust for the propagation of the works of Joanna Southcote, who believed that she was pregnant by the Holy Ghost and would give birth to a New Messiah. See also Re Watson, [1973] 1 WLR 1472 (Ch).


Bowman, 449.

Registrar-General, 707, per Lord Denning MR. Both Justice Wynn and Justice Buckley wrote concurring judgments, the latter stating that worship was essential for registration under the statute and that “[w]orship ... must have some at least of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer and intercession” (709).

See, for example, Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners, [1931] 2 KB 465, in which the court stressed the need for worship and ritual: religion was “spiritual teaching in a wide sense” supported by “observances that serve to promote and manifest it” (477). See to similar effect The Oxford Group v. Inland Revenue Commissioners, [1949] 2 All ER 537 (Ch. D.).

Registrar-General, 707. Charity Commission, Decision ... Scientology.

The American cases on the meaning of religion are comprehensively reviewed in Note, “Toward a Constitutional Definition of Religion,” Harvard Law Review 91 (1978), 1056. For ethical societies and religious charity, see especially Washington Ethical Society v. District of Columbia, 249
The Scientology story is complicated by issues of personal inurement and illegal behaviour, the latter leading the U.S. Supreme Court to uphold the decision by the Internal Revenue Service (IRS) that sums paid to the church could not be deducted as charitable contributions: *Hernandez v. Commissioner*, 490 U.S. 680 (1989). However, the IRS has more recently agreed that the organization is entitled to tax-exempt status and that contributors can have the deduction: see A. Eaton, “Can the I.R.S. Overrule the Supreme Court?” *Emory Law Journal* 45 (1996), 987.

The leading Australian case is *Church of the New Faith v. Commissioner for Pay-Roll Tax (Victoria)* (1983), 49 ALR 65 (HC). Three judgments were written, and while they represent different degrees of liberality, all adopt a wider definition than the English one. That of Justices Mason and Brennan, for example, is the least liberal but still eschews a deism requirement for a belief in the “supernatural.” It sets up a two-fold test: “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” (74). For New Zealand, see *Centrpoint Community Growth Trust v. Commissioner of Inland Revenue*, [1985] 1 NZLR 673 (HC).

The cases are reviewed in Marriott, 18–9.

Religion was defined as “involv[ing] matters of faith and worship” in *Walter et al v. Attorney-General of Alberta* (1969), 3 DLR (3d) 1 at 9 (SCC), per Martland, J.

This summary of the CCRA’s approach was confirmed in conversation with Carl Juneau, assistant director, Charities Division. For a more extended treatment see Juneau, “Is Religion Passé?” Juneau notes that the CCRA has registered such organizations as the Khalsa Diwan Society, the Hindu Society of Manitoba, the Zoroastrian Society of Ontario, and the Spiritualist Church of Divine Guidance. It did not, however, register the Edmonton Grove of the Church of Reformed Druids or the Mouvement raelien canadien; the latter was apparently rejected because it did not have a belief in god (9–11).

“Infrastructure” is the term employed by the OLRC, *Report*, 1: 195. The cases establish that the category includes activities such as establishment and repair of churches, burial plots, and so on; support and training of ministers; missionary activity; and publication of religious works. See generally Oosterhoff and Gillese, *Cases on Trusts*, 823, and Waters, *The Law of Trusts*, 571ff.
OLRC, Report, 1: 197.


30 [1949] AC 426 (HL); quotations at 457, 458–9, and 461.


33 Hetherington, [1989] 2 WLR 1094 (Ch.).

34 Funnell v. Stewart, [1996] 1 WLR 288. See also Re Warre’s Will Trusts, [1953] 1 WLR 725 (Ch.), in which a trust for the provision and upkeep of a diocesan retreat house was invalidated on the Gilmour principle. Charity Commission, Decision ... Scientology.

35 At one stage Chief Justice Fitzpatrick said that “private devotion or edification,” while religious activity, was not necessarily charitable: (1918), 57 SCR 298 at 307.

36 Some of these are discussed in Waters, The Law of Trusts, 578.

37 [1932] 4 DLR 516 (Ont. CA).

38 [1919] AC 815 (HL).


40 See Re Sansom (1967), 59 DLR (2d) 132 (N.S.S.C–TD).

41 Conversation with Carl Juneau.

42 Application for Income Tax Registration.

43 In R.W.D.S.U. v. Dolphin Delivery (1987), 33 DLR (4th) 174 (S.C.C), the Supreme Court held that the Charter did not apply to the common law as enforced by the courts in disputes between private parties. However, while “[a]ction by the executive or administrative branches of government will generally depend on legislation,” such action “will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom”: per McIntyre, J., at 195. For a fuller discussion, see Moran, chapter 8 in this volume.

44 (1985), 18 DLR (4th) 321 (S.C.C); quotations at 353 and 354.

45 It may also be possible to draw on another section 2(a) case decided by the Supreme Court, Edwards Books and Art Ltd. v. The Queen (1986), 35 DLR (4th) 1 (S.C.C). As in Big M Drug Mart, Sunday closing legislation was at issue, this time an Ontario statute. Four judgments were written, the principal one on the meaning of religion being that of Chief Justice Dickson. His judgment contains a useful discussion of the fact that the legislation made it more expensive for retailers and consumers to observe a day of rest other than Sunday. There was an exemption for small stores from the legislation if they had closed the previous Saturday, and the exemption, it was argued, provided an “indirect” form of coercion, because it was more expensive to close on a day other than Sunday. In the
course of discussing this point, the chief justice said that indirect burdens were as relevant as direct ones, although not every state-imposed cost on carrying out religious practices would offend the Charter. But as an example of the kind of things exempted as “trivial or insubstantial,” he cited a sales tax that applied to objects used in religious worship as well as to all other goods. An argument therefore could be made that in addition to saying that charity law offers benefits to some practices and some religions and not others, it makes the non-favoured ones more difficult to practise by imposing a financial burden – lack of an ability to issue deduction receipts. However, this argument cannot automatically be applied here, because Chief Justice Dickson’s real concern about cost was the competitive disadvantage suffered by Saturday-observing retailers, and it is difficult to talk about any similar “competitive disadvantage” in religion.


48 Adler. This reference is to section 29 of the Charter, which specifically protects denominational school rights from Charter review.

49 [1987] 1 SCR 1148. This case dealt with the constitutionality of Ontario’s extension of public funding to Catholic secondary schools.

50 Adler, 642; the quotation from Reference Re Bill 30 appears on 642 and 644 of Adler.

51 Ibid., 649.

52 Big M Drug Mart, 349–52.

53 Ibid., 361–2.

54 Ibid., 361.

55 Edwards Books, 34.

56 Article 1 of the U.S. Bill of Rights states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

57 Big M Drug Mart, 357.

58 The Court has said that the establishment of a state church would clearly contravene section 2(a), although it made the statement by way of a hypothetical example: see AG Quebec v. Quebec Protestant School Boards (1984), 10 DLR (4th) 321 at 338 (S.C.C.). In addition, of course, the Court has also hinted that preferential treatment in funding of denominational schools would be unacceptable if not required by another section of the constitution: see discussion of Adler.

59 What follows is a necessarily very brief analysis of section 15. A very useful introduction to section 15 jurisprudence appears in P. Macklem et al., Canadian Constitutional Law, 2nd ed. (Toronto: Emond Montgomery, 1997), chap. 25. The fact that section 15 talks about “every individual” would not create an application problem, given that “charities” are the bodies registered by the CCRA, for it is individual taxpayers who receive the benefit of the tax credit for donations.


“[L]egislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the Charter is aimed”: Big M Drug Mart, 374, per Wilson, J.

Church of the New Faith.

See, for example, Singh v. Minister of Employment and Immigration (1985), 17 DLR (4th) 422 (SCC).


Hill, 156–7.

Ibid., 157. See similar caution about leaving certain matters to the legislature in other cases where the “Charter values” argument has been discussed: Salituro and Ryan, 172, where the Supreme Court stated that “the basic structure of the common law ... must remain intact, even if particular rules ... must be modified.”

Church of the New Faith and Centrepoint Community Growth Trust.


By “religion per se” I refer, of course, to the pure advancement of religion, not to those activities carried out by religious or religiously inspired groups that would otherwise be charitable.

There is an interesting irony here concerning the Church of Scientology, whose application for registration as a religious organization is being considered by the CCRA. One of the many issues raised about Scientology by the U.S. Internal Revenue Service (IRS) was whether the money paid
by adherents for “auditing” could be treated as a charitable contribution; the IRS argued that this was simply the purchase of a service. Why is a charitable contribution to church funds by a member any different? It is less direct, for one does not pay for church services on a “tariff,” but the principle is not very different.

In February 1999 the Supreme Court of Canada handed down its judgment in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*.¹ This was the first occasion on which the Court had dealt with a case in charities law for more than thirty years,² and the first time that the Court has ever essayed a general discussion of the meaning of “charity” in Canadian law. It released the judgment after the chapters in this part were completed, but we could obviously not ignore it. It did not seem sensible to disperse commentary about it through the book. Hence we decided to devote a separate commentary to it. This chapter reviews in some detail what the Court had to say both about the general method of deciding the meaning of “charity” and its approach to two of the categories – advancement of education and “other purposes beneficial to the community” – and, where appropriate, it relates what the Court said to those aspects of the law of charity discussed in chapters 7–10. Before we embark on those tasks, we review the context and procedural history of the case.

The Vancouver Society of Immigrant and Visible Minority Women was incorporated in 1985.³ The Canada Customs and Revenue Agency (CCRA) refused it registration as a charity in 1992, and it made another application commencing in 1993.⁴ It made changes to the purposes stated in its constitution between the two applications and during the processing of the second. Those purposes, at the time that the CCRA gave the decision appealed from, read as follows:
a. to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self employment;
b. to carry on political activities provided such activities are incidental and ancillary to the above purposes and provided such activities do not include direct or indirect support of, or opposition to, any political party or candidate for public office; and
c. to raise funds in order to carry out the above purposes by means of solicitations of funds from governments, corporations and individuals.
d. [Deleted]
e. To provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.

The society also submitted a “Statement of Activities” which indicated that it provided “services and workshops” through which it delivered, among other things, “career and vocational counselling” as well as “information and assistance in résumé writing, interview skills, and dealing with Canadian employers.” In a telephone conversation with the CCRA it revealed that its membership was comprised of “[a]bout 300 members from all walks of life seeking employment opportunities and general support for integration into Canadian life.” That conversation also revealed that the society maintained a “job skills directory” and a listing of some 600 immigrants and their qualifications and that it acted as a kind of employment bureau, receiving job advertisements and distributing them to individuals in the directory who seemed qualified.

The CCRA denied the Society registration on various grounds: it did not qualify as educational or as pursuing any other charitable purposes; some of its purposes were political; and various of its activities – especially “networking, referral services, liaising for accreditation of credentials, soliciting job opportunities and maintaining a job skills directory” – were “not charitable activities.” The Federal Court of Appeal dismissed the Society’s appeal in a very short judgment. It rejected the argument that the society’s purposes qualified as educational, stating that “the activities of the Society described ... are not sufficiently structured and articulated as to respond to the requirements set out by the jurisprudence.” It also held that the purposes did not qualify under the fourth head of charity, refusing in particular to accept an analogy between immigrant and visible minority women and Aboriginal peoples. That is, it refused to draw a parallel with *Native Communications Society of British Columbia v. Minister of National Revenue*, stating:
we are of the view that the comparison with aboriginal people simply does not
withstand scrutiny: aboriginal people have a distinct constitutional status ..., 
being referred to in section 91(24) of the Constitution Act, 1867 and section 35 of the Constitution Act, 1982. The Charter arguments advanced at the
hearing before us are not persuasive. It may well be that charitable organi-
sations in assisting those in need will generally deal with persons specifically pro-
tected by the equality provisions of the Charter, but the focus when deciding
whether or not to grant charitable status is not so much, to start with, on the
answer to the question 'who are those who are most likely to benefit?' as on
the answer to the question 'do the proposed purposes and activities constitute
charitable activities within the ambit of the law of charities?' Providing a
benefit to those who are in a position to invoke Charter rights will not in itself
result in an activity falling within the fourth head.8

Finally, the court argued that its “basic difficulty” with the application
was that the society’s “purposes and activities are so indefinite and
vague as to prevent the Minister, and this Court, from determining
with some degree of certainty what the activities are, who are the true
beneficiaries of the activities and whether these beneficiaries are
persons in need of charity as opposed to merely being in need of
help.” That is, “[t]he provision of services and workshops to the com-
munity, while laudable, is not necessarily charitable at law and activi-
ties and objects of general public utility are not always charitable in the
legal sense.” Thus it had “opened the door to purposes beyond the
legal definition of charity.”9

In the Supreme Court two judgments were written, with the appeal
being dismissed 4–3. Justice Iacobucci, for Justices Bastarache, Cory,
Major, and himself, found that purpose (a) listed above was charita-
ble, falling within the advancement of education. But the majority
also held that the purpose of assisting immigrant women to find
employment was not charitable under “other purposes beneficial to
the community.” This was fatal to the society’s appeal, because it
pursued purposes and activities other than educational ones; while
some of these were ancillary to the educational ends, the Supreme
Court majority held that others were not but rather were directed to
helping immigrant women find employment. As that was not a chari-
table purpose, the society was not exclusively charitable and therefore
could not be registered. The dissenting judgment of Justice Gonthier,
with whom Justices L’Heureux-Dubé and McLachlin concurred,
agreed that some of the society’s purposes qualified under the edu-
cation category and also that the purpose of assisting immigrant
women find employment was charitable in itself. The dissent also
found that all of the society’s activities were related to one or the
other of its charitable purposes and accordingly that it did meet the exclusively charitable test.

The more detailed analysis of the case that follows has four thematic sections. The first two deal with general interpretive matters. We begin with what the Court had to say about the sources of the law of charity and about the role of the courts in developing that law. The second section looks at the Court's discussion of the distinction between purposes and activities. The third and fourth sections are more particular, examining in turn the two categories of education and “other purposes beneficial to the community.” In the first and fourth sections we discuss both the majority and the dissenting judgments, giving more weight to the former; in the middle two we give the dissent little attention, as it is not materially different from the majority judgment of Justice Iacobucci. There were other issues discussed in the case, but we have concentrated on these four, which we regard as the most important.

DETERMINING THE LEGAL MEANING OF CHARITY

Justice Iacobucci’s majority judgment begins with a suggestion that the Court might be ready to modify substantially the definition of charity. After noting that Canadian law “continues to make reference to an English statute enacted almost 400 years ago,” he suggested that it was “not surprising” that many commentators have called for change. The case before him represented “an opportunity to reconsider the matter”; not only was the Court being asked “to consider, for the first time in more than 25 years, the application of the law as it presently exists,” it was also being invited to consider “the interesting questions of whether the time for modernization has come, and if so, what form that modernization might take.” The boldness of this opening did not, however, carry through to what followed. The majority judgment held that any “modernisation,” by which we assume it meant wholesale reform, had to come from Parliament, not the courts. In addition, in its analysis of the existing law, the Court confirmed in large measure the Federal Court of Appeal’s approach of limiting itself largely to existing categories of charitability.

Justice Iacobucci’s consideration of how the courts should go about deciding what “charity” means is actually divided into two sections, one at the beginning of his judgment and the other near its end. The former is principally a restatement of the existing methodology, made prior to assessing whether the society was charitable; the latter, a detailed consideration of whether the law ought to be radically
altered. There is an obvious overlap between the two, and in this dis-
cussion we therefore conflate the two sections.

In the early section, the starting point of his analysis, Justice
Iacobucci provides a descriptive account of the development of the
Anglo-Canadian law of charity. He does so because, as he notes, the
lack of a definition of “charity” in the Income Tax Act forces a reliance
on “common law” (strictly speaking, equitable, or trusts) principles.
Justice Iacobucci takes us through the standard account, from the pre-
amble to the Statute of Elizabeth, through Morice v. Bishop of
Durham, to the well-known categorization of charity under four
Pemsel. He confirmed the Pemsel holding that the preamble was not
an exhaustive list of charitable purposes but noted that it had “proved
to be a rich source of examples.”

More important, at this early stage Justice Iacobucci insisted that the
method of deciding on charitability by analogy from existing purposes
should remain the one for the courts to follow. Whether or not a
purpose is charitable, he said, “is discerned by perceiving an analogy
with those purposes already found to be charitable at common law.”
He confirmed this method, which he called the “Pemsel approach,” at
the end of the introductory section: “In the absence of legislative
reform providing guidelines, the best way in which to discern the char-
itable quality of an organization’s purposes is to continue to proceed
by way of analogy to those purposes already found to be charitable by
the common law, and conveniently classified in Pemsel, subject always
to the general requirement of providing a benefit to the community,
and with an eye to society’s current social, moral, and economic
context.”

Next – and inevitably, given what he had said – Justice Iacobucci
explicitly rejected any major reforming role for the courts. He did
note the well-known problem that the application of the Pemsel
approach “to the myriad of modern organizations vying to be identi-
fied as charitable has often proved a daunting task” and adverted to
recent calls for legislative change. And in the section towards the end
of the judgment he accepted the suggestion that “the law of charity has
been plagued by a lack of coherent principles on which consistent
judgment may be founded” and seemed to agree that judicial reason-
ing in this area was often circular. But he categorically resisted the
suggestion that the court could, or should, do anything about these
problems.

Justice Iacobucci gave two reasons to justify this reluctance. First, he
adverted to general principles governing when the courts, rather than
the legislature, should effect substantial change in the law, citing this
passage from the Supreme Court’s judgment in *R. v. Salituro*: “Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law... In a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and as for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.”

Second, and more important, he was influenced by the fact that this was a tax case. In his introductory analysis he insisted that it was “imperative” to “preserve the distinction” in the *Income Tax Act* between charitable and non-profit organizations. The definition of the latter in the act includes “a club, society or association that ... was not a charity ... and that was organized and operated exclusively for social welfare.” His concern therefore seems to have been that an expansive approach to the meaning of charity would run the very real risk of subsuming within that category most or all of the bodies “organised ... for social welfare.” He returned to the taxation context more forcefully much later in the judgment, when considering whether a new approach should be adopted:

[A] new approach would constitute a radical change to the common law and, consequently, to tax law. In my view, the fact that the *ITA* [Income Tax Act] does not define ‘charitable’, leaving it instead to the tests enunciated by the common law, indicates the desire of Parliament to limit the class of charitable organizations to the relatively restrictive categories available under *Pemsel* and the subsequent case law. This can be seen as reflecting the preferred tax policy: given the tremendous tax advantages available to charitable organizations, and the consequent loss of revenue to the public treasury, it is not unreasonable to limit the number of taxpayers who are entitled to this status. For this Court suddenly to adopt a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system. In my view ... this would be a change better effected by Parliament than by the courts.

The Supreme Court has therefore provided a clear statement that substantial change in this area must come from legislative, not judicial,
action. Justice Iacobucci reviewed various proposals for reform of the law that had been put to the Court in argument. Although he approved of the one offered by the Canadian Centre for Philanthropy, calling it a proposal that "respects both the established law of charity and the need for a flexible approach that will permit movement forward," he thought it no more than "potentially a useful guide for the legislator."  

Overall, the majority decision will disappoint those who hoped for a more expansive approach, but it will not surprise those who have lost faith in the likelihood of judicial innovation in this area. The Court does seem, not unreasonably, to have been substantially influenced by the fact that it was dealing with a tax case. That context led Justice Iacobucci to two major conclusions. First, the absence of a definition of "charity" in the Income Tax Act meant that the legislature intended the long line of Anglo-Canadian decisions on charities to apply. Second, whatever scope the judiciary may have for deciding that new purposes qualify, it did not extend to altering the law so substantially as to conflate "charity" with something like "social welfare" or "public benefit," precisely because the statute made a distinction between the two.

Despite these conclusions, the majority judgment was hardly uncritical of the current law. In a section headed "A New Approach" it noted that both the appellant and some intervenors had criticized the traditional method and proposed alternatives. As we noted above, it seemed to agree with some of the critiques. It found it "difficult to dispute" the criticism that "the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded." And it thought that while the task of the courts was to keep the law of charity as a "moving subject," it conceded that in that process "very little assistance is provided by such standards as 'in a way which the law regards as charitable' and 'within the spirit and intent of the Statute of Elizabeth.'" This was because such phrases represented "circular reasoning" and instituted "retrospective bias." But, as we have noted, the court's principal response was that Parliament should reform the law.

Although this comment is principally a review of what the Court said, we would offer two general observations. First, Justice Iacobucci continually displays deference to the legislature. This deference manifests itself, for example, in the determination to preserve the distinction between "social welfare" and "charitable" organizations, which latter must provide a "public benefit." Thus the Court places what we consider unacceptable weight on precedent in distinguishing between "social welfare" and "public benefit," which are otherwise near-identical...
concepts. However, given that the legislature has clearly left the definition of charity to the courts, it is not clear that history should carry such weight. Legislative intention could as easily, if not more easily, support a much more dynamic approach. One can argue that the legislature has decided that the courts are the institution best suited to ensuring that the definition of charity keeps pace with a changing society. In this account it would be more respectful of legislative intention for the Court to have taken a principled rather than a precedential approach, leaving it to the legislature to put the brakes on if it decided that the Court had gone too far. The deferential posture also arguably fails to account for the significance of judicial pronouncements where the legislature has left it to the courts to provide the guidance necessary to ensure proper functioning of the legislative regime.

Second, and related, the deferential impulse is clearly fuelled by concern about the fiscal implications of decisions on taxation. But every decision interpreting a provision of the Income Tax Act has fiscal implications, and it is not clear why that concern should be so dominant here. Again, Parliament could respond to a decision it does not like by changing the act, as it does in other cases. Overall therefore it seems difficult to understand why the majority was so anxious to preserve a regime that Justice Iacobucci himself admits is “plagued by a lack of coherent principles on which consistent judgment may be founded.”

The dissenting judgment of Justice Gonthier takes a subtly, but significantly, different approach. Like Justice Iacobucci he dealt with the question of determining the legal meaning of charity in two sections, one at the beginning and one at the end of his judgment. In the early section, which looked at how courts should deal with novel claims, he did not take exception to the idea that they should analogize from existing case law. But he offered two observations. First, he emphasised that “the Pemsel classification is a flexible judicial creation.” Second, and more important, he purported to find “underlying principles” within the classification and insisted that courts should look to those principles rather than “become too wedded to outdated conceptions of the existing categories.” In fact he thought that there were two “central principles” to the concept of charity in the common law – “(1) voluntariness (or what I shall refer to as altruism, that is, giving to third parties without receiving anything in return other than the pleasure of giving); and (2) public welfare or benefit in an objectively measurable sense.” These principles, he insisted, both “underlie the existing categories of charitable purposes” and “should be the touchstones guiding their further development.”
This brief statement represents, to our knowledge, the first judicial statement in the Anglo-Canadian jurisprudence that seeks to find a core of principle in the legal meaning of “charity,” to define the term conceptually. The definition is not particularly felicitous, given the vagueness of the term “third parties” and the fact that tax law actually gives plenty to the donor in return, yet the search for concepts is laudable. And Justice Gonthier carried the notion into his next section on the test for charitability. While most of this section recites and approves of the well-worn analogy and “spirit and intendment” approach and insists that the test should not be “public benefit” but “public benefit in a way the law recognises as charitable,” he argued that the principles that he had delineated should guide future development:

The best approach, in my view, is one which marries adherence to principle with respect for the existing categories as established by the Pemsel scheme. ... It would be unwise to jettison the vast historical inheritance associated with judicial development of the law of charity, although I do think it appropriate to ensure that the existing common law accords with certain identifiable principles which should guide the development of this area of law as a whole. ... Our perceptions as to what should and should not be included ... have changed over the centuries, as they will continue to do. New social needs arise, and old social problems decline in importance. Consequently, it would be a mistake to make a fetish of the purposes enumerated in the preamble. Rather, the Court should adhere to the principles of altruism and public benefit, to which I adverted above, in order to identify new charitable purposes and to ensure that existing ones continue to serve the public good. The law should reflect the realization that although the particular purposes seen as worthy of pursuit change over time, the principles of which they are instantiations endure. Thus, in determining whether a particular purpose is charitable, the courts must look to both broad principles – altruism and public benefit – as well as the existing case law under the Pemsel classification. The courts should consider whether the purpose under consideration is analogous to one of the purposes enumerated in the preamble of the Statute of Elizabeth, or build analogy upon analogy. Yet the pursuit of analogy should not lead the courts astray. One’s eye must always be upon the broader principles I have identified, which are the Ariadne’s thread running through the Pemsel categories, and the individual purposes recognized as charitable under them. The courts should not shy away from the recognition of new purposes which respond to pressing social needs.

Justice Gonthier went even further at the end of his judgment, in a section entitled “Should the Common Law Definition of Charity Be
Revised?” Given that, as we see below, he found the society to be pursing charitable purposes, he did not have to answer that question in this case. But he did essay an answer of sorts, which would give much more scope to the judiciary than Justice Iacobucci was prepared to do. Not only were the courts not “precluded from recognizing new charitable purposes,” they were also not prohibited “from revisiting the Pemsel classification itself should an appropriate case come before us.” The rationale for this bold assertion was that “[t]he task of modernizing the definition of charity has always fallen to the courts,” and the legislature is content with that situation: “There is no indication that Parliament has expressed dissatisfaction with this state of affairs, and it is plain that had Parliament wanted to develop a statutory definition of charity, it could have done so. It has not. This leads me to the conclusion that Parliament continues to favour judicial development of the law of charity.”

Although Justice Gonthier saw no need to make such a sweeping change in the case before him, critics of the current approach of the Federal Court of Appeal and the ccra could hardly wish for a clearer invocation of innovation. Justice Gonthier argued that his approach would still retain the distinction between charitable and non-profit organizations that Justice Iacobucci was so concerned to preserve. But he obviously saw much scope for judicial action, which could include a reduction of the number of purposes categorized as charitable – the likely meaning of his suggestion to “revisit” the Pemsel classification. Here his judgment breaks sharply with that of Justice Iacobucci, who throughout assumed that judicial action could lead only to more charitable purposes.

Moreover, Justice Gonthier made passing mention of an argument that the judiciary, in developing the law of charity, should consider “Charter values.” Again, he said little about this, but he did note that “the Charter is the repository of fundamental values which should be taken into account in the development of the common law.” He did not go further, even though the question of whether the society’s concentration on combating the effects of discrimination helps to make its purposes charitable was raised later. As argued in chapter 8, the Charter can be considered relevant to the contemporary meaning of charity. Even though Gonthier understated the role of the Charter, his own decision reveals how much weight he did accord to Charter values in giving content to the meaning of charity. Because of the role of courts in defining charity, and the rarity of judicial pronouncements on the subject, more attention to how the Charter affects the meaning of charity would perhaps have been in order.
A second general issue in charities law that the Court examined was that of whether the test for charitability should focus on the overall purposes of the organization at issue or on its particular activities. In trusts law the answer has long been “purposes,” but the wording of the Income Tax Act complicates the issue. Section 149.1(l) defines a “charitable organization” as one “all the resources of which are devoted to charitable activities carried on by the organization itself.” As one of us discusses elsewhere in this volume, the act’s use of the word “activities” has frequently led the Federal Court of Appeal to concentrate on particular activities and often not even to consider whether an organization is pursuing more broadly defined charitable “purposes.”

Justice Iacobucci had no doubt that an activities-only approach was wrong. As he put it: “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.” As a result, courts “must focus not only on the activities of an organization but also on its purposes.” The inclusion of both dimensions means that if an activity clearly furthers charitable objects, the organization would qualify. But even if the activity were not charitable in itself, an organization would still be acceptable, provided that the activity furthered a charitable purpose. Not only is this eminently sensible – indeed, the only workable approach – it is also in line with prior authority. Moreover, it will, we hope, eliminate the double standard of applying an activities test in some cases and a broader purposes test in others.

On a closely related point the Court went further. As part of its discussion of the need for organizations to be exclusively charitable, it confirmed its approval, given over thirty years ago in the Guaranty Trust case, of the ancillary purposes doctrine. This doctrine permits charitable organizations to pursue non-charitable purposes that are clearly ancillary to a charitable purpose – a means to an end. This is not quite the same as saying that it is purposes and not activities that must be looked at. To illustrate the distinction we use the example, taken in part from the facts of Guaranty Trust, of an alumni organization, whose purposes include supporting an educational institution, hosting an annual golf tournament to raise money for scholar-
ships, and holding an annual dinner to help promote and sustain people’s interest in the association. An activities-only test would find the first activity charitable and the second and the third non-charitable. A purposes test would find the second acceptable, as it was designed to help achieve the first purpose, but not the third, whose purpose is to sustain the association – clearly a non-charitable purpose. But a court could hold, as the Supreme Court did in Guaranty Trust, that this non-charitable purpose was not really an end in itself, but a means to an end – a way ultimately of supporting the educational institution, providing that that was indeed the association’s primary purpose.

In Vancouver Society the Court held that “the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfillment of another, charitable, purpose and not as an end in itself.” Somewhat confusingly it went on to say that in such a case “the purpose is better construed as an activity in direct furtherance of a charitable purpose.” We would suggest that this language not be seen as suggesting that the activities–purposes distinction and the ancillary purposes doctrine are the same. The key phrase here is “construed as”; both non-charitable activities and non-charitable purposes can further charitable purposes, but the former do so more directly than the latter.

The reaffirmation of ancillary purposes is significant, for four reasons. First, it overturns a holding of the Federal Court of Appeal that the doctrine is not available for charitable organizations under the Income Tax Act, which uses the word “activities.” Second, it gives charitable organizations two opportunities to argue that things that it does which are not directly in pursuit of charitable objects need not defeat their application for registered status. They can first argue that their activities are not in themselves purposes but are simply activities in pursuit of charitable purposes. If that contention fails, they can then claim that any non-charitable purpose is ancillary. The Vancouver Society case itself provides an example. Clause (b) of the society’s statement of purposes permitted it to “carry on political activities provided such activities are incidental and ancillary to the above purposes.” Justice Iacobucci treated this as a purpose clause, and thus as outside the saving provision in the Income Tax Act for political “activities.” But he then held that the clear intention of the document was that the purposes mentioned in clause (b) – and indeed those in clause (c) – were to be carried out in a manner “incidental and ancillary” to purpose (a), which he had found to be charitable – a matter discussed in the next section of this chapter. Third, his holding eliminates the
arbitrariness that results from treating non-charitable activities and non-charitable purposes differently. Henceforth little will turn on whether something non-charitable is classified as a purpose or an activity. This seems eminently desirable, particularly in view of the difficulty of drawing the line.

Fourth – and perhaps most important – the Court has effectively placed great emphasis on drafting. Clauses (b) and (c) were ancillary because the society’s incorporating document said that they were. The Court stated that “its purposes clause now makes clear that the sole purpose of carrying out political activities and raising funds is to facilitate a valid educational purpose. Thus ... purposes (b) and (c) can be taken as means to the fulfilment of purpose (a), not ends in themselves, and thus do not disqualify the Society from obtaining registration as a charity.” This is a clear message to applicants that proper wording of their constitutions may greatly increase their chances of registration.

The obvious danger of this approach is that organizations may present some purposes as ancillary, whether or not they reasonably are. Justice Iacobucci seems to have seen this problem, and his judgment seeks to limit the extent to which drafting facility will influence decisions on registration. First, he insisted that organizations must limit their non-charitable purposes to those that are directly ancillary; clause (e) in this case – “all such things that are incidental or conducive to the attainment of” other purposes – was not truly about ancillary purposes, both because “conducive” means “only that the action leads or contributes to the result, not that it is carried on only in pursuit thereof,” and because its content was “exceedingly vague.”

Second, and more important, he also took from Guaranty Trust the idea that the court must look not only at the purposes of an organization, but also at its actual activities. In Vancouver Society, some of the society’s activities were neither charitable purposes in themselves nor referable to any ancillary purpose. Thus they fit under clause (e); hence that clause specifically, and thus the society’s constitution generally, “can and do accommodate non-charitable activities.” As we noted above, it was for this reason that the society failed the test of being exclusively charitable.

These two qualifications, the second in particular, give some scope to the ccra and the courts to disqualify organizations if their constitutions are not sufficiently tailored to charitable and ancillary purposes or if their operations show them to have strayed outside the exclusivity boundary. The second limitation will create something of a hurdle for operational charities that apply for first registration, but it
will obviously not affect any that do little or nothing operationally before they apply. They now have a greater ability to achieve registration through careful drafting.

**The Advancement of Education**

In this and the following section we move from assessing the Court’s general approaches to deciding what is charitable to its consideration of two of the four categories – the advancement of education and “other purposes beneficial to the community.” The majority judgment on education begins with the bald statement that “[i]n Canada, ‘advancement of education’ has been given a fairly restricted meaning.” It has, Justice Iacobucci said, “generally been limited to the ‘formal training of the mind’ or the ‘improvement of a useful branch of human knowledge.’”

He also cited this passage from the Federal Court of Appeal to demonstrate the relative narrowness of the definition: “[W]hen the word ‘education’ or ‘educational’ is used without qualification, it has reference to a fundamental process of learning which is aimed at preparing either for life in general or for a large purpose such as a particular profession or trade, and is in any event without an immediately utilitarian focus.”

Given this definition, he concluded, the refusal to find any of the society’s purposes charitable was “neither surprising nor incorrect”:

Although purpose (a) does contemplate the provision of ‘educational forums, classes, workshops and seminars,’ the goal of these programs is clearly ‘immediately utilitarian’: preparing women ‘to find or obtain employment or self-employment.’ This does not, in my view, equate to preparation for ‘life in general’ or for a ‘particular profession or trade.’ This conclusion is bolstered, I think, by the nature of the activities which the Society viewed as coming within purpose (a). ... [I]t was not unreasonable for Revenue Canada to conclude that there was no systematic instructional structure or format to the supposedly educational activities planned by the Society. Indeed, ... the Society was unable even to show any actual intention to confine its activities to within either the formal training of the mind or the improvement of a useful branch of human knowledge, as those terms have been defined at common law.

However, while Justice Iacobucci thought the Federal Court of Appeal’s decision correct according to its own jurisprudence, he held that “the law regarding the educational head of charity should be modified.” He disavowed the use of the *Maclean Hunter* test just quoted, given that it did not emanate from a case about charity, and
he argued that “the slightly more expansive approach taken by the English courts” was preferable.\(^5\) He stated:

In my view, there is much to be gained by adopting a more inclusive approach to education for the purposes of the law of charity. Indeed, compared to the English approach, the limited Canadian definition of education as the ‘formal training of the mind’ or the ‘improvement of a useful branch of knowledge’ seems unduly restrictive. There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind. ... To limit the notion of ‘training of the mind’ to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education which is of little use in modern Canadian society. ... [T]he purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of special benefit to the community, or advancing a common good. In the case of education, the good advanced is knowledge or training. Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.\(^5\)

As support for these views, in addition to English authority, Justice Iacobucci drew on the Ontario Law Reform Commission’s Report on the Law of Charities, (1996),\(^5\) which argues that “knowledge can take many forms ... theoretical or practical, speculative or technical, scientific or moral” and that “it can be sought in many different ways, and for many different reasons.” Thus, according to Justice Iacobucci, “there is no good reason why non-traditional activities such as workshops, seminars, self-study, and the like should not be included alongside traditional, classroom-type instruction in a modern definition of ‘education.’ Similarly, there is no reason to exclude education aimed at advancing a specific, practical end. In terms of encouraging activities which are of special benefit to the community, which is the ultimate policy reason for offering tax benefits to charitable organizations, there is nothing to be gained, and much to be lost, by arbitrarily denying benefits to organizations devoted to advancing various types of useful knowledge.”\(^53\) To the same effect, the majority later asserted that “an informal workshop or seminar on a certain practical topic or skill can be just as informative and educational as a course of classroom instruction in a traditional academic subject.”\(^54\)
Applying this approach to the case, Justice Iacobucci held that purpose (a) of the society was charitable under the new, “more expansive” definition of education: “the purpose is to train the minds of immigrant women in certain important life skills, with a specific end in mind: equipping them to find and secure employment in Canada. I find that this is indeed a valid charitable purpose. Moreover, certain activities carried out in furtherance of this purpose, such as the provision of the educational programs contemplated by the purposes clause, are undoubtedly charitable within this expanded definition, whether or not they have the quality of systematic instruction traditionally associated with education in the charitable sense.”

Justice Gonthier’s judgment in dissent was no different in substance from the majority’s, although he did suggest that the “more inclusive” approach taken by Justice Iacobucci was “already latent in the authorities” – a point that we make below. Thus the Court has substantially changed this area of charities law in the context of the Income Tax Act. Over the last decade or so the Federal Court of Appeal has adopted a very narrow meaning of the concept. Although most of its decisions have come in cases where the claimed educational activity was the presentation of information to the public, and thus in cases where the court was concerned more to exclude this from the category than to carefully define “education” in a positive sense, the Federal Court has taken up as its own a definition first used by England’s Court of Appeal in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*:

education is “the formal training of the mind” or the “improvement of a useful branch of human knowledge and its public dissemination.” And, in consequence, the CCRA has adopted a similarly limited definition. The overturning of this definition in cases of registration under the Income Tax Act does expand the meaning of charity in that context.

The Supreme Court is probably incorrect to have conflated the Federal Court of Appeal’s definition with the “Canadian” position. The Canadian law of charities is much more than the sum of the Federal Court’s work. It includes provincial decisions given in the context of both trusts and tax law, such as *Re Societa Unita and Town of Gravenhurst*. At issue in that case was a summer camp where children took part in the usual recreational activities but were also taught the Italian language and learned about the history and customs of Italy. It was held to be charitable because it was “learning” designed to produce better citizens by encouraging them to understand their background and themselves.

Moreover, the common law of charities, including its Canadian variant, has long included a much wider variety of purposes within the
education category than the majority judgment suggests. It may be that many of these purposes should not be considered educational, that they should be charitable under some other heading, but the law of charities puts them in this box. Even the CCRA, working largely with a definition drawn from the Federal Court of Appeal’s cases, includes “providing and maintaining museums and public art galleries” in this category. We stress this point, for there is language in the majority judgment that suggests that the category ought, in some respects, to be narrowed. For example, at one point Justice Iacobucci cautions against education’s being “broadened beyond recognition” and seems to insist that it must always include a “teaching or learning component” and thus that “the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise.” He suggests exclusion of some matters previously considered educational, including “providing an opportunity for people to educate themselves,” which could be read as removing, for example, the provision of library services. He also suggests that education is not charitable if “provided exclusively to a particular class of individuals, defined only by their creed.” Whether or not it ought to be, denominational education is charitable; witness the substantial number of Jewish and Christian fundamentalist private schools registered with the CCRA. In our view the best way to read these kinds of statements is to place them in the context of the Court’s desire to respond to the Federal Court of Appeal’s narrow approach and in turn to stress the extent to which the latter’s judgments have concerned cases where the applicant wishes simply to distribute information, and sometimes political views, to the public at large.

FOURTH HEAD OF CHARITY: OTHER PURPOSES BENEFICIAL TO THE COMMUNITY

Before discussing whether the society could be considered to be pursuing purposes recognized as charitable under the fourth head of Pemsel, we need to see why this issue was relevant, given the majority’s finding that clause (a) of the purposes was charitable as advancing education. Here we must return to the discussion of ancillary purposes and recall that Justice Iacobucci found that while clauses (b) and (c) were ancillary to (a), (e) was not. It allowed the society to do things broader than the educational activities encompassed by (a). Moreover, and more important, the evidence showed that some of the society’s activities were not educational. Thus the society was not constituted or
operated exclusively for charitable ends. If, however, some of those activities carried out under clause (e) were in pursuit of some other charitable purpose, they would be charitable also, and the exclusivity standard would be met.

At issue therefore was whether helping immigrant women obtain employment could be considered a charitable purpose in and of itself, under the fourth head of the *Pemsel* categorization. This was the principal issue in the case, and one on which the two judgments diverged substantially. The majority held that it could not be a charitable purpose, the dissenters that it could. We reverse our usual order and look first at the dissent, because the majority judgment on this issue is framed as a response to the dissent.

Justice Gonthier began by asserting that in his view “assisting the settlement of migrants, immigrants, and refugees, and their integration into national life, is a charitable purpose already recognized under the fourth head of *Pemsel*,” and in this instance the society’s purposes were “subsumed within this subcategory.” He supported this contention by reference to a series of Australian, New Zealand, English, and (one) Canadian decisions, all of which had held a variety of immigrant- and refugee-related trusts and other organizations to be charitable. A number of these cases drew an analogy with the resettlement of soldiers returned from war, found by the Judicial Committee of the Privy Council to be a charitable purpose in *Verge v. Somerville*, and Justice Gonthier accepted that analogy and expanded on the point: “Let me pursue the analogy between returned soldiers and immigrants directly. Soldiers return home after a lengthy period of time spent abroad. They may require assistance in integrating back into national life: employment and training opportunities, counselling, support groups, and the like. The same is true with many immigrants. In fact, soldiers may have an easier time of it, as they are unlikely to face language or cultural barriers, and are also likely to have friends and family already in Canada to assist them in the task of reintegration. Nonetheless, the life that the soldier left behind before going abroad may well be gone forever, and he or she may require assistance to making the transition to a new life upon his or her return.”

Justice Gonthier also discussed the “discrimination and prejudice” faced by some immigrants. The U.S. Internal Revenue Service had ruled charitable an organization to aid immigrants, in part because they were subject to discrimination, and he stated: “The organization was upheld as pursuing a mixture of purposes, some of which were grounded in the advancement of education head, and some of which were grounded in the elimination of discrimination and prejudice. Yet it cannot be denied that the purpose of the organization itself was to
aid immigrants in integrating into national life, and it is that purpose
to which I draw the analogy here. I fully agree that not all of the diffi-
culties faced by immigrant women in obtaining employment stem
from prejudice and discrimination: but it is undoubted that some of
them do. Indeed, the greatest barrier to the integration of immigrant
and visible minority women into the workforce is probably not racial
or other animus: rather, it is the unintended exclusionary effects of
facially neutral practices.”

Justice Gonthier concluded by rejecting the majority’s position, dis-
cussed below, that helping immigrants *per se* could not be a charitable
purpose and that one needed some additional element, such as the
relief of poor immigrants, to so qualify. “[T]he suggestion that a char-
itable purpose must be related to the relief of poverty,” he stated, “was
rejected in Pemsel,” and: “[t]he reality is that immigrants may face a
number of obstacles to their integration into Canadian society, social,
vocational, cultural, linguistic, or economic. It would be futile to focus
on one obstacle to the exclusion of the others ... [T]he Society pro-
vides assistance, guidance, and learning opportunities. It assists immi-
grants in developing and acquiring vocational skills, so that they may
obtain employment.”

Justice Gonthier was thus prepared to find that a broadly defined
purpose – assisting immigrants of all kinds to settle in their new home
– is charitable. While immigrants may be poor, or may have suffered
persecution as refugees, or may suffer discrimination, none of those
factors needed to be present:

The unifying theme to the[se] cases, in my view, is the recognition that immi-
grants are often in special need of assistance in their efforts to integrate into
their new home. Lack of familiarity with the social customs, language,
economy, job market, educational system, and other aspects of daily life that
existing inhabitants of Canada take for granted may seriously impede the
ability of immigrants to this country to make a full contribution to our
national life. In addition, immigrants may face discriminatory practices which
too often flow from ethnic, language, and cultural differences. An organiza-
tion, such as the Society, which assists immigrants through this difficult transition
is directed, in my view, towards a charitable purpose. Clearly, a direct
benefit redounds to the individuals receiving assistance from the Society. Yet
the nation as a whole gains from the integration of those individuals into its
fabric. That is the public benefit at issue here.

As we saw above, Justice Iacobucci’s majority judgment held that the
society’s purposes were not charitable. He began his consideration of
this question by again referring to the test for charitability: that “the
purpose must be beneficial to the community ‘in a way which the law regards as charitable’ by coming within the ‘spirit and intendment’ of the preamble to the Statute of Elizabeth if not within its letter.” Thus the society had to show that helping immigrant and visible minority women obtain work was more than just beneficial “in a loose or popular sense”; it was also “beneficial in a way that the law regards as charitable.”

He acknowledged that this reasoning was “obviously circular” but then stressed what he had said earlier about the usefulness of analogy, based on “the trend of those decisions which have established certain objects as charitable under this heading.”

In the rest of his judgment on this question Justice Iacobucci argued that there was no “trend” of decisions supporting the idea that assisting immigrants in general was charitable. Two points were key to his reasoning. First, one category of immigrants to Canada is the “independent class,” persons who come other than to join relatives or as refugees. Potential immigrants for this class are assessed for the extent to which they “will be able to integrate successfully into Canadian society, with particular emphasis placed upon employment skills and opportunities.” For Justice Iacobucci the “expectation of successful integration” spoke conclusively against charitability: “I fail to see how providing assistance with integration to independent immigrants is to be considered charitable. ... Of course, many other groups of immigrants may in fact be in special need of such assistance. But in so far as an organization assists all immigrants, I find it difficult to see how such an organization does not run afoul of the exclusive charitability rule, absent either specific legislation or the targeting by the organization of groups with special needs relating to their immigrant status.”

It is not entirely clear from this passage what “special needs relating to their immigrant status” are, but that becomes clear from the second point – that the case law used by Justice Gonthier did not support the conclusion that immigrant settlement in general was charitable. *Re Stone,* for example, was not a useful analogy because it dealt with Jewish settlement in Israel and was really about alleviating the problems caused by persecution of Jews. Thus it was not the case that “the analogy embraces the more general case of helping any immigrants to settle in a new land.” Another Australian case, *Re Wallace,* similarly dealt with aid to poor immigrants and thus was really about the relief of poverty. Cases about refugee settlement were similarly distinguished. In short, helping migrants who are poor, or persecuted, or have some other “special” problem is a charitable purpose, but immigrants who are simply immigrants are not in the same category.
Justice Iacobucci also looked at another aspect of the society’s work – its targeting of “immigrant and visible minority” women. He did not see this as the kind of endeavour that could place it in the category of qualifying immigrant aid organizations. While declining to comment on “whether the elimination of prejudice and discrimination may be recognized as a charitable purpose at common law,” he found that the society was not necessarily combating prejudice and discrimination: “The Society is solely aimed at helping immigrant women obtain employment, and it is not clear that all of the difficulties faced by immigrant women in obtaining employment stem from prejudice and discrimination so as to make this an exclusively charitable purpose. For example, making contacts and obtaining information pose difficulties with respect to gaining employment, but these difficulties do not necessarily indicate prejudice and discrimination.”

In the result, therefore, the society was not charitable under the fourth head, being unable to fit itself into the lists by analogy.

On this issue we think that the majority clearly got it wrong and would make five related points. First, if the Court is saying that immigrants or refugees need to be poor to be “objects of charity” then it is departing from a well-established principle that the charitability of a purpose is not dependent on the economic status of potential recipients. Education can be provided to the rich, because the charitable purpose is advancing education. Religion is advanced whether or not the rich are its beneficiaries. And assisting the young, the elderly, or the sick does not require members of those groups to be indigent. Other examples could be cited; the point is that there seems no reason to suggest that poverty is a prerequisite. An organization devoted to assisting poor immigrants is really one dedicated to the relief of poverty, with immigrants defining the class of beneficiaries rather than the charitable purpose.

Second, the refusal to classify as charitable the integration and assistance of immigrants also runs contrary to an important, albeit only implicit, theme in the definition of charity – charitable purposes frequently fulfil governmental purposes. Commentators and judges have noted the tendency to treat governmental purposes as inherently charitable and have pointed out that in a modern society many of the activities in the preamble are now carried out by public authorities. Viewed in this light, the government’s role in helping immigrants integrate should have weighed in favour of classifying the society’s purposes as charitable.

Third, the majority’s refusal to expand the definition of what is charitable by analogy will encourage the Federal Court of Appeal, as if it needed such encouragement, to interpret analogy very strictly. In
effect the Court is saying that the kinds of purposes previously considered charitable will be so in future – and no others. If one cannot move from poor or persecuted immigrants to female visible minority immigrants (let alone to immigrants generally) one cannot get very far through analogy.  

Fourth, and closely related, it is unfortunate that the Court so quickly rejected the idea that “discrimination and prejudice” were relevant to this case. As we noted above, the courts help to define charity, and the guidance that they provide to the ccra shapes officials’ decisions. Given the infrequency of judicial pronouncements on the meaning of charity, the Court should have given serious attention to the impact of the Charter and its cognate values on the common law definition. Moreover, since the Charter must affect the distribution of benefits in a legislative scheme such as the Income Tax Act, it is unfortunate that the Court did not take the issue more seriously. As things stand, the Charter’s role in determining the meaning of charity for this public law purpose will remain uncertain.

Fifth, and a more speculative point, the majority decision may have narrowed the ccra’s definition of charity under the fourth head. The ccra did not reject the society’s application on the general ground that an organization formed to assist the settlement of immigrants was non-charitable. It stated variously that the society’s purposes were not educational, that helping women was not charitable, and that there were political purposes involved. While it is difficult to say what the Federal Court of Appeal thought on the question of whether assisting immigrants was charitable, the department made no comment on it. Indeed, at the conference on which this volume is based, a senior official from the ccra defended its decision on vagueness grounds, and asserted that it does register organizations that assist immigrants. If that is so, it may be that the Supreme Court has now told the department to stop doing so, unless the targeted groups have “special needs.” This suggestion is, as we noted above, speculative, and the uncertainty that surrounds it a product of the procedure by which claims are adjudicated and appealed. But it is a possible outcome of the majority judgment, and one much to be regretted.

CONCLUSION

The Supreme Court’s ruling in Vancouver Society is, and will continue for some time to be, a landmark decision on the meaning of charity. It will doubtless be studied and dissected many times in the years to come. The Court did clarify some methodological questions and help to decide whether an organization should be judged by its purposes or
by its activities. The decision is none the less something of a disappoint ment. Although the Court outlined the need for reform and gestured towards some directions in which such reform might move, it ultimately did little to advance the definition or clarify conceptual questions. Given its determination not to undertake substantial change, it seems likely that the Elizabethan-derived definition of charity and the Pemsel method that have been with us for so long will continue to dominate the tax treatment of charity for a considerable time to come.

NOTES

1 [1999] 1 SCR 10. Subsequent page references to the case refer to this report.
2 The last such case was Guaranty Trust Company v. Minister of National Revenue, [1967] SCR 133.
3 This account of the background is taken from the Supreme Court judgment, 93–8.
4 The legislative framework governing the registration of charities appears in the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as am. For those provisions, and a review of the CCRA's administration of them, see Sossin, chapter 12 in this volume.
5 Quotation from the CCRA's final refusal letter of 14 October 1994, cited by Gonthier J. at 35.
7 (1986), 23 ETR 210 (FCA). The case is discussed extensively in Phillips, chapter 7 in this volume.
8 Vancouver Society (FCA), 91.
9 Ibid., 91–2.
10 Vancouver Society, 92.
11 For an analysis of the Federal Court of Appeal's work, see Phillips, chapter 7 in this volume.
12 Statute of Charitable Uses, 43 Eliz. 1, c. 4 (1601).
14 [1891] AC 531 (HL).
15 Vancouver Society, 104.
16 Ibid., 106.
17 Ibid., 111.
18 Ibid., 106–7. Justice Iacobucci cited only the comments of Justice Strayer in Human Life International of Canada v. Minister of National Revenue, [1988] 3 FC 202 at 214 (CA). He might have cited also Panel on Accountability and Governance in the Voluntary Sector, Building on

19 Vancouver Society, 135.
20 [1991] 3 SCR 654 at 670; the quotation appears at p. 107 of Justice Iacobucci’s judgment.

21 Vancouver Society, 107.
22 Income Tax Act, s. 149 (1)(l).

23 Vancouver Society, 134.

Justice Iacobucci summarizes the proposal in ibid., 136–7: “the Centre proposes an approach which focuses on whether a given project pursues a good for the benefit of strangers in a way that is practically useful. A three-step inquiry is suggested, as follows: (1) Determine whether the purposes are charitable within the first three heads of Pemsel: the relief of poverty, the advancement of religion, or the advancement of education. (2) If not, determine whether a public benefit is offered, by examining whether, (a) the purpose benefits an identifiable group of people, of whatever size, having a common interest; (b) the benefit is physical or spiritual, measurable or intangible, direct or indirect; and (c) the benefit is reasonably recognized and realistically to be provided, as opposed to merely speculative, putative, or hoped-for. If these requirements are met, then a prima facie presumption of charitable purpose is raised. If not, then proceed to determine whether the purpose falls within one of the decided anomalies under the fourth head of Pemsel. (3) Once a prima facie presumption of charity is established, determine whether there are grounds for holding the purpose to be non-charitable by reason of one or more of the following: (a) exceptions previously decided (e.g., political purpose or purpose contrary to public policy); (b) reasons of public policy relating to the nature of the common interest; or (c) a failure to be exclusively charitable because the means or activities undertaken are not primarily concerned with giving actual effect to the stated purpose or, at least, subordinate to the primary concern.”

This is a very broad test, very close to a simple public-benefit standard. If Parliament indeed wishes to retain some special meaning for “charity,” it seems unlikely that it would opt for such a proposal.

25 Ibid., 135. See Phillips, chapter 7 in this volume, for a more detailed elaboration of many of these criticisms.

26 Vancouver Society, 135
27 Ibid., 42.

28 Ibid., 43–4. For the likely origins of the “altruism” idea, and for a similar view that the law implicitly reflects these kinds of values, see Ontario Law Reform Commission (OLRC), Report on the Law of Charities (Toronto, 1996), especially chap. 6.
29 See Phillips, chapter 7 in this volume, for a discussion of this as stated by the Federal Court of Appeal.

30 Vancouver Society, 50–2.

31 Ibid., 90.

32 Ibid.

33 See Moran, chapter 8 in this volume.

34 Income Tax Act, s. 149.1(l).

35 See Phillips, chapter 7 in this volume.

36 Vancouver Society, 108.

37 We have chosen not to discuss Justice Gonthier’s judgment on this question, which appears at 52–8. While he formulated matters a little differently from Justice Iacobucci, there is really no substantial divergence between the two on the general approach to activities and purposes. Justice Gonthier’s application of the test is briefly discussed below, note 46.

38 See the Guaranty Trust case.

39 Ibid.

40 Vancouver Society, 111.


42 The Income Tax Act contains a specific ancillary purposes doctrine for “political activities”: see s. 149.1(6.1) and (6.2).

43 Vancouver Society, 130–1.

44 For an argument that the Federal Court of Appeal’s decision in Native Communications prompted a similar development, see E. Zweibel, “A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes,” Philanthropist 7, no. 1 (1987), 4. Whether or not Zweibel was right about that case, the subsequent history of the Federal Court’s jurisprudence and of the CCRA’s practice shows that the particulars of drafting do not play a large role in determining charitability.

45 As well, drafting skills may now matter more: organizations with the resources to engage experienced (and expensive) counsel will fare much better in the registration process than small, perhaps grassroots groups, which cannot do so.

46 Vancouver Society, 132. Justice Iacobucci referred at one point to the job skills directory and to support groups for professionals and at another point to “the ... job skills directory ... networking, liaising for accreditation of credentials, soliciting job opportunities, and offering referral services.” They were not charitable purposes because they were “directly in furtherance of helping immigrant women to find employment,” and this he found not to be a charitable purpose: 132. Justice Gonthier’s dissent found these activities to be related to a charitable purpose, but to that of
assisting immigrant women to obtain employment; see 84–9. Thus, as we noted above, the judgments differ materially not on the relationship of activities to purposes but rather on whether helping immigrant women to find work is charitable: for the debate on this, see below.

47 Ibid., 112.

48 The definition originally appeared in Maclean Hunter Ltd. v. Deputy Minister of National Revenue for Customs and Excise, [1988] DTC 6096 (FCA), which was not a charities case but rather concerned an excise-tax exemption for “printed books used solely for educational purposes.” The definition from Maclean Hunter was adopted by Justice Robertson in Briarpatch Inc. v. The Queen, [1996] DTC 6294 at 6295 (FCA), which was a charitable registration case.

49 Vancouver Society, 113.

50 Ibid., 115. Cited for this more expansive approach were Inland Revenue Commissioners v. McMullen, [1981] AC 1 (HL); Re Hopkins’ Will Trusts, [1964] 3 All ER 46 (Ch. D.), and Re Koeppler Will Trusts, [1986] Ch. 423 (CA).


52 OLRC, Report deals with education at 202–8.

53 Vancouver Society, 117.

54 Ibid., 118.

55 Ibid., 119.

56 Ibid., 64.

57 See, for example, Positive Action against Pornography v. Minister of National Revenue, [1988] 1 CTC 232 at 237 (FCA), in which the court, as well as defining education, stated that “the presentation to the public of selected items of information and opinion ... cannot be regarded as educational in the sense understood by this branch of the law.” For similar cases, see Briarpatch; Human Life International; Interfaith Development Education Association Burlington v. Minister of National Revenue, [1997] 97 DTC 5424 (FCA). Justice Gonthier seems to make a similar point about the context of the Federal Court of Appeal’s decisions, stating at 65: “When reviewing the authorities which have defined the scope of the concept of ‘advancement of education’, one must be careful to appreciate the context in which each particular definition has been advanced. So, for example, it has been a recurring theme of the jurisprudence in this area that the advancement of education must be clearly distinguished from the pursuit of political purposes. ... I suspect that the true ground of decision was not that the mode of education selected by the organization in that case was too informal, but rather that the organization was seeking to advance a particular point of view, and gain adherents to it, instead of educating members of the public about a certain subject matter and allowing them to come to their own conclusions.”
“The courts recognize a purpose or activity as advancing education when it involves significant training or instruction, develops mental faculties, or improves a branch of human knowledge”: see “Registering a Charity for Income Tax Purposes,” a short publication accompanying Form T2050, Application for Income Tax Registration for ... Canadian Charities.

See the following statements: “In Canada, ‘advancement of education’ has been given a fairly restricted meaning”; the “inclusiveness” of the English approach has not been incorporated into “Canadian law”; “the limited Canadian definition of education as ‘the formal training of the mind’ or the ‘improvement of a useful branch of human knowledge’ seems unduly restrictive”: 112, 115, and 116. Justice Gonthier also suggested that education “has traditionally been given a relatively restrictive interpretation in Canada”: 62.

It includes trusts for libraries, learned societies, and adult learning institutes. Education has also been extended to include what is often termed “aesthetic appreciation,” so that trusts for a wide range of artistic and cultural pursuits have been held to be charitable. One can also find authority for the charitableity of the production of law reports and the encouragement of chess playing among boys. For all of this see J. Phillips, “Purpose Trusts,” in M. Gillen and F. Woodman, eds., Cases and Materials on Trusts (Toronto, 2000).


Vancouver Society, 117–18. Another example given of something that should not be considered educational is that of “a trust to assist the publication of unknown authors” (117). Just such a purpose was held to be charitable in Re Shapiro (1979), 107 dlr (3d) 133 (Ont. hc).

Ibid., 75.
73 Ibid., 75–6.
74 Ibid., 120.
76 Ibid., 123.
77 Ibid.
78 Re Stone.
79 Vancouver Society, 124.
80 Re Wallace.
81 Vancouver Society, 128–9.
82 For these examples see Phillips, “Purpose Trusts,” passim.
84 One commentator sympathetic to retaining the analogy approach based on the preamble has argued that the Court could have found the society charitable by analogy to “the marriage of poor maids” listed there. He argues: “One begins by establishing the Elizabethan social framework in which marriage was one of the better ways for poor maids to escape from the limited opportunities [they had]. ... Four centuries later society would advocate education rather than marriage ... for women of limited economic means to better their situation. ... In our society the women who need such charitable assistance are not Elizabethan ‘spinsters’ but immigrant and visible minority women”; see B. Bromley, “Answering the Broadbent Question: The Case for a Common Law Definition of Charity,” paper presented to the Canadian Association of Gift Planners Conference, Calgary, 1999, 6. With respect, we think that this is a somewhat strained analogy and that its use reveals the problems with analogy – it is highly manipulable, and the analogy is all too often in the eyes of the beholder.
85 See Sossin, chapter 12 in this volume.
86 See Phillips, chapter 7 in this volume.
87 As we discussed above, the Court rejected the educational claim and the analogy to Native peoples and insisted that the principal problem was the vagueness of the society’s objectives. While its decision could be read as saying that assisting immigrants was not charitable, the Court did not say that explicitly. We must assume that if the Court thought the objects clear enough to be so defined, it would not have rested its decision largely on the “indefinite and vague” argument.
88 There is no systematic publication and explanation of Revenue Canada’s registration decisions or an appeal process that allows for substantial gathering and adjudication of facts. For a critique of the registration process, see Sossin, chapter 12 in this volume.
PART THREE

Charity and Tax: Policy and Practice
Regulating Virtue:
A Purposive Approach to the Administration of Charities

LORNE SOSSIN

Charities in Canada are regulated principally by the federal government through the income tax system.¹ The federal government exempts from income taxes organizations that have obtained registration from Revenue Canada as a recognized charity. In addition, registered charitable organizations may issue receipts for donations, making tax benefits available to donors. Much attention, in this volume and others, focuses on the dramatic expansion of the charitable sector. Over 5 million tax-filers now claim in excess of $4 billion in donations each year to the 75,000 registered charities in Canada.² In 1990, the auditor general estimated that the value of subsidy in terms of forgone tax revenue per year amounted to approximately $600 million.³ In 1995, the Department of Finance calculated the annual tax expenditure on charitable donation tax credits to be $940 million, and in 1999, this was estimated to grow to $1.35 billion. Charities depend on this vast federal tax expenditure both to attract donations and to obtain funds that would otherwise be spent on taxes. This represents a substantial public subsidy for private altruism. Notwithstanding the growth of the charitable sector, and the corresponding increase in the public subsidy of that sector, the supervision of charities under the Income Tax Act⁴ remains largely a neglected area of study.

We cannot and should not, in my view, divorce the question of how the subsidy to charities is administered from the question of the purpose this subsidy is intended to further. While there seems to be a consensus that charities are subsidized because they do “good works,”⁵
beyond this there is little common ground about subsidizing charities in Canada. For some, this subsidy compensates private organizations for providing services and benefits that would otherwise fall to government. For others, it is an inducement to encourage private support for activities of public benefit. Still others would contend that it constitutes a reward for voluntarism and virtue. All of these explanations are reasonable, and the reality may well be a combination of more than one of them. Uncertainty regarding the purpose of the subsidy to charities, I conclude, leaves to those officials charged with administering the subsidy a difficult, if not impossible task.

The departure point for any analysis of state regulation is the trite observation that administration never can be neutral. Discretionary determinations, and the value judgments that they embody, are necessarily a part of administering public programs. Inexorably, government officials either further or inhibit social ends; certain groups obtain benefits at the expense of others. To paraphrase Michael Lipsky, the decisions of such bureaucrats effectively become the public policies they carry out. Without a clear sense of the ends of granting charitable registration, the administration of this process may devolve into an aggregation of subjective and arbitrary determinations, or at least this is how those determinations may seem to those organizations whose interests depend on them.

Neither Parliament nor the courts have provided a practical and principled framework for making such determination. As a result, tax officials must distinguish between those bodies that qualify as charities and those that do not. Tax officials, however, are neither well-equipped nor well-suited to defining the scope of socially desirable activities. This function is inherently political. The absence of such a purposive mandate has prevented the supervision of charities from being conducted in a consistent and coherent fashion, despite Revenue Canada’s significant commitment to making the administrative process transparent, responsive, and procedurally fair.

The growing literature appears united in the view that the administrative process needs reform. Revenue Canada has just been reconstituted as the Canada Customs and Revenue Agency (ccra). Thus the time would appear ripe to re-evaluate the role and function of the tax official in the administration of charities in Canada.

This chapter examines the administration of charities under the Income Tax Act from both a positive and a normative perspective. From a positive perspective, I review the statutory authority, legal obligations, and administrative practices of Revenue Canada/ccra. From a normative perspective, I explain why I believe it is necessary to determine the ends to which the administration of charities ought to
aspire. The analysis has three sections. In the first, I canvass the statutory and common law regime governing the regulation of charities in Canada. In the second, I examine the dynamics of the CCRA’s discretion. I explore dilemmas of consistency, coherence, and adaptability stemming from the CCRA’s application of vague common law standards. In this section, I also consider the entitlement to fairness at two distinct junctures in the administrative process: registration (the making of the decision to grant or deny charitable registration to an organization) and deregistration (the making of the decision to revoke or annul an organization’s charitable registration). Finally, in the third section, I propose a purposive approach to the regulation of charities. I conclude that, under this approach, statutory articulation of the purpose of regulating charities is essential to its effective and efficient administration.

CHARITIES REGULATION AND ADMINISTRATION IN CANADA

History

The history of state regulation of tax benefits for charities is intimately bound up with administrative concerns about fraud and abuse. Indeed, England’s Charitable Uses Act, 1601 (the Statute of Elizabeth), which forms the basis of the common law definition of charities, was principally an administrative measure, enacted in response to widespread use of charitable trusts for illegitimate ends. The preamble to this act set out the “good, godly and charitable” uses over which the newly created “commissioners” were to have supervisory jurisdiction (for investigating breaches of trust, misappropriation of charitable funds, and so on).

The Charitable Uses Act, 1601, was not, however, an administrative measure alone. It was part of a concerted response to the widespread increase in the incidence of poverty in England in the 1590s. Providing a benefit to charities, and regulating the scope of its enjoyment, had a distinct purpose – the alleviation not of poverty per se, but of the burden that poverty placed on local parishes responsible for the care of the poor. The commissioners administered this act with that goal in mind. For example, they established that the preamble would be interpreted broadly and generously, so that more rather than fewer endowments could be applied to public benefit. They determined that as long as a use benefited the poor, it fell within the equity of the act, even if it had an incidental benefit for the rich (for example, the graveling of a highway or the maintenance of a public midwife).
The commissioners viewed interpretation of the preamble as a pur-
positive rather than a technical enterprise; their task was to determine which uses fell within the “equity” of the preamble and which did not. This also provided a normative basis for justifying their decision-making as principled and coherent. For example, it made sense to authorize repairs to a church’s belltower as charitable, for, at common law, such expenses would otherwise be borne by the parish (thus diverting funds from the relief of poverty). In contrast, the commissioners refused to authorize repairs to private pews in the church, as private (and, generally, wealthy) individuals would otherwise be responsible for that expense. It was clear to the commissioners that the act’s purpose was not to identify technical categories of uses (such as religious uses) that would receive public benefit, but to provide the criteria against which to measure all uses (for example the relief of poverty and its expenses for the parish). As I show below, it is this pur-
positive approach to the administration of charities that is missing from the modern equivalent of the commissioners in Canada.

Charities first received tax-exempt status in Britain in the Income Tax Act of 1799.17 In Canada, federal supervision of charities through the tax system also coincided with the first legislation on income tax, enacted in 1917 as a revenue-raising mechanism to help finance the First World War.18 This exemption was accompanied by an administrative scheme to prevent its abuse. The War Charities Act, 1917, set up the first registration scheme in Canada to restrict the number of organizations permitted to launch appeals for public donations for war charity purposes (although it exempted churches and the Salvation Army). Registration was denied if the charity was not established in “good faith” for “charitable purposes” or if it was not properly administered. Those organizations that did obtain registration were required to file biennial reports to the federal government covering banking, bookkeeping, and organizational structure. With the end of the war, federal support for, and regulation of, charities ceased.19 Parliament repealed the registration scheme in 1927.20 A similar pattern followed the regulation of charities during the Great Depression21 and the Second World War.22

The regulation of charities remained inconsistent and episodic until 1967. As part of a larger overhaul of the income tax, Minister for National Revenue Edgar Benson introduced amendments to the Income Tax Act which required all charitable organizations seeking to issue tax receipts to obtain a registration from the ministry and also obliged them to keep a copy of each tax receipt issued.23 Once again, the scheme appeared to be a response to fears of widespread fraud and abuse.24
The mandate of tax officials has focused narrowly on the prevention of fraud and the enforcement of compliance. However, while this may have been appropriate for an earlier era, the authority vested in tax officials under the Income Tax Act calls for determinations that define the very nature and scope of charitable activity in Canada.

*The Legal and Statutory Framework*

The unsettled nature and scope of “charitable activities” continues to provide the backdrop for the wide discretion afforded officials in the administration of the Income Tax Act. The act nowhere defines “charity.” The departure point for the regulation of charities is sections 149.1(1) and 248(1) of the act, which define “charitable organization” and “registered charity,” respectively, as follows:

149.1(1) ‘charitable organization’ means an organization, whether or not incorporated,

(a) all the resources of which are devoted to charitable activities carried on by the organization itself,

(b) no part of the income of which is payable or is otherwise available for the personal benefit of any proprietor, member, shareholder, trustee or settler thereof,

(c) more than 50% of the directors, trustees, officers or like officials of which deal with each other and with each of the other directors, trustees, officers or like officials at arm’s length, and

(d) where it has been designated as a private foundation or public foundation ... or has applied for registration ... under the definition ‘registered charity’ ... not more than 50% of the capital of which has been contributed or otherwise paid into the organization by one person or members of a group of persons who do not deal with each other at arm’s length and, for the purpose of this paragraph, a reference to any person or to members of a group does not include a reference to Her Majesty in right of Canada or a province, a municipality, another registered charity that is not a private foundation, or any club, society or association described in paragraph 149(1)(I).

248(1) ‘registered charity’ at any time means

(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or

(b) a branch, section, parish, congregation or other division or an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf.
that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

Thus the act recognizes three categories of “registered charities” – charitable organizations, public foundations, and private foundations. A charitable organization in this context is usually an organization that engages in charitable activities, while private or public foundations typically fund the charitable activities of other organizations. All these forms of charities must direct their resources and expenditures towards exclusively charitable purposes. Non-profit organizations, in contrast, are exempt from income taxation but may not issue tax receipts for donations, and need not limit their activities to charitable purposes.

Most organizations denied charitable registration typically will qualify as non-profit and thus be able to take advantage of the tax benefits that this status engenders. However, if, in the opinion of the CCRA, an organization would qualify as a charity, it may not register as a non-profit organization. In other words, the CCRA decides whether organizations are charitable or non-profit, not the organizations themselves.

The current scheme of regulating charitable organizations under section 149.1 of the Income Tax Act was enacted pursuant to legislation of 1976. The new scheme “grandparented” charities registered prior to 1977, allowing them to remain registered until such time, if any, as their registration was revoked. However, registration provisions had been more haphazard than is currently the case, and so hundreds of charities remained registered that would not have qualified had they applied after 1976.

The CCRA’s key judgment in determining eligibility for registration is whether a body’s activities are charitable. In the absence of a statutory definition, the CCRA has turned to the common law, which traces its definition of charitable activities back to the preamble of the Statute of Elizabeth (Charitable Uses Act, 1601). The jurisprudence to which this act gave rise, carefully reviewed in the English case *Commission for Special Purposes of Income Tax v. Pemsel*, identified four areas of charitable activity: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community. Rather than viewing these four spheres as illustrations of acceptable charitable activity, as the House of Lords in *Pemsel* appear to have intended, the Federal Court of Appeal has regarded these as the only acceptable categories, which approach in turn has guided the CCRA’s decisions on eligibility for charitable registration.
Even on this basic method, however, there is little judicial consensus. Other courts have concluded that the preamble and *Pemsel*’s analysis of its categories are of “no real value” in deciding whether an activity or object is charitable. As for the content of these four categories, Canadian courts agree on little. While the Supreme Court of Canada has acknowledged that the law of charities is a “moving subject,” which continues to evolve, its jurisprudence often reflects an inability or unwillingness to appreciate the “contemporary Canadian context.”

The Supreme Court’s much-anticipated *Vancouver Minority Women* decision reiterated, and to some extent ameliorated, this lack of coherence. The Vancouver Society of Immigrant and Visible Minority Women helps immigrant women to find employment. Revenue Canada rejected its application to be registered as a charity. This rejection was upheld on appeal both to the Federal Court of Appeal and by the Supreme Court of Canada, by a slim 5–4 majority. Both courts found this organization’s stated objectives to be vague and outside the common law categories developed to define “charitable activities.” Justice Iacobucci, writing for the majority, observed: “[I]t is difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded. The Statute of Elizabeth was never intended to provide an exhaustive list of charitable purposes, and although the categories enunciated by Lord Macnaghten in *Pemsel* are to some extent a useful classification of what the common law has decided is charitable, they should not and have not been read strictly by the courts.”

It is against this backdrop that the C CRA determines what objects and activities are “charitable” and enforces the restrictions placed on charities’ objects and activities. For example, charitable organizations may carry on a “related business” (such as a church bingo, a hospital cafeteria, or a university gift shop) only under certain circumstances and may not engage in “political activities” in order to fulfil their objectives (for example, lobbying government officials, publishing partisan views, picketing and other forms of public demonstration).

C CRA officials must thus adapt the common law on charities to specific applications for registration in order to determine which organizations become or remain charities and which do not. Sometimes, there is Canadian case law directly on the point; in such circumstances, the C CRA merely applies these standards. However, more often, there is no Canadian case law directly relevant. In these circumstances, the C CRA officials must exercise their best judgment as to whether the organization’s objects and activities are analogous to existing case law. Not surprisingly, the attempt to adapt imprecise, some-
times archaic jurisprudence to rapidly evolving social and economic structures has led to significant criticism of the ccra. The aim of this chapter is not to rehearse such criticisms but rather to show that they are inevitable, given the purposive vacuum in which officials exercise their discretion.44

THE CHARITIES BUREAUCRACY

Administrative concerns about fraud and abuse were a constant concern of those who designed the tax expenditure for charities, but the administrative process by which organizations obtained and maintained charitable registration rarely received serious scrutiny. The Carter Commission’s comprehensive Report on Taxation (1966) said little about the charitable sector, and even less about its administration. However, it did propose an interdepartmental body to supervise charities.45 As part of the 1967 reform to the administration of charities, the taxation division established a separate bureau of the assessments branch to oversee the new registration system.

Long the victim of federal government cuts and retrenchment in the 1980s and early 1990s, the Charities Division now appears to be expanding dramatically. Following the 1997 federal budget, the number of full-time equivalent employees (ftes) was to rise from 71 in 1997 to 133 in 1998,46 and the division’s annual budget, from $5,115,050 in 1997 to $8,410,957 in 1998. Between 1987 and 1996, while the number of registered charities escalated from 56,254 to 75,012, the number of ftes inched upwards from 63.5 to 67.47

In this section, I examine the jurisdiction and scope of discretion afforded these officials, as well as the dilemmas that their authority has created.

Jurisdiction

Federal and Provincial governments regulate charities in Canada.48 Federally, the principal agency for charities is the ccra, which enforces the laws relating to tax-exempt status and registration of charities as well as the laws relating to deductions from personal and corporate income tax for donations to registered charities.49 Provincial regulation varies but, for example, in Ontario includes laws governing the creation and conduct of charitable trusts and the licensing of charitable casinos, lotteries, and other fund-raising ventures, including registration of charities by the Office of the Public Trustee. Federal supervision of charities has not changed much since 1917 and focuses on policing the charitable registration process. As one recent study
concluded, “the federal jurisdiction [over charities] is exhausted if the tax system is protected from leakages.” However, as I show below, because CCRA officials effectively define the scope of charities in Canada, far from just plugging leaks, tax officials keep the charitable ship afloat.

**Administrative Discretion and Decision-Making**

The key to both the regulation and the support of charities in Canada is the system of registration supervised by the CCRA. In order to access the significant tax benefits of charitable status, an organization must obtain from the CCRA the status of a registered charity. As I noted above, there are approximately 75,000 registered charities in Canada. With the ongoing restructuring of the welfare state, organizations carrying out activities traditionally funded by the public sector have sought status as registered charities to augment diminished state funding.

The Income Tax Act permits a registered charity to carry out its charitable purposes, both inside and outside Canada, in only two ways. First, it may make gifts to other organizations on the list of qualified donees set out in the act. Second, it may carry on its own charitable activities. In contrast to a charity’s relatively passive transfer of money or other resources involved in making gifts to qualified donees, its carrying on its own activities implies its active participation in a program or project that directly achieves a charitable purpose.

To qualify for registration as a charity (and the resulting tax advantages), an organization must meet the following six conditions: it must be created or established in Canada; it must be resident in Canada; its purposes and activities must be charitable; it must carry on its own charitable activities and/or fund certain organizations identified in the act; it must maintain enough books and records in Canada to enable the agency to verify that its funds have been properly spent and that the charity is retaining control and direction over the use of its resources; and it must spend a certain amount on charitable work every year.

The CCRA makes several determinations in deciding whether an organization seeking charitable status has met these conditions. First and most important, does the organization engage in charitable activities? There are two types of appropriate activities: transferring funds to qualified donees identified in the Income Tax Act and a “charitable activity.” The CCRA determines which activities qualify as charitable in the light of the applicable or analogous case law. Charities Division examiners, while usually not lawyers, are trained to read and
analyse case law. Examiners receive a two-to-three-week orientation
text covering the substantive areas of charitable activities. These
include "overview of the concept of 'public benefit,' 'advancement of
religion,' 'advancement of education,' 'relief of poverty' and 'other
purposes which benefit the community.' A seminar conducted in
1994 and 1995 by tax litigators from the Department of Justice
covered legal interpretation through such topics as "stare decisis,"
"ratio decidendi," and "obiter dictum."

In materials that employees
are required to read, the Charities Division sets out its decision-
making "philosophy":

Charity is an ever-evolving and often "grey" area of the law. It covers subject
matters on which society is divided and on which even the Supreme Court of
Canada renders split decisions (e.g. abortion, euthanasia, gay rights). There
will always be differences of opinion in these matters. A decision made within
the Charities Division at one point in time, given the facts and social climate
of that moment, may well be overturned at a later date, due to the evolution
of social standards, [sic] other principles of the law. Such is the nature of
charity ... As an officer in the Charities Division you have an important role to
play in ensuring that the decision-making process is transparent. In other
words, anyone who reads a file after a decision has been made (whether to
grant or deny registration) should be able to easily understand why the deci-
sion was made, through documentation which is clear, concise and logical. By
adhering to this philosophy, examiners can be confident that they have made
the 'right' decision, based on the material presented by the applicant, at a
given point in time. This philosophy will become increasingly important as
additional information on charities becomes available to the public.

The key to consistency and coherence lies in adherence to prece-
dent. The C CRA must ensure that like cases are treated in a like
fashion. For this reason, it summarizes the implications of important
case law in "interpretation bulletins" (intended for tax experts such as
lawyers and accountants) and "information circulars" (for members of
the public without expert training). All these sources are available to
the public and thus allow organizations to predict the result of the
agency's determinations with some accuracy. I discuss below the "trans-
parency" of its decisions.

Dilemmas of Consistency, Coherence, and Adaptability

Despite these attempts to guide the discretion of tax officials, reliance
on analogy and precedent invariably gives rise to decisions that are
subjective and likely to appear arbitrary. Three recent examples of
organizations applying for registration as charities can illustrate the dilemmas of consistency, coherence, and adaptability caused by reliance on common law definitions of charitable activities.

The first example shows the dilemma of consistency. It involves an Ontario self-help organization that was seeking registration as a charity. The body provides resources and support for medical and social work professionals engaged in running self-help groups. The Charities Division responded to its application for registration with a letter outlining a negative preliminary position. In the letter, the examiner set out the four accepted categories of charitable activity under the common law and indicated that self-help groups lack the necessary element of “altruism” to qualify as a “benefit to the community” under the fourth category and thus concluded that approval was unlikely.

This position puzzled and frustrated the applicant organization for two reasons. First, it did not correspond with its self-perception. All the people involved perceived their efforts as intended to help those in need in return for no material gain. If helping others help themselves was not altruism, they wondered, what was? Second, board members had been in touch with other like organizations around the country and discovered that many, which engaged in substantially similar and in some cases identical activities, had received registration in other parts of Canada, and in the same region at other times. When a board member informed the examiner of the inconsistency of the Ccra’s positions, the examiner told her flatly that information regarding the registration process vis-à-vis other organizations was privileged and confidential and that he could not comment on it. The board member concluded that the agency’s decision-making was arbitrary and depended mostly on the examiner to which one was assigned. Her informal survey suggested that the only consistent factor in success was tenacity. Those organizations that persevered despite negative letters or rejected applications, who enlisted the support of an MP or municipal councillor, seemed more often than not to receive registration. Problems of consistency arise with particular frequency under the fourth category of charitable activity, because it depends on evolving notions of “benefit to the community,” many of which are uncharted in case law.

The second example highlights the problem of coherence. It involves the Church of Scientology’s application for registration as a charity. At the time of writing, the decision is pending a comprehensive investigation into the church’s activities. The decision will turn on whether the church constitutes a religion and therefore qualifies as a charity. While religious activity is one of the four qualifying spheres,
the case law contains no universal definition of a religion. Rather than examining why religions should be entitled to public subsidies, the CCRA’s guidelines focus on technical criteria. They state that a religion must have an element of theistic worship, defined as “the worship of a deity or deities in the spiritual sense.” Arthur Drache, counsel to the church in its application, raised the case of Buddhist organizations, registered even though Buddhism does not involve the worship of deities. Apparently, the CCRA had determined that Buddhism qualified as an exception to the general rule. Such problems of coherence arise because officials have not been provided with practical and principled guidelines to apply.

The third example shows the dilemma of adaptability. How does the CCRA exercise its discretion in novel cases? This issue arose in the context of non-profit organizations providing free access to the internet. One group in Vancouver sought charitable registration. The CCRA took the position that internet providers, unlike libraries, do not control the content of the material to which they provide access and denied the application.

In *Vancouver Regional FreeNet Assn. v. M.N.R.*, the Federal Court of Appeal considered whether a non-profit organization providing free access to internet qualified as a charity. Given the novelty of the technology, no case law was available. The choice seemed to be whether to analogize the internet to a public library (in which the issue of control over material distributed would be relevant) or to a public highway (in which control would not be relevant). The Court allowed the applicant’s appeal. Once again, it used the Statute of Elizabeth as its point of departure. Justice Hugessen, writing for the majority, held that the provision of public access to the modern “information highway” was as much a charitable purpose as was the provision of access by more conventional highways in the time of Queen Elizabeth I. Justice Décary dissented on the basis that the organization did not exercise sufficient control over the uses of the internet to ensure its charitable purpose. He offered the following general observations regarding the dangers of relying purely on analogy in the face of novel claims: “The ‘information highway’ is a concept that is novel to our era and compares only marginally with the examples raised by the appellant. *The Court should rise above the constraints of analogy and, rather than compare the extrinsic qualities of past charitable purposes with the subject before it, consider the essential charitable nature of the organization on appeal.* Public benefit is an interminably broad concept, which spills over from the pure altruism of community welfare at one end of the spectrum into the realm of collective self-interest at the other. It is the courts’ role to decide in each case
whether the community values underpinning a certain purpose are overshadowed by what is otherwise its essentially non-charitable character” (emphasis added). 62

CCRA officials cannot “rise above the constraints of analogy” in this fashion. In the absence of a statutory definition of charitable activity, they have recourse only to the decided case law. While they may have the authority to adapt the law of charities to novel applications, they lack the legitimacy to do so and thus remain dependent on infrequent and sometimes indeterminate judicial pronouncements.

In each of these three examples, the CCRA was called on to apply vague common law standards to specific, complex, and often novel factual circumstances. Because its decisions turn on an appreciation of these factual circumstances, the way in which prospective and charitable organizations are permitted to present their case to it takes on added significance. It is to an analysis of this process that I now turn.

Fairness and the Administrative Process

In its first year of operation in 1967, the Charities Division had received 34,630 applications for registration and approved 31,373 of these. Today, the CCRA receives approximately 5,000 applications annually and approves roughly 3,000. 63 It denies approximately 600 applications 64 and the rest are abandoned or deferred by applicants. The process typically takes between seven and fifteen months. Applicants file Form T2050, accompanied by a certified copy of all constituting documents; a statement containing full details of the activities of the applicant; financial statements for the last fiscal year or if they are unavailable, a budget for the first year of operation; names and addresses of all members of the executive; and a statement as to whether the applicant plans to purchase property and, if so, the name of the registered owner of the property. An applicant is not entitled to have any other written or oral submissions considered by the minister in his or her determining whether to grant registration.

Where an organization meets the requirements of the Income Tax Act, the CCRA has no discretion to deny registration to an applicant. This, however, obscures the substantial discretion afforded it in its determining whether or not those requirements have been met. As I indicated above, there is no meaningful legislative direction or guidance as to how its officials should determine what constitutes a charity. Should the applicant receive the benefit of the doubt? Should tax officials take into consideration limitations of resources and expertise which may compromise an organization’s application? These are
crucial questions and affect the confidence that the ccra enjoys both within the charitable sector and from the public at large.

Applicants have minimal “due process” rights. The scope of such rights is discussed in *Scarborough Community Legal Services v. The Queen*. In this case, a legal aid clinic had applied for registration. The ccra denied registration and informed the clinic that it did so because of the clinic’s “political activities.” The clinic challenged this decision, partly because the agency had failed to comply with the rules of natural justice or procedural fairness in that it reached a decision without giving the clinic prior notice of the case against it and an opportunity to meet that case. The appeal yielded three separate opinions from the Federal Court of Appeal on the issue of procedural fairness. The majority dismissed the clinic’s procedural argument. Justice Marceau, writing for himself, held that “the decision to refuse the application in the present case was not made on the basis of information obtained without the interested party’s participation; it was made solely on the evidence submitted by the applicant itself.” He concluded:

The function of the Minister in dealing with an application for registration as a ‘charity’ under the *Income Tax Act* is, in my view, a strictly administrative function, and in spite of the fact that it involves the application of substantive rules and not the implementation of social and economic policy, on the basis of the basic criteria formulated by Mr. Justice Dickson (as he then was) in the leading case of *M.N.R. v. Coopers and Lybrand*, [1979] 1 SCR 495, it does not appear to me to be one subject, in its exercise, to judicial or quasi-judicial process. I am unable to accept the Appellant’s suggestion that procedural fairness would call for a hearing of some sort before a contrary decision is reached by the Minister (or his duly authorized representative). Not only do I think that a requirement of that kind would go beyond Parliament’s will as reflected in the legislation, I fail to see how such a hearing could better achieve justice and equity. If the decision is wrong because the law was improperly applied to the facts or because improper qualification was attributed to those facts, the appeal will remedy the situation; and if the decision is wrong because of a failure by the applicant to give all the facts or to expose them correctly, there is nothing to prevent him from renewing his application.

Justice Urie reached the same result, but for somewhat different reasons. His analysis of administrative law, and in particular of *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, led him to conclude that the granting or withholding of registration was a purely policy-based decision. Consequently, he held: “I am unable to find either as a matter of natural justice or of procedural fairness, an oblig-
ation on the Minister to invite representations or conduct a hearing before reaching a decision on the application.”

Justice Heald dissented and held that the CCRA had failed to comply with its duty of fairness in denying registration. He noted that the distinction between “administrative” and “judicial” decisions had lost favour in recent Supreme Court decisions in administrative law. In particular, Justice Heald relied on his earlier reasons in Renaissance International v. M.N.R., in which the Court had found the agency’s revocation of a charitable registration to have violated the duty of fairness. Whereas the majority of the Court distinguished this decision, as it dealt with the more serious act of deregistration, Justice Heald viewed the reasoning of the case as equally applicable to the initial determination of registration. He stated: “I do not contend that the statutory scheme requires a formal hearing before the decision to refuse was made. However, I do think natural justice or the duty to act fairly would require, perhaps, a telephone call or a letter to the appellant advising of the Minister’s difficulties or problems with the application, thus giving the appellant the opportunity to, at least, attempt to answer the Minister’s objections. This would have resulted in a record reflecting the point of view of both the Minister and the organization concerned. Such a procedure would have given the appellant a reasonable opportunity to answer the allegations made against registration.” In the result, the Court dismissed the appeal and denied leave for a further appeal to the Supreme Court of Canada. The CCRA’s practice since then appears to be to alert applicants by correspondence to the potential for an adverse disposition.

In addition to the procedural entitlements discussed in Scarborough Legal Services, applicants also have a right of appeal directly to the Federal Court of Appeal if registration is not granted. The number of appeals from denials of registration varies sharply from year to year. Between 1987 and 1996, the high was eighteen appeals in 1996, while the low was one in 1993. The average was about eight.

The record for such appeals is usually quite slim, consisting of the application form, the letter of refusal from the minister, and any prior correspondence. As Drache observes, the requirement that a first appeal be made to a “senior” court increases the time and expense of an appeal: “This means that in practical terms, a decision by the Minister not to register a charity is de facto final.” Not only have there been remarkably few appeals, but the overwhelming majority of appeals taken to the Federal Court of Appeal have been decided in favour of the CCRA. Drache suggests that “this may be a factor in the sometimes seemingly arbitrary decisions made by the Department on
the issue of what constitutes a charity." For these reasons, the OLRC’s report recommended a right of first appeal to the Tax Court, which, unlike the Federal Court of Appeal, could review findings of fact and law and amount to a trial de novo for applicants refused registration.

The charity sector poses unique problems for a system of regulation premised on voluntary reporting and disclosures. Most charities are staffed by volunteers and managed by officers who rotate frequently. The CCRA has accordingly “softened” its enforcement relating to non-compliance with reporting requirements. Indeed, as of July 1990, the auditor general reported that the late-filing penalty imposed under section 162(7) of the act had never been applied and that, had it been, Revenue Canada would have recovered an additional $49 million annually.

The act requires charities to file a return to the CCRA. The return includes schedules and financial statements, which disclose a charity’s sources of income and the nature of its disbursements and expenditures. Failing to file this return is grounds for revocation of registration and is the most common cause of deregistration. In 1995–96, for example, 1,639 of 2,555 revocations resulted from failure to file a T3010.

All charities are subject to the same disclosure and reporting requirements, despite the vast disparity in their resources and their ability to comply. The CCRA appears to compensate for this disparity by not rigorously enforcing these requirements, which allows both worthy and potentially unworthy organizations to continue to enjoy public benefits and erodes confidence in the regulation of charities generally. A system of graduated penalties for non-compliance would seem to represent a more effective alternative. Similarly, differential reporting and disclosure requirements – like the current British system – might restore some equity to the system.

Reporting and disclosure help ensure the integrity of the system, but only auditing by the CCRA can ensure compliance. Four recognized sources of information determine which charities are audited: random screening of files using predetermined criteria, internal and external leads, letters of complaint, and press clippings.

Approximately 0.75 per cent of charities are audited regularly. In 1995–96, the last year for which statistics are available, Revenue Canada conducted 576 audits. Only 23 ended in a “clean result” (i.e., the charity was in compliance with requirements). In 331 cases, the department issued an “education letter,” indicating some form of problem that could lead to non-compliance but not sufficient to
warrant an undertaking or revocation of registration. In another 116 cases, organizations had to undertake to remedy non-compliance. Finally, in 8 cases, registration was revoked. These numbers, if representative, suggest that almost all registered charities are failing, or close to failing, to meet their legal obligations. Problems arguably go deeper than a simple increase in audits could reasonably hope to remedy.

Further, despite random audits, there remains no validation procedure for tax receipts issued by charities. The auditor general’s report for 1990 noted this lacuna, as did the OLRC’s report. As I noted above, the only significant enforcement mechanism is revocation of registration. Virtually all observers agree that this provides a sledgehammer where often a chisel would be more useful. There are two types of deregistration – technical and substantive. Technical deregistration result from non-compliance with reporting and filing requirements pursuant to section 168(1) of the act. Remediating the non-compliance, as prescribed in Information Circular 80-10R, usually resolves this sort of problem. In 1995–96, there were approximately 2,550 deregistrations on technical grounds, and approximately 900 of these were voluntary. As for substantive grounds for deregistration, subsection 149.1(2)(a) prohibits a charity from carrying on an unrelated business, 149.1(2)(b) lays down an annual disbursement quota, and 149.1(4.1) prohibits a charity, in concert with another charity, from making a gift to the other charity to delay unduly the expenditure of funds on charitable activities. In 1995–96, there were eight deregistrations based on such “serious breaches of the legislative provisions.”

Whether or not the deregistration occurs on technical or substantive grounds, it has the same effect. That organization will be subject to 100 per cent tax on the fair market value of all assets not distributed to other registered charities. This is sometimes referred to as a “penalty tax.”

As I indicated above in the discussion of Scarborough Legal Services, the Federal Court of Appeal has viewed the act of revoking a registration as more serious than the decision to grant or deny a registration in the first place. As a result, additional duties of procedural fairness accompany deregistration. These duties were discussed in Renaissance International v. M.N.R. In Renaissance, a charitable organization received the following notification from the CCRA: “You are hereby notified that I propose to revoke the registration of Renaissance International as a result of its failure to comply with the requirements of the Income Tax Act for registration as a charity inasmuch as it has devoted resources to activities that are not charitable activi-
ties." While the CCRA followed the notification procedure as set out in the act, it was not in dispute that the appellant had not been made aware either of the allegations made against it or of the intention to revoke its registration. Renaissance appealed the CCRA’s decision on two grounds: first, that the decision-maker followed an incorrect procedure in reaching the decision and, second, that the agency had no valid reason for revoking registration.

The Federal Court of Appeal was unanimous in allowing the appeal and setting aside the CCRA’s decision. Both Justice Heald, writing for himself, and Justices Cowan and Pratte spoke in general terms of the agency’s failure to comply with the requirements of natural justice and procedural fairness. All shared a concern that the record on which the agency based its decision contained no input from the appellant. Reform proposals following Renaissance have focused on the requirement that the CCRA adhere to some process capable of producing a record sufficient for an organization to launch an appeal.

Few appeals from deregistrations have reached the Court. An appeal must be filed within 30 days of mailing of the notice to revoke. This is an extremely short time within which to decide to appeal. Additionally, appeals go directly to the Federal Court of Appeal, which does not normally hear testimony but relies instead on the written record, which may or may not reflect the true dimensions of the dispute.

The CCRA also has the authority to “annul” a charity – section 149.1 (15) refers to registration that has been “revoked, annulled or terminated” (emphasis added). While the act sets out no procedure for “annulment,” the agency has taken the position that annulment would apply where the registration of a charity in the first place was in error and should not have occurred. There would also appear to be no statutory right of appeal from an annulment, leading Drache to conclude, based on communications from the CCRA, that the procedure would be used only where all parties consent.

Public Access and Bureaucratic Transparency

In addition to ensuring the rights of applicants and charities to procedural fairness and appeals, the CCRA values openness. It is one of the most “transparent” departments in the federal civil service. It regularly issues interpretation bulletins, information circulars, pamphlets and brochures intended to clarify matters ranging from the definition of a charity to instructions on how to file an annual return.

The Charities Division also has responsibility for ensuring public access to information about charities. As I indicated above, all chari-
ties must file an information return, a portion of which the CCRA is authorized to make available to the public. The CCRA also provides a list of all registered charities, which may be downloaded from its website. Finally, the division, to accompany its move to more spacious accommodations in Ottawa, plans for a new charities library for public use.101

The most significant and concrete evidence of the CCRA’s commitment to transparency, however, has come in the form of a statutory amendment. In 1998, Parliament added section 241(3.2) to the Income Tax Act: “Registered Charities. An official may provide to any person the following taxpayer information relating to a charity that at any time was a registered charity: (a) a copy of the charity’s governing documents, including its statement of purpose; (b) any information provided in prescribed form to the Minister by the charity on applying for registration under this Act; (c) the names of the persons who at any time were the charity’s directors and the periods during which they were its directors; (d) a copy of the notification of the charity’s registration, including any conditions and warnings; and (e) if the registration of the charity has been revoked, a copy of any letter sent by or on behalf of the Minister to the charity relating to the grounds for the revocation.”102

Transparency, however, comes at a cost. The additional information now required in the annual T3010 lengthened the form from four to thirteen pages for 1998 – a substantial burden for small charities staffed entirely by volunteers. The division, for the first time ever, sent officials across the country to explain the new forms and facilitate compliance.103

Despite these efforts, some of the most basic and important information regarding the regulation of charities remains inaccessible to the public. The OLRC’s report recommended, for example, that the financial reports of registered charities, currently unavailable to the public, be made available (except information that would identify particular donors) and that for charities with revenues or net assets in excess of $250,000 be required to have their financial disclosures audited.

While the new “transparency” provisions make available to the public “notification” of any charity’s registration and, in the case of deregistration, a letter setting out the “grounds for the revocation,” members of the public still are not permitted to learn why any particular organization was or was not granted registration. As this is arguably the most significant determination that the CCRA makes in its supervision of charities, this area, in my view, poses the greatest risk of unfairness and therefore has the greatest need for transparency.
Conclusion

It is now well-established that the ccra owes prospective and current charities a duty of fairness in the administrative process. Clearly, it has gone to considerable lengths to ensure fairness and transparency in its treatment of charitable organizations. However, the very structure of the regulation of charities impairs its ability to meet the most basic tenet of fairness — namely, allowing an affected party to know the case that it has to meet. Because the statute is silent and the case law is ambiguous, the principles and standards that the ccra will apply in any given case are virtually impossible to know in advance. The result — as the examples of the self-help organization, the Church of Scientology, and the Vancouver FreeNet demonstrate — is that the ccra’s attempts to ensure fairness have been unable to remedy the problems in the areas of consistency, coherence, and adaptability that have come to characterize the supervision of charities in Canada.

A Purposive Approach to the Regulation of Charities

In earlier examinations of the ccra’s discretion, I have proposed that reforms should focus not on new procedures and rules to limit the tax administrator, but rather on more explicit ways of linking officials’ inevitable and important judgments to clearly expressed norms and principles. The foundation of such a reform project is the clearer articulation of those norms and principles through the democratic process.

The current system of charities regulation relies largely on litigation to provide guidance and direction to tax officials. The flaws with this system of regulation are many. Litigation leads to uneven, retrospective, and partial solutions to the many regulatory uncertainties that flow from the Income Tax Act. As Drache has observed, “A great many issues which revolve around what is a charity in the Canadian tax context have not been litigated. Therefore, although Revenue Canada may have views on such diverse issues as day-care centres, ethnic cultural centres or homes for single women vis-à-vis whether they will be registered as charities, no explicit case-law exists. This being the case, even a full understanding of the case law will not guarantee a full understanding of what Revenue Canada considers to be charitable.” Litigation also may mean that the ability to obtain legal representation becomes a prerequisite to charitable registration. This imposes an added and often onerous burden on appli-
It also may contribute to the erosion of the CCRA’s credibility in the charitable sector.

Additionally, relying on litigation and the common law as a means of developing the law of charity precludes any substantial reconsideration or reform of this area of the law. As the Supreme Court itself acknowledged in *Vancouver Minority Women*, it would be inappropriate for the courts to initiate any substantial change to the law of charities. For the majority, Justice Iacobucci stated, “As I have said, it would not be appropriate for the Court, in the context of this case, to adopt an entirely new definition of charity. If this is to be done, especially for the purposes of the *ITA* [Income Tax Act], the specifics of the desired approach will be for Parliament to decide.”

After looking at some proposals for reform from interested groups and academics, Justice Iacobucci returned to this theme: “However, I reiterate that, even though some substantial change in the law of charity would be desirable and welcome at this time, any such change must be left to Parliament. To be sure, the proposed change would amount to much more than merely a clarification of the law; indeed, it would likely result in a major expansion of the range of organizations that can qualify as charitable both under the *ITA* and otherwise. This would go well beyond the type of incremental change to the common law which this Court has been prepared to make.”

However, not everyone is enthusiastic about Parliament’s heeding the Court’s call to legislative reform of the law of charities. The OLRC’s report, among other documents, has argued on conceptual grounds against codifying a definition of “charity.” The report draws the distinction between the process of determining the content of the “good” (i.e., politics and the legislative process) and that of determining the “good” itself (i.e., law and the judicial process), and it concludes that the meaning of “charity” for the purpose of a system of registration is an example of the latter type of determination. In my view, this distinction is untenable. In the context of charities, the content of charitable activity is inextricably bound up with its value. This is, moreover, appropriate in my view. We do not provide a public benefit to universities as such; rather, we provide a public benefit to universities because they teach students a set of skills and information that is socially valued and viewed as an important public good. Unless those who supervise charities pay attention to the content of an organization’s activities, the meaning of charity becomes emptied of meaning and purpose. What then, taxpayers should ask, are we subsidizing?

Contrary to the OLRC’s approach, the Voluntary Sector Roundtable, founded by a coalition of major, national non-profit organizations, has
recommended that a definition be codified on democratic grounds.\textsuperscript{110} The panellists summarized their argument as follows: “The determination of which organizations get the full benefits of the tax system should signal to all Canadians what we most value in civil society when it comes to providing a tax based incentive for giving. This determination and the assignment of privileges and responsibilities associated with it is inherently political, involving trade-offs in values and in expenditures. It therefore should be decided by legislatures, not by the courts.”\textsuperscript{111}

I reach the same conclusion as the panellists, but for additional reasons. In my view, a statutory definition of charitable activity may be desirable not only from the standpoint of political efficacy but also in order to ensure consistency, coherence, and adaptability in the treatment of charities and prospective charities by the \textsc{ccra}.

The so-called common law definition of charitable activities has its origins in a statutory instrument – England’s Charitable Uses Act, 1601, or the Statute of Elizabeth. Statutes, their administration and the common law are necessarily intertwined. The Statute of Elizabeth arose because lack of clarity in the common law prevented the coherent administration of charitable trusts at a time of urgent pressures on the public purse; our situation is virtually identical today. Passage of the Statute of Elizabeth signalled the beginning rather than the end of the process of clarifying the categories of charity. Its norms and principles had to be interpreted, applied, and adapted to changing legal and factual circumstances. For example, \textit{Pemsel} sought to adapt them to the income tax. By the same token, any attempt to refine and rearticulate them today will invariably give rise to gaps and ambiguities, to which the common law is uniquely well-suited to respond on a case-by-case basis. The goal of codifying the definition of charitable activities should therefore achieve not specificity but purpose. In other words, a definition need not list all the activities that will be accepted as charitable, but rather should provide those who supervise the registration of charities with the ability to understand and apply the distinction between organizations worthy of charitable status and those that are not. This is the crucial function that the common law, to date, has been unable to perform satisfactorily.

To return again to consistency, coherence, and adaptability, the difference between the common law and statutory approaches becomes evident. In explaining its preliminary negative assessment of the self-help organization’s application, as we saw above, the \textsc{ccra} set out the four categories recognized in the common law definition of charity and added that “court have not recognized that self-help activity is charitable” because it lacks the necessary element of “altruism.” To the
Church of Scientology, the ccra’s preliminary objections revolved around the absence of worship for a deity. In the Vancouver FreeNet case, the agency puzzled over whether the internet is or is not akin to a library. These three explanations provide the affected organizations with no chance for a meaningful understanding of the distinction between what is and is not a charity.

In denying the Vancouver Society of Immigrant and Visible Minority Women’s application for registration, the minister stated: “the courts have not considered women simply by virtue of their gender or racial origin to be in special need of charitable relief. Decisions in common law, upon which the law of charities evolves, originate in the courts; the Department only administers the law as it now stands” (emphasis added).

Clear statutory categories would set out the principles underlying acceptable charitable activities; indicate criteria to distinguish charitable from non-charitable activities; and provide examples of acceptable and unacceptable charitable activities. Such a schema would enable tax officials to justify their determinations according to principles and norms reflecting a social and political consensus. Where such justifications were challenged, these criteria would provide a basis on which the courts could refine and clarify legislative intentions. This proposed legislative mechanism could not provide perfect clarity of purpose, but it would replace the purposive vacuum that currently undermines the regulation of charities in Canada.

An example of such an approach is the Income Tax Act’s definition of “non-profit organization”: “a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit” (section 149.1[1]). This definition discloses a general principle (i.e., that a non-profit organization must be operated for a purpose other than profit), examples to illustrate the principle (for example, social welfare and civic improvement), and examples of a distinguishable category of organizations (i.e., charities).

In the case of our self-help organization, such a statutory definition of charity would help clarify the scope of altruism. Is altruism about helping others, or does it also include helping others help themselves? Additionally, self-help organizations, among others, could make submissions to the parliamentary drafters of new legislation on why their activities ought to be charitable. A statutory definition of charity would enable the ccra to approach this and other contexts on a consistent basis.
Similarly, in the case of the Church of Scientology, a statutory definition of charity would probably provide the **ccra** with a purposive definition of charity on which to grant or refuse religious organizations registration (and thus avoid distinctions between worship and non-worship of a deity). Finally, in the Vancouver FreeNet case, a statutory definition would probably deal with the internet and other analogous technologies. What we need is a clear, principled, and practical definition, based on wide and comprehensive consultation with the charitable sector, as well as the participation of the federal and provincial administrative bodies charged with supervising charities.

There are many ways in which a purposive approach may alter administrative practices. For example, it would lead to decisions that correspond and are *seen* to correspond to the broader norms underlying the tax expenditure for charities. This can happen only with dissemination of some form of reasons for decision-making in the registration process. Under the recent amendments to the act, the **ccra** will make available to the public both notification of registration for any registered charity and any correspondence setting out the grounds for a revocation of registration. Reasons why a particular group was or was not granted registration, however, remain unavailable. The Supreme Court recently has recognized a common law duty to provide written reasons in certain circumstances.\footnote{113}

There are clear benefits attaching to the dissemination of reasons. First and foremost, it increases the likelihood of consistency within an administrative agency. As one text on administrative law concludes, “[M]aking a statement of reasons for decisions available to other members of the agency is likely to improve the quality of the subsequent decisions of the agency. Decision makers who are able to consult the reasons for decision in previous cases are likely to interpret their enabling legislation, and to exercise their discretionary powers in a more consistent and informed way. Relating the interpretation of a statute, or the exercise of statutory discretion, in a particular case to the broader framework of agency policies and jurisprudence can help to promote administrative rationality and consistency, and to avoid purposeless “drift.”\footnote{114}

Concerns about privacy, efficiency, delay, and cost may influence the kind of reasons produced but should not impair the goal of demonstrating a consistent and principled adherence to the norms and rules articulated in a statutory definition of charity.

Finally, a purposive approach should render the government more accountable for the subsidy provided to the charitable sector and more responsive to its needs. It may lead to periodic and independent reviews of the administration of charities; to creation of a charities ombudsman,
an office to assist smaller charities in registering and reporting; and to regular reporting of the value of the tax expenditure directed to the charitable sector. Without such an approach, the ccra will undoubtedly continue to muddle through and improve administrative practices on an incremental and ad hoc basis. However, this is unlikely to satisfy either the charitable sector or the Canadian public in the long run.

CONCLUSION

Charity, in the final analysis, is about the public good. When an organization receives charitable status, this reflects a social consensus that its activities are beneficial to our society. In this sense, the supervision of charities necessarily involves the regulation of virtue. The commissioners assigned to administer the Statute of Elizabeth recognized this duty and had statutory guidance to assist them. The ccra’s officials, by contrast, do not see their task as determining the “equities” of the Income Tax Act, and, whether as a cause or as a result of that fact, the act provides few or no “equities” for them to enforce. Therefore, the first step towards improving the supervision of charities in Canada, in my view, is clarifying the purpose to which the support and regulation of charities aims. This exercise in turn will provide the missing normative basis for the supervision of charities in Canada.

In this chapter, I have concluded that articulating the purpose of the tax benefit for charities through a definition of charitable activities in the Income Tax Act will give rise to more consistent, more coherent, and more flexible exercise of administrative discretion. This situation in turn will lead to enhanced accountability by the government for the vast tax expenditure provided to charities and to more focused judicial decisions interpreting the scope of this tax expenditure. Greater clarity and accountability in the supervision of charities, in my view, will lead to a more vibrant and engaged charitable sector and ultimately to greater public confidence in the regulation of charities in Canada. In short, a clear, purposive mandate makes both the regulation of virtue and the virtues of regulation possible.

NOTES

I would like to thank the participants in the Conference on Charity and Charities Law held at the University of Toronto, 22–23 January 1999, for providing a stimulating and thought-provoking forum in which to develop the ideas contained here. I am especially grateful to Jim Phillips and to Carl Juneau of the ccra’s Charities Division for reading and commenting on an earlier draft.
Provinces also have a significant regulatory role in the conduct of charities, especially in providing the legal structures within which charities may operate, in protecting charities against fraud, and in enforcing charitable fiduciary relationships. See Ontario Law Reform Commission, Report on the Law of Charities (Toronto: OLRC, 1996), 385–92.

These figures are drawn from T1 statistics; see Sharpe, chapter 2 in this volume.


See the discussion of the value placed on the charitable sector in OLRC, Report, 17.

A thorough review of these and other rationales for subsidizing and regulating charities appears in ibid., chap. 9.


This is not an argument restricted to the charitable setting. Elsewhere, I have set out the importance of elucidating the purpose(s) of the tax system generally as a condition for the effective administration of the anti-avoidance provisions in the Income Tax Act. See L. Sossin, “Redistributing Democracy: Authority, Discretion and the Possibility of Engagement in the Welfare State,” Ottawa Law Review 26 (1994), 1.


See Legislation Tabled to Create Canada Customs and Revenue Agency (Bill C-43). Revenue Canada, Customs, Excise and Taxation, News Release 25tc/98 (Ottawa, 4 June 1998).

13 Preamble to the Charitable Uses Act, 1601 (43 Eliz. I, c. 4). The categories include the 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, seaboards, and highways; the education and preferment of orphans; the relief of 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.” The list was not intended to be exhaustive or exclusive. See Jones, *History of the Law of Charity*, 26.

14 The main prong of this response was the Poor Relief Act, 39 Eliz. I., c. 3.

15 As Jones emphasizes, “Public benefit was the key to the statute, and the relief of poverty its principal manifestation”: *History of the Law of Charity*, 27. For a discussion of this purpose, see ibid., 16–22.


17 39 Geo. 3, c. 13 (UK).

18 Commencing with the outbreak of the First World War, the federal government offered tax incentives for charities supporting the war effort. The rationale appears to have been that such tax expenditures would reduce the obligation on the part of the government to finance humanitarian activities associated with the war. In the case of the first Canadian Patriotic Fund Act, 1914, 5 Geo. 5, c. 8 (Can.), this consisted of supporting soldiers through the Red Cross and similar humanitarian relief endeavours. The original Income War Tax Act exempted “religious, charitable, agricultural and educational institutions”: see Income War Tax Act, 1917, 7–8 Geo 5, c. 28 (Can.), s. 5(d). All subsequent versions of income tax legislation retained this exemption in one form or another. For an excellent summary of the history of charitable regulation, see olrc, *Report*, 249–86. See also R.M. Bird and M.W. Bucovetsky, *Canadian Tax Reform and Private Philanthropy* (Toronto: Canadian Tax Foundation, 1976).

19 See An Act to Amend the Income War Tax Act, 1917, 1920, 10–11 Geo. 5, c. 49 (Can.), s. 5.


21 See An Act to Amend the Income War Tax Act, sc 1930, c. 24, s. 3.

22 See War Charities Act, 1939, sc 1939 (2d sess.), c. 10. A registration scheme set up to accompany the tax incentive for charities during the Second World War was repealed shortly after the end of the war. See An Act to Amend the Income War Tax Act, sc 1939 (2nd Sess.), c. 6.
23 See Act to amend the Income Tax Act, sc 1966–67, c. 47, s. 3.
24 These allegations implied that the charitable organizations were either complicitous or responsible for the abuse. See the summary of the parliamentary debates on this issue in Olrc, Report, 262–3.
25 Technically, the discretion provided in the act is ministerial. In this sense, it is not the CCRA nor particular officials in it that are authorized to make determinations; rather the minister is so authorized (and, by regulation, delegates certain kinds of authority to other officials in the ministry). In this chapter, however, I refer to decisions by variously “tax officials,” “Revenue Canada officials,” “Revenue Canada,” and “the Minister.”
26 See section 110(8) of the act. See also Revenue Canada, Information Circular 80-10R “Registered Charities: Operating a Registered Charity” (17 Dec. 1985).
27 Because private foundations are usually funded by a single family or organization, they are additionally subject to restrictions regarding non-arm’s-length transactions between the foundation and its founders.
29 See L.I.U.N.A. Local 527 Members’ Training Trust Fund v. Canada, [1992] 2 CTC 2410 (TCC). However, an organization may always insert into its objects some activity or purpose that will disqualify it as a charity. In this fashion, organizations that have no interest in issuing tax receipts for donations can effectively avoid the added scrutiny that charitable registration may bring. See A. Drache, Canadian Taxation of Charities and Donations (Toronto: Carswell, 1994), 15–22.
30 See 1976–77, c. 4, s. 60(3)-(5).
31 See Drache, Canadian Taxation of Charities, 1–24.
32 Charitable Uses Act, 1601 (43 Eliz. I, c. 4).
33 [1896] AC 531 (HL)
34 See Olrc, Report, 167–8. See also Human Life International in Canada Inc. v. Minister of National Revenue, [1998] 3 FC 202 at 214: “One may observe in passing that that statute [of Elizabeth] does not purport to give an exhaustive definition of charity nor was that its purpose, and one may well question its relevance to Canadian society some four centuries later. This Court has however been obliged to develop principles appropriate for Canada particularly with respect to the open-ended fourth category of ‘purposes beneficial to the community’ and it is this jurisprudence to which we must give primary consideration. It remains, nevertheless, an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts” (emphasis added).
35 See, for example, Native Communications Society of B.C. v. M.N.R., [1986] 3 FC 471 at 478 (CA), per Stone, JA.
Revenue Canada used to make this test explicit in Information Circular 77-14. However, in 80-1oR, which superseded it, there is no mention of the *Pemsel* categories or of any other basis on which “charitable activities” will be defined. However, ccra, Charities Division, *Employee Handbook* (May 1997), states, “It is still recognized that, in order to be charitable at law, a purpose must fall within one of [Pemsel]’s four heads of charity” (45).

37 See *Re Laidlaw Foundation* (1984), 48 or (2nd) 5,49 at 582 (Div. Ct), per Southey, J.

38 See *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, [1999] 1 SCR 10 at 107, in which Justice Iacobucci cited the following passage from *R. v. Salituro*, [1991] 3 SCR 65, at 670: “Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law ... The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.” See also Iacobucci, J., 135.

39 See Phillips, chapter 7 in this volume.


41 *Vancouver Minority Women*, 135.

42 See section 149.1(1)(6)(a) of the act. See also *Alberta Institute on Mental Retardation v. The Queen*, [1987] 2 CTC 70 (FCA.), leave to appeal to SCC denied 87 NR note (SCC). For further discussion, see Davis, chapter 15 in this volume.


44 Whether this purposive vacuum is created by a legislative void or by a failure on the part of the courts, particularly the Federal Court of Appeal, to elucidate the purposes of the charitable subsidy remains an open question. For a discussion of this question, see Phillips, chapter 7 in this volume.


46 These figures come from correspondence from the ccra dated 2 July 1998, on file with the author.

47 I draw these figures from Charities Division, *Employee Handbook*, 33.

48 For more on these jurisdictional boundaries, see olrc, *Report*, 1–19.

This list appears in a draft brochure issued by the ccra entitled “Registered Charities: Operating outside Canada.” This list includes: a charity registered under the act; a Canadian amateur athletic association registered under the act; a national arts service organization registered under the act; a housing corporation resident in Canada and exempt from tax under Part I of the act because of paragraph 149.1(I); a municipality in Canada; the United Nations or an agency thereof; a university outside Canada that ordinarily includes students from Canada (listed in Schedule VIII); a charitable organization outside Canada to which Her Majesty in Right of Canada has made a gift during the taxpayer’s taxation year or the 12 months immediately preceding that taxation year; and Her Majesty in Right of Canada or of a province.

This apparent inconsistency may have resulted from a range of factors, including differences in objectives and in constituting documents. It could also result from the “grandparenting” of charities registered prior to 1977, discussed above. Thus a significant number of charities registered that would not qualify today. Organizations that are identical to registered charities may well be denied registration.


On this point, Drache observed, “I mean, what they’re saying is if it looks okay to us, we’re going to register it, no matter what it is, and if it doesn’t look okay to us, we’re not going to register it”: ibid., A6.


Vancouver FreeNet, 118.


Charities Division, Employee Handbook, 33.

(1985), 17 DLR (4th) 308 (FCA); leave to appeal to scc refused 87 nr note (scc).

Scarborough Legal Services, 323.
In this case, the Supreme Court held that a duty of procedural fairness does not apply to the exercise of purely “legislative functions” by government.

Scarborough Legal Services, 317.

[1983] 1 FC 860 (CA).

Scarborough Legal Services, 313

See section 172(4) of the act.

ccra correspondence dated 2 July 1998. Very few of these appeals result in decisions from the Federal Court of Appeal. According to Jim Phillips, since the 1970s, the Federal Court of Appeal has decided seventeen appeals from a denial of registration (see Phillips, chapter 7 in this volume). Thus, the majority of appeals commenced by unsuccessful applicants presumably are settled or abandoned.

Drache, Canadian Taxation of Charities, 6–13. It would appear that an incorporated charity must be represented by a lawyer should it seek judicial review of an adverse decision, even if it is impecunious: see IAM Institute of Applied Methodology v. Canada, [1991] 1 CTC 226 (FCTD).

See a brief discussion of these decisions in Drache, Canadian Taxation of Charities, 6–12.

See Phillips, chapter 7 in this volume.

Ibid.

See olrc, Report, 292, n18, noting criticism of the appeals procedures from both academic and judicial commentators.

Ibid, 341. The option of a more “robust internal administrative procedure within Revenue Canada” was also considered. The Tax Court reduced administrative costs and increased fairness, openness, and the ability to ensure a proper record. The olrc further recommended that the appeal to the Tax Court would not be available only for adverse decisions but also for cases where no decision had been reached within 180 days, which would be deemed a refusal of registration.


See section 149.1(14).

See ccra, “Guide to Charity Information Return”; see also Drache, Canadian Taxation of Charities, chap. 7.


Audits differ in scope, but most would involve independent verification of the key information provided on an organization’s annual filings and disclosures. Pursuant to sections 250(2) and (4) and Regulation 5800(1)(d–g), all registered charities must have available sufficient
records to allow verification of donation receipts issued, income received, and disbursements made. The ccra publishes a pamphlet explaining the audit process to registered charities. See T4118 Auditing Registered Charities, which can be located at www.rc.gc.ca/E/pub/gd/t4118w/3305e.w51.html. Charitable organizations are not required to file audited financial statements, though the Carter Commission and others have recommended this requirement, at least for larger charitable ones. See olrc, Report, 264.

86 Assuming that an organization becomes a “registered charity,” it must complete and file annually the Registered Charity Information Return (form T3010). Section I asks for details on how the charity is accomplishing its charitable goals. Based on these filings, the ccra will target certain organizations for an audit.

87 ccra correspondence dated 2 July 1998.

88 See Charities Division, Employee Handbook, Table 6.

89 See Auditor General Report, 1990, 265; and olrc, Report, 312.

90 See Charities Division, Employee Handbook, Table 7.

91 Ibid., 34.

92 See sections 188(1) and (2) of the act. In such cases, the fair market is valued as of 120 days prior to the date on which the notice of the minister’s intention to deregister was mailed.

93 Renaissance International, 864. Pursuant to this notification, the revocation would become effective when the notice is published in the Canada Gazette, which must be at least 30 days after the date the notification letter was mailed: see section 168 of the act.

94 The evidence indicated that the director had noticed a Globe and Mail article that cast doubt on Renaissance’s charitable status: see Renaissance International, 869.

95 Justice Pratte concluded in his analysis of the act: “I have concluded after much hesitation that, contrary to what was argued by counsel for the respondent, the provisions of the Income Tax Act do not impliedly relieve the Minister from the duty to comply with the rules of natural justice and procedural fairness before sending a notice pursuant to subsection 168(1). On the contrary, those provisions, as I read them, rather suggest that the Minister, before sending the notice, must first give to the person or persons concerned a reasonable opportunity to answer the allegations made against them”: ibid., 866.

96 See olrc, Report, 340.

97 According to Phillips, only three decisions by the Federal Court of Appeal have resulted from appeals of deregistration: see Phillips, chapter 7 of this volume.

98 An annulment, see Drache, Canadian Taxation of Charities, 6–20.

99 Ibid.
The Department of National Revenue initiated a program in 1970 to provide interpretation bulletins and information circulars to the public. See Revenue Canada, Information Circular No. 70-1, “Announcements, Information Circulars, and Interpretation Bulletins,” 25 Aug. 1970. Interpretation bulletins are often written in technical language and tailored to the tax practitioner (lawyers, accountants, and financial advisers). Even more specialized technical explanations routinely accompany the Department of Finance’s amendments to the Income Tax Act. The department has issued well over 500 interpretation bulletins since 1970, typically revealing its interpretation of a specific section or area of the act. These guidelines do not have the force of law, but they serve to structure the exercise of administration discretion and guarantee at least a measure of uniformity and predictability in application of the act. It is a principle of administrative law that an administrative body may not bind itself to or fetter its discretion by non-statutory rules. See J.M. Evans, *de Smith’s Judicial Review of Administrative Action*, 4th ed. (London: Stevens & Son, 1980), 311–17.

While interpretation bulletins clarify the department’s interpretive judgments in particular areas of the act, information circulars are typically more general and oriented to procedure. They usually concern a certain class of taxpayer or realm of tax administration and tend to deal more with policy. Even more informal are pamphlets and brochures that offer general information to a large class of taxpayers, such as charities that engage in foreign operations. Additionally, when a new publication is contemplated, a draft is usually circulated for public comment: see, for example, a draft of the forthcoming brochure “Registered Charities: Operating outside Canada,” available online at www.rc.gc.ca/E/pub/

Finally, the Charities Division of the ccra publishes a newsletter that regularly updates registered charities on new developments in legal interpretations and administrative practices. These publications provide practical and relevant guidance to the charitable sector and suggest the sense of balance and fairness that the division seeks to convey in its judgments. Typically, it provides examples of what would and would not be acceptable practice for charities.

See remarks by Carl Juneau, acting director, Charities Division, in *Canadian Not-for-Profit News* 5, no. 11 (Nov. 1997), 84. The division’s move is not yet complete, and it is housed in two locations.

Section 241(3.2) was added by sc 1998, c. 19, s. 65(1).

This information was provided by Jayne Bell, Charities Division, ccra, in a telephone conversation on 1 October 1998.

See L. Sossin, “Revenue, Legitimacy and Ideology: The Politics of Canadian Tax Administration,” PhD dissertation, University of Toronto,


When an organization is told that its activities may be “charitable” in the popular sense but not in the legal sense because a court has so determined, it may have no alternative but to obtain legal assistance. For smaller bodies, this may foreclose the possibility of responding adequately to a negative decision. A 1994 study revealed that almost half of all charities in Canada have annual revenues of less than $50,000 and that 38 per cent of all charities are run entirely by volunteers and have no full-time staff. See Sharpe, chapter 2 in this volume.

Vancouver Minority Women, 135.

Ibid., 137.


Helping Canadians Help Canadians, 31. The panellists believe that flexibility could be preserved by having the statutory definition “reviewed” every 10 years.

Vancouver Minority Women, 88, 90.


The last fifteen years has witnessed significant changes in the way in which charitable contributions by individuals are treated under the Canadian Income Tax Act. In 1984, an optional standard deduction of $100, which taxpayers could claim irrespective of the amount that they actually contributed to charities, was repealed. In the same year, rules governing the taxation year in which charitable contributions could be deducted were relaxed, permitting taxpayers to claim amounts up to five years after the year of the gift. More recently, amendments have increased the maximum limit on charitable gifts eligible for tax assistance from 20 per cent of the taxpayer’s annual income to 50 per cent for 1996 and 75 per cent for 1997 and subsequent taxation years and reduced the taxable amount of any gain on charitable gifts of certain publicly traded securities made after 18 February 1997 and before 2002 from three-quarters of the gain to three-eighths.

The most significant change, however, involves the conversion in 1988 of what had previously been a deduction for charitable contributions, whereby the value of the tax benefit depended on the donor’s level of income, into a tax credit, under which the value of this benefit depends on the total amount of charitable contributions claimed in the particular taxation year. As a result of this amendment, Canada has become the only developed country that recognizes charitable contributions by individuals in the form of a tax credit rather than a deduction.

This chapter evaluates the merits of this policy change and the structure of the Canadian charitable contributions tax credit in the light of
alternative possible rationales for the recognition of these gifts in computing the amount of tax payable under an income tax. The first section reviews the history of Canadian income tax provisions regarding charitable contributions by individuals and explains the structure of the current tax credit and related provisions governing the tax treatment of charitable contributions by individuals. The second section examines four possible rationales and related tax designs for the recognition of these charitable gifts in computing the amount of tax payable under an income tax, rejecting the views that recognition is necessary to define income or reward altruism, but accepting the arguments that tax assistance may have a useful role to play in promoting pluralism by encouraging donations. The third section offers brief conclusions on the current Canadian tax credit in light of the rationales and design characteristics examined in the second.

HISTORY AND STRUCTURE

Although the Canadian income tax currently recognizes charitable contributions in the form of a credit against basic tax otherwise payable, not a deduction in computing taxable income, the basic structure of the credit and other provisions relating to charitable contributions dates back to 1930, when the Income War Tax Act was amended by the addition of a deduction for charitable donations. This part of the chapter examines the history of tax relief for charitable contributions in order to explain the current scheme of the act.

Deduction

When Canada adopted its first income tax in 1917, the act contained a limited deduction for “amounts paid by the taxpayer during the year to the Patriotic and Canadian Red Cross Funds, and other patriotic and war funds approved by the Minister.” While this provision was repealed in 1920, a more general deduction was adopted in 1930, at which time a provision was introduced allowing taxpayers to deduct “... not more than ten per centum of the net taxable income of any taxpayer which has been actually paid by way of donation within the taxation period to, and receipted for as such by, 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.” Based on this provision, therefore, taxpayers could deduct receipted donations to qualifying “charitable organizations” up to an annual maximum of 10 per cent of their net taxable income, com-
puted after deducting various costs of earning income and other personal amounts such as medical expenses and allowances for dependants. While subsequent amendments imposed a registration requirement on charitable organizations, the deduction itself changed little until its conversion to a tax credit in 1988. Indeed, the credit itself continues to contain an income-related ceiling on the extent to which charitable contributions qualify for the credit.

Notwithstanding six printed pages of parliamentary debate, most of which centred on the kinds of organizations donations to which would qualify for the deduction, there was remarkably little discussion of the purpose for which the deduction was introduced. Referring to comments by Leader of the Opposition R.B. Bennett, however, one commentator concludes that “it was thought that the deduction would encourage wealthy taxpayers to contribute to ‘useful, philanthropic and religious purposes’ and that such contributions were laudable and deserving of encouragement in this fashion.”

In the United States, where a similar deduction was adopted in 1917, four years after the introduction of its income tax in 1913, the deduction was designed to offset any discouragement to charitable contributions that might be caused by high tax rates needed to finance American participation in the First World War. Similarly, as the Royal Commission on Dominion–Provincial Relations observed in 1940, the Canadian deduction was intended “to promote munificence or at least to protect charities against the indirect consequence of high rates of income tax on those who sustain them.”

More generally, the Canadian deduction, which was enacted in the early years of the Great Depression at a time when governments were increasingly pressed to provide relief to the unemployed, was a method whereby the federal government could “be seen to be assisting those in need” without itself assuming responsibility for relief or becoming involved in what was at the time a sphere of exclusive provincial jurisdiction. In this respect, as another commentator has observed, the Canadian deduction was introduced in order to promote “public policy and the general good of the community.”

Qualifying Gifts

Among the early questions considered by Canadian courts in applying the deduction was whether it applied to gifts in kind as well as cash donations. In Gaudin v. M.N.R., where the taxpayer sold a house to a church for use as a rectory for half its value and claimed the other half as a charitable deduction, the court held that the contri-
bution was not a “gift” within the meaning of then paragraph 27(1)(a) of the Income Tax Act of 1952. Although the decision appeared to suggest that gifts-in-kind were not deductible, a subsequent decision, in which a taxpayer was permitted to claim a deduction in respect of the value of a yacht donated to the University of Toronto, confirmed that the deduction applied to gifts in kind. This result is now reflected in the language of subsection 118.1(1), which refers to “the fair market value” of gifts of various kinds.

As an administrative practice, however, the Canada Customs and Revenue Agency (ccra) does not recognize gifts-in-kind of nominal value, such as gifts of used clothing of little value. As well, gifts of services are not recognized as charitable contributions within the meaning of the act.

Among tax theorists, non-recognition of gifts of services as charitable contributions is often explained on the basis that the donor obtains an implicit deduction through the non-taxation of the “imputed income” associated with the gift of services. Indeed, to the extent that a person who contributes services is not subject to tax on the value of these services, while a person who works to earn the income to make a cash contribution is subject to tax on the earnings, it is often argued that a deduction for cash donations is essential to achieving equity between these two taxpayers. More persuasively, it might be argued that non-recognition of the value of gifts of services is consistent with non-taxation of imputed income from self-performed services. However, to the extent that tax assistance is designed to encourage charitable gifts and subsidize charitable activities, there seems little reason to limit this incentive to gifts of cash and property while excluding gifts of services.

Optional Standard Deduction

The first significant amendment to the charitable deduction involved the enactment of an optional standard deduction in 1957, whereby taxpayers could claim a $100 deduction without submitting receipts in lieu of specific deductions for charitable contributions, medical expenses (which were deductible only to the extent that they exceeded 3 per cent of the taxpayer’s net income), and union, professional, or similar dues. The reason for this standard deduction, which had been adopted in the United States in 1944, was to limit paperwork both for the revenue authorities and for taxpayers. According to the minister of finance: “From a survey it has been established that for more than half of income taxpayers the combined claims for charitable contributions, medical expenses, union dues
and professional fees of employees amount to less than $100 a year per taxpayer. In the light of this situation it is proposed to allow to every taxpayer the option of taking what might be called a ‘standard deduction’ of $100 a year in lieu of claiming actual deductions for the items just mentioned. Of course if the claims for these four items add up to more than $100 the taxpayer may obtain a deduction in the future just as he has in the past. For the majority of taxpayers, however, the standard deduction will prove more advantageous and will, for all concerned, eliminate handling millions of pieces of paper.”

While the optional standard deduction certainly reduced paperwork, it also eliminated any tax incentive to make charitable contributions that, together with qualifying medical expenses and union, professional, or similar dues, did not exceed $100 per year – since this amount could be claimed in any event without submission of receipts. Indeed, although the effect of the optional standard deduction on amounts actually contributed to charities is uncertain, the percentage of taxfilers claiming charitable deductions decreased dramatically after 1956. According to one study published in 1976, total charitable donations of $284 million claimed in 1956, the year before the optional standard deduction was introduced, exceeded the total of itemized deductions for charitable contributions in each of the years from 1966 to 1971. According to another study published in 1984, after increasing from 1951 to 1956, average amounts claimed as charitable donations as a percentage of average disposable personal income declined steadily from 1.9 per cent in 1956 to 0.54 per cent in 1974 before rising slightly to 0.61 per cent in 1980. Similarly, the percentage of taxfilers claiming charitable donations decreased from 24.5 per cent in 1961 to 9.2 per cent in 1977 before recovering slightly to 10.3 per cent in 1980.

Although it is unlikely that these declines were fully attributable to the optional standard deduction, which might have been expected to have its largest effects immediately after its enactment in 1956 and again in 1965 when the deduction was amended to exclude union, professional, or similar dues, and a diminishing impact thereafter as the real value of the $100 deduction was eroded by inflation, the measure was sharply criticized by advocates for voluntary organizations on the grounds that it lessened tax incentives to contribute to charities. When the Royal Commission on Taxation (Carter Commission) delivered its final report in 1966, it accepted the optional standard deduction as “an administrative concession” but recommended that its dollar value be reduced. According to the commission: “if an optional standard deduction, that is, a minimum amount
that could be claimed instead of listing the actual donations and irrespective of the amount of actual donations, were too large, ... it would ... have a perverse incentive effect, discouraging those people from making moderate donations who could claim the standard deduction in any case. For this reason, we recommend that an optional standard deduction should be retained for charitable donations, but that it should be limited in size to the minimum amount necessary to achieve the desired administrative savings.” 48 For this purpose, it recommended that “[a]n amount of not more than $50 would appear to be appropriate.” 49

Although the federal government did not act on the Carter Commission’s recommendation when it amended the Income Tax Act in 1972, the optional standard deduction was eventually repealed effective for 1984 and subsequent taxation years. 50 According to documents released with the federal budget of 1983: “Representatives of voluntary associations have expressed concern that this deduction reduces the tax incentive for charitable giving since the deduction is not directly related to actual amounts given. The budget proposal to remove the $100 standard deduction for 1984 and subsequent taxation years responds to this concern.” 51 Not surprisingly, the percentage of taxfilers claiming charitable contributions increased substantially following this amendment, rising from 10.3 per cent in 1980 to 25.7 per cent in 1984. 52 Since, then, however, the incidence of taxfilers claiming charitable contributions has remained relatively constant, rising to 29.5 per cent in 1990 and declining thereafter to 26.9 per cent in 1996. 53 As for dollar amounts, aggregate amounts claimed as charitable donations increased from slightly more than $1 billion in 1980 to more than $1.8 billion in 1984. 54 Since the aggregate amount claimed under the optional standard deduction was roughly $1.3 billion in 1980, 55 however, the information provided by this latter statistic is of limited value. More generally, whether the elimination of the optional standard deduction has had any impact on actual charitable contributions, as opposed to charitable contributions claimed for tax purposes, is uncertain.

Gifts of Appreciated Property

Among the many amendments to the Income Tax Act following the Carter Report, perhaps the most significant was the introduction of a tax on capital gains, one-half of which became subject to tax beginning in 1972. 56 This inclusion rate was increased to two-thirds in 1988 and 1989 and to three-quarters for 1990 and subsequent taxation years but was reduced by the most recent federal budget to two-thirds for dis-
positions of capital property made after 27 February 2000. In addition to this measure, the federal government adopted the Carter Commission’s recommendation to impose a tax on accrued gains when property is transferred by way of gift or at death by enacting provisions deeming the donor to have received proceeds equal to the fair market value of the property so transferred. As a result, while taxpayers making a charitable donation of capital property that had appreciated in value would be able to deduct the appreciated value of the property at the time of the gift, they would also have to include half the amount of any accrued gain in computing their income in the year of the gift. Thus, for example, if a taxpayer acquired a capital asset for $1,000 and gave it to a charity when its value had risen to $5,000, the taxpayer would be able to claim a deduction for $3,000 (subject to the annual ceiling on deductible contributions) but be required to include $2,000 (half the gain) in computing his or her income for the year, resulting in a net deduction of $3,000.

Even before the amendments were enacted, concerns were expressed about imposing a tax on gifts of appreciated property to charities. According to Commons and Senate committees examining the proposed legislation, gifts of appreciated property should be non-taxable but deductible only to the extent of their cost to the donor, not of their market value at the time of the gift. In the above example, therefore, the taxpayer would not be taxable on any part of the $4,000 accrued gain but would be able to deduct only $1,000, representing the cost of the asset to the taxpayer.

Although the federal government initially rejected these proposals, the act was amended in 1972, shortly after the new rules came into effect, to allow taxpayers making a gift of appreciated property to elect any amount between the cost of the property and its fair market value at the time of the gift, which would apply to determining both the amount of any gain recognized for tax and the amount deductible as a charitable contribution. As a result, the taxpayer in the above example could select any amount between $1,000 and $5,000, which would determine both the proceeds for the computation of any gain and the amount of the available deduction. Since only half the gain was taxable while the elected amount was fully deductible, however, the only circumstance in which it was not more advantageous to designate the full fair market value was where the ability to claim the deduction was limited by the 20 per cent ceiling. Indeed, by including only one half of the capital gain in computing the donors income while permitting a deduction for the fair market value of the gift, the Canadian tax system created an added incentive for charitable donations of appreciated property.
While this amendment was consistent with the recommendations of the Commons and Senate committees, it did not go as far as others, most notably representatives from private museums, recommended. Emphasizing the need to compete for donations with American museums, these representatives suggested that gifts of appreciated property should be non-taxable and fully deductible based on their fair market value at the time of the gift, as is the case in the United States. On this basis, the taxpayer in the above example would be able to deduct the $5,000 value of the asset at the time of the gift (subject to the annual ceiling), without having to include any portion of the $4,000 accrued gain, resulting in a net deduction of $5,000.

Among U.S. tax theorists, the exemption from capital gains tax on gifts of appreciated property has been widely criticized. According to William Andrews, for example, the additional “subsidy or artificial inducement” for philanthropic giving that is provided by this rule is both arbitrary and inequitable: “The magnitude of the subsidy is a function of the amount of unrealized appreciation in relation to the basis of the property and the taxpayer’s rates of tax, being the greatest for taxpayers in highest brackets and with the most appreciation.” Moreover, as Richard Goode explains, this approach “tempts some donors to place excessive values on their gifts, occasionally with the collusion of recipient institutions.”

Notwithstanding these criticisms, subsequent amendments have introduced further incentives in Canada for gifts of appreciated property under limited circumstances. In 1977, the act was amended to exempt from capital gains tax any gain on a gift to designated institutions of “cultural property” certified under the Cultural Property Export and Import Act. In this circumstance, therefore, the taxpayer in the above example would be able to deduct the full $5,000 value of the asset at the time of the gift (subject to the annual ceiling), without including any portion of the $4,000 accrued gain, resulting in a net deduction of $5,000. Although statistics on the value and frequency of donations of cultural property do not appear to be available, the extremely favourable tax treatment for gifts of this kind might be expected to produce a significant increase in donations of this kind. Indeed, by providing such favourable tax treatment, this provision has encouraged a number of questionable transactions, in which taxpayers (often with the encouragement of the recipient institution) have acquired property at a relatively low cost and donated this property immediately thereafter at an assessed value well in excess of its acquisition price, resulting in a net after-tax profit to the donor. In response to these kinds of transactions, the
Income Tax Act was subsequently amended to authorize the Canadian Cultural Property Export Review Board to determine the fair market value of cultural gifts for which recognition is sought under the Income Tax Act.\textsuperscript{72}

More recently, the act was amended effective 19 February 1997 to reduce the taxable amount of any gain on charitable gifts of certain publicly traded securities from three-quarters of the gain to three-eighths.\textsuperscript{73} According to supplementary information released with the federal budget of 1997, this provision, which has a built-in “sunset clause” according to which the low inclusion rate applies only on gifts made before the year 2002, was enacted to “provide a level of tax assistance for donations of eligible capital property that is comparable to that in the U.S.”\textsuperscript{74} in order to “facilitate the transfer of appreciated capital property to charities to help them respond to the needs of Canadians.”\textsuperscript{75} Statistics are as yet unavailable to indicate the extent to which this measure has affected amounts donated to charities and amounts claimed for income tax purposes. By limiting this added incentive to publicly-traded securities, however, this measure may at least provide the secure basis for valuation that appears to have been lacking with respect to gifts of cultural property.

\textit{Credit}

In the 1970s and 1980s, tax theorists increasingly came to question the merits of a deduction for charitable contributions.\textsuperscript{76} Noting that a deduction is worth more to a high-income taxpayer under a progressive income tax than it is to a low-income taxpayer and is worthless to persons whose income is too low to pay any tax, critics argued that the deduction was a regressive method of encouraging charitable donations which provided a greater level of encouragement to charities favoured by high-income donors than low-income donors.\textsuperscript{77}

In 1971, for example, when federal income tax rates ranged from 16 per cent on taxable income between $500 and $2,000 to 80 per cent on taxable income exceeding $400,000,\textsuperscript{78} the value of the deduction for a dollar donated to charity was nil for taxpayers with taxable incomes of less than $500, 16 cents for taxpayers with taxable incomes between $500 and $2,000, and 80 cents for taxpayers with taxable incomes exceeding $400,000. As a result, the net after-tax cost of donating a dollar to charity was 20 cents for taxpayers with taxable incomes exceeding $400,000, 84 cents for taxpayers with taxable incomes between $500 and $2,000, and one dollar for taxpayers with taxable incomes less than $500. While top marginal rates of federal income tax were reduced significantly to 47 per cent in 1972,\textsuperscript{79} 43 per
cent in 1977,\textsuperscript{80} and 34 per cent in 1982,\textsuperscript{81} the difference between these rates and the lowest marginal rate, which was 6 per cent from 1976 to 1987,\textsuperscript{82} continued to imply a regressive distribution of federal tax assistance to charitable giving.\textsuperscript{83}

To the extent that high- and low-income taxpayers differ in the kinds of charities to which they contribute, moreover, this regressivity implied a greater level of encouragement to charities favoured by high-income donors than to those favoured by low-income donors. Indeed, studies indicating that high-income taxpayers tend to devote a larger proportion of charitable donations to hospitals, higher education, and culture (for example, museums and the arts), while low-income taxpayers are more likely to favour religious organizations and social welfare agencies,\textsuperscript{84} suggest that a deduction provides greater encouragement for contributions to charitable organizations devoted to health, higher education, and culture than it does for contributions to charitable organizations devoted to religion and social welfare.

As an alternative to the deduction for charitable contributions, these critics suggested that charitable donations be encouraged by matching grants paid directly to the charitable organization\textsuperscript{85} or by tax credits the value of which would depend not on the income level of the donor but on the total amount of charitable contributions claimed in the particular taxation year.\textsuperscript{86} According to one study published in 1977, when federal income tax rates ranged from 6 per cent on the first $500 of taxable income to 43 per cent on taxable income exceeding $60,000,\textsuperscript{87} a flat-rate credit set at 28 per cent of each taxpayer’s charitable donations claimed in each year would result in a similar level of aggregate donations and a similar level of federal assistance to charitable donations in terms of forgone federal tax revenues.\textsuperscript{88} As the authors noted, however, “such a rate would imply a shift in real income from high-income to low-income taxpayers, and probably a shift in the destination of donations.”\textsuperscript{89} More specifically, they explained: “Tax-credit schemes, since they can be expected to increase the percentage of charitable donations coming from low-income groups, will also increase the percentage going to religious institutions. Charitable organizations now heavily dependent on the wealthy would face difficult times under such a regime.”\textsuperscript{90}

Although any reduction in tax incentives for high-income taxpayers could be eliminated by setting the rate of the credit equal to the top marginal rate (47 per cent in 1977), this would provide even further encouragement to charitable contributions by low-income taxpayers and significantly increase the cost of the credit in terms of forgone tax revenues.\textsuperscript{91}
When the Carter Commission examined the charitable deduction in 1966, it acknowledged the deduction’s regressivity, explaining that “[i]f equity were the only consideration, we would propose a system of credits for charitable donations” so that “[t]he tax concession would ... be related only to the size of the donation and would not also depend upon the income of the taxpayer.”

Emphasizing that “private philanthropy performs a worthwhile social purpose,” however, the commission feared that “[t]he credit approach would ... tend to stifle charitable giving by upper income individuals and families” – implicitly assuming that any credit would be set at a rate lower than the top marginal rate.

Consequently, it concluded, “the fundamental feature of the present system, the deduction of charitable donations from income, should be continued.”

Although the commission did not explain why the risk of a reduction in charitable giving by “upper income individuals and families” justified the continuation of a deduction which it itself considered inequitable, two arguments might be imagined. First, to the extent that high-income taxpayers are more responsive to changes in the after-tax cost of charitable giving than low-income taxpayers, any reduction in the rate of tax assistance for high-income taxpayers would be expected to cause a greater reduction in charitable donations than any increase in charitable donations induced by a comparable increase in the rate of tax assistance for low-income taxpayers. On this basis, a deduction for charitable donations might be characterized as a more efficient method of encouraging charitable contributions than a credit. Indeed, a Canadian study published in 1986 estimated that a revenue-neutral tax credit of 29 per cent would cause aggregate donations to fall by $10 million, while a high-rate credit of 50 per cent would increase aggregate donations by only $6 million at a cost in terms of forgone revenue of $422 million.

Alternatively, to the extent that charitable organizations which tend to be favoured by high-income taxpayers (i.e., hospitals, universities, and cultural institutions) are considered more deserving of public support than those favoured by low-income taxpayers (religious organizations and social welfare agencies), a deduction might be preferred to a credit on the grounds that it better targets tax assistance to these preferred organizations. As Faye Woodman has argued: “Simply, an argument may be made that some institutions are richer contributors to the social, cultural, and intellectual mosaic than others. Hence, it may be possible to justify a system of deduction that is skewed in the direction of the favourite charities of upper-income taxpayers.” Indeed, Woodman speculates that this was the key...
reason why the Carter Commission recommended that the deduction for charitable contributions be retained.\textsuperscript{99}

Whatever reason or reasons caused the Carter Commission to recommend the continuation of the charitable deduction in 1966, the federal government ceased to be convinced by these arguments in 1987, at which time it announced that it would amend the Income Tax Act by converting the deduction to a credit designed to “increase fairness by basing tax assistance on the amount given, regardless of the income level of the donor.”\textsuperscript{100} Implicitly accepting the commission’s concern that a credit might “stifle charitable giving by upper income individuals and families,” however, the government also indicated that the credit would be designed to “maintain a substantial incentive for charitable giving.”\textsuperscript{101} Since a flat-rate credit could achieve this result only at a substantially increased cost in terms of forgone tax revenues,\textsuperscript{102} moreover, the government settled on a “two-tier credit” equal to the lowest marginal rate of tax on charitable donations claimed up to $250\textsuperscript{103} and the highest marginal rate of tax on amounts exceeding this threshold.\textsuperscript{104} According to supplementary information accompanying the White Paper in which these reforms were announced, the proposed amendment was expected to cost an additional $80 million per year, increasing the aggregate level of federal tax assistance for charitable giving to $900 million in 1988.\textsuperscript{105}

When the act was amended for 1988 and subsequent taxation years, the rates of federal income tax were set at 17 per cent on taxable income up to $27,500, 26 per cent on taxable income up to $55,000, and 29 per cent on taxable income exceeding $55,000.\textsuperscript{106} As a result, under the formula enacted in 1988,\textsuperscript{107} the credit for charitable contributions equalled 17 per cent on the first $250 claimed for the year and 29 per cent on amounts exceeding $250. For 1994 and subsequent taxation years, the credit equalled 17 per cent on the first $200 claimed for the year and 29 per cent on amounts exceeding $200. When federal surtaxes and provincial taxes are taken into account, the credit is equal to roughly 25 per cent on amounts up to $200 and 50 per cent on amounts over this threshold. As a result, the after-tax cost of charitable gifts is approximately 75 cents for each dollar up to $200 and 50 cents for each dollar over $200.

For taxpayers paying tax at the lowest marginal rate, therefore, the credit functions as a deduction for annual contributions up to $200 and an additional incentive on charitable gifts exceeding these amounts. For taxpayers paying tax at the top marginal rate, the credit provides roughly half the assistance as a deduction for annual charitable gifts up to $200\textsuperscript{108} but functions as a deduction for annual amounts exceeding $200. For taxpayers paying tax at the 26 per cent
rate, the credit is worth less than a deduction for amounts up to $200 but more than a deduction for amounts over this threshold.

Although the two-tier credit appears to be more equitable than the deduction, providing an “equal reward for effort in giving by donors in all income brackets in contrast to the ... deduction system which provides greater reward for those in higher income brackets,” its distributional impact differs little from a deduction. On the contrary, since average contributions by low-income taxpayers are less than or not much greater than the $200 threshold, while average contributions by high-income taxpayers greatly exceed the $200 threshold, a significant proportion of charitable donations by low-income taxpayers is creditable at the 17 per cent rate, whereas most charitable contributions by high-income taxpayers are creditable at the 29 per cent rate. As Table 13.1 indicates, while the credit is on average somewhat more valuable than a deduction for claimants with incomes of $10,000 to $30,000 and slightly less valuable than a deduction for claimants with incomes of $60,000 to $100,000, its impact is indistinguishable from a deduction for claimants with incomes less than $10,000 and largely indistinguishable from a deduction for claimants with incomes from $30,000 to $60,000 or over $100,000. Since the credit is not refundable, moreover, it provides no assistance to charitable giving by taxpayers whose income is too low to pay any tax.

While these figures indicate that the two-tier credit has, as the government intended, preserved “a substantial incentive for charitable giving,” particularly among high-income contributors, they also demonstrate that the level of tax assistance for charitable contributions continues to depend on the income level of the donor, as it did

<table>
<thead>
<tr>
<th>Income class ($)</th>
<th>Average donation for tax-filers claiming donations ($)</th>
<th>Average credit ($)*</th>
<th>Average effective rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–10,000</td>
<td>196.12</td>
<td>33.34</td>
<td>17.0</td>
</tr>
<tr>
<td>10,000–30,000</td>
<td>468.08</td>
<td>111.74</td>
<td>23.9</td>
</tr>
<tr>
<td>30,000–60,000</td>
<td>617.80</td>
<td>155.16</td>
<td>25.1</td>
</tr>
<tr>
<td>60,000–100,000</td>
<td>939.23</td>
<td>248.38</td>
<td>26.4</td>
</tr>
<tr>
<td>100,000–250,000</td>
<td>2,177.05</td>
<td>607.34</td>
<td>27.9</td>
</tr>
<tr>
<td>Over 250,000</td>
<td>11,165.00</td>
<td>3,123.85</td>
<td>28.8</td>
</tr>
</tbody>
</table>

*Calculated as 17 per cent of the first $200 of average donations and 29 per cent of amounts exceeding $200.

Source: Calculated from figures in CCRA, Taxation Statistics on Individuals: 1996 Tax Year (Ottawa: Minister of Supply and Services, 1998).
under the deduction. Indeed, one commentator has suggested that the two-tier credit can be regarded as "a deduction masquerading as a credit."¹¹⁰ Not surprisingly, therefore, the conversion from a deduction to a credit appears to have had little impact on the value of charitable donations claimed for tax purposes, which increased only slightly from 1987 to 1988.¹¹¹ Nor does it seem to have had much effect on the distribution of charitable donations by income group, which, as Table 13.2 demonstrates, changed very little from 1987 to 1988.

By adopting a two-tier credit rather than a flat-rate credit set at the top marginal rate of tax, however, the government was able to minimize the cost of the credit in terms of forgone revenues. In fact, despite the government’s expectation that tax assistance for charitable giving would increase to roughly $900 million in 1988,¹¹² its figures indicate that the cost of the charitable credit was $670 million in 1988, $750 million in 1989, $815 million in 1990, $845 million in 1991, $865 million in 1992, $880 million in 1993, and $900 million only in 1994.¹¹³ By lowering marginal rates of tax and the associated rates of the charitable credit, therefore, the 1987 tax reforms actually reduced federal assistance for charitable giving.

Ceilings

As I indicated above, the deduction for charitable contributions enacted in 1930 was limited to a maximum of 10 per cent of the tax-

Table 13.2 Distribution of tax-filers and charitable donations claimed, by income class, 1987, 1988

<table>
<thead>
<tr>
<th>Income class ($)</th>
<th>Percentage of tax-filers</th>
<th>Percentage of charitable donations claimed</th>
<th>Percentage of tax-filers</th>
<th>Percentage of charitable donations claimed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–10,000</td>
<td>31.3</td>
<td>2.5</td>
<td>29.1</td>
<td>2.2</td>
</tr>
<tr>
<td>10,000–30,000</td>
<td>44.6</td>
<td>33.4</td>
<td>44.6</td>
<td>31.1</td>
</tr>
<tr>
<td>30,000–60,000</td>
<td>21.0</td>
<td>37.7</td>
<td>22.3</td>
<td>37.8</td>
</tr>
<tr>
<td>60,000–100,000</td>
<td>2.3</td>
<td>10.9</td>
<td>3.0</td>
<td>12.0</td>
</tr>
<tr>
<td>100,000–250,000</td>
<td>0.7</td>
<td>8.5</td>
<td>0.9</td>
<td>8.9</td>
</tr>
<tr>
<td>Over 250,000</td>
<td>0.11</td>
<td>7.0</td>
<td>0.18</td>
<td>8.1</td>
</tr>
</tbody>
</table>

Source: Calculated from figures in Revenue Canada, Taxation Statistics on Individuals: 1987 Tax Year (Ottawa: Minister of Supply and Services, 1989); and Revenue Canada, Taxation Statistics on Individuals: 1988 Tax Year (Ottawa: Minister of Supply and Services, 1990).
pater’s income for the year. Although the U.S. provision on which the Canadian deduction was based contained a ceiling of 15 per cent of the taxpayer’s income, a 10 per cent ceiling was selected in Canada on the basis that “it originated in the Mosaic Law and the practice of tithing.”

Although this rationale for a maximum ceiling on deductible contributions might suggest that contributions up to 10 per cent of a taxpayers annual income were regarded as in some sense obligatory and therefore meriting a deduction, while those exceeding 10 per cent were considered discretionary and non-deductible, a more prevalent explanation involves the concern that without an income-related ceiling high-income taxpayers might be able to eliminate their tax liabilities altogether by making substantial charitable gifts. As one American commentator has observed, although this outcome might be considered acceptable to the extent that donors contribute to various public purposes qualifying for a charitable deduction (or credit), it would enable large donors to avoid any obligation to support the cost of public goods and services determined by the elected representatives of the community as a whole. Thus, he explains, the existence of a maximum limit on deductible (or creditable) contributions in any year “reflects a judgment ... that although charitable contributions are important and should be encouraged, every taxpayer should bear part of the burden of supporting the government.” In this respect, he adds, a maximum limit on deductible (or creditable) contributions functions as “a mechanism to effectuate an appropriately limited consumer sovereignty over social service expenditures.”

Consistent with the second rationale for a maximum limit on deductible (or creditable) donations, the ceilings in Canada and the United States have increased significantly since the deductions were enacted – well beyond the 10 per cent ratio established by the Mosaic law and the practice of tithing. In the United States, the ceiling was increased to 50 per cent, where it currently remains. In Canada, the general ceiling was increased to 20 per cent in 1972, 50 per cent in 1996, and 75 per cent for 1997 and subsequent taxation years. In each case, these amendments were designed to “encourage larger donations to charitable organizations.”

In addition to these increases in the general ceiling, as a further incentive for charitable giving, specific categories of gifts have been subject to higher limits or no limit at all. In 1939, for example, when the general ceiling on deductible contributions was 10 per cent of the donor’s income, a separate ceiling of 50 per cent was enacted for donations to “any patriotic organization or institution in Canada
which hereafter receives the written approval of the Secretary of State of the Dominion of Canada.” In 1941, this ceiling was replaced by a lower ceiling of 40 per cent applicable for donations to “the fund registered under *The War Charities Act, 1939*, under the name of The Canadian War Services Fund,” provided that such funds were subscribed on before 7 April 1941 and paid before 31 December 1941. Thereafter, the ceiling for all gifts returned to 10 per cent of the donor’s income for the year.

In 1950, however, gifts to the federal government were made subject to a separate deduction without any limit. For 1968 and subsequent taxation years, this provision was amended to include gifts to a province as well as the federal government. In 1977, when the act was amended to exclude gifts of cultural property from capital gains tax, a separate deduction without any ceiling was also enacted for gifts of this kind. Although these specific deductions were repealed when the general deduction was converted to a credit in 1988, the credit for these two categories of gifts continues to be available without any income-related limit. In 1995, moreover, the act was amended yet again to exclude certain gifts of ecologically sensitive land from any income-related ceiling. Noting that the value of such land “may often be high relative to the donor’s income,” supplementary information accompanying the announced reform indicated that the ceiling for gifts of this kind would be eliminated in order to “further encourage the conservation and protection of Canada’s environmental heritage.”

In addition to these three categories of gifts, recent amendments have also increased the ceiling on creditable gifts to include the full amount of taxable capital gains from gifts of appreciated capital property and increased the ceiling on creditable gifts made in the last two years of an individual’s life to the individual’s income for each of these two years. While the former amendment is intended “to ensure that taxpayers making gifts of appreciated capital are able to claim tax credits for the full amount of the capital gain,” the latter amendment is designed to “facilitate planned giving in circumstances where the gift is large relative to income in the last two years of life.” In more general terms, these amendments were enacted in order to eliminate “a serious impediment to charitable giving.” Both in the form of gifts of appreciated property, the tax on which might otherwise exceed the allowable credit, and by way of bequests or legacies, which can be quite large relative to one’s income in the last year of one’s life.

These increased ceilings, as well as recent increases in the general limit, appear to have had a dramatic impact on donations claimed for
According to one recent study, the average inflation-adjusted value of donations claimed by taxfilers claiming charitable donations increased sharply from 1995 to 1996 by 11.7 per cent, after remaining relatively constant during the period 1984–95. More significantly, as Table 13.3 indicates, increases in the maximum donations that can be claimed in a taxation year have altered the distribution of charitable donations claimed by income class, significantly increasing the percentage of charitable donations claimed by the highest income groups. The extent to which this increase reflects a change in actual donations or merely in donations claimed for tax purposes remains to be determined.

**Carryovers**

To the extent that the Income Tax Act limited deductions (and later credits) for charitable donations to a maximum percentage of the donor’s annual income, it was inevitable that individuals with little or no taxable income and individuals who had made substantial charitable contributions relative to their annual incomes were likely to face limits on the extent to which otherwise eligible gifts would be recognized for tax purposes. In 1957, therefore, when the ceiling was 10 per cent of the donor’s income for the year, the act was amended to permit taxpayers whose charitable donations were not deductible in the year of the gift to carry the excess forward to the next taxation year. According to one commentator, this amendment was “a minor con-
cession to supporters of the universities who were urging an increase in the 10 per cent limit.”\footnote{144} Although the ceiling was increased to 20 per cent in 1972, the act was further amended in 1981 to allow taxpayers whose charitable contributions were not deductible in the year of the gift to carry the excess forward for five years.\footnote{145}

In 1984, this carryover was amended yet again to allow taxpayers to claim charitable contributions in the year of the gift or any of the following five taxation years, even if the amount could have been deducted in the year when the gift was made.\footnote{146} This amendment, which radically transformed the carryover from a “minor concession” to lessen the impact of the income-related ceiling into an instrument for tax planning, has enabled taxpayers to aggregate the value of their contributions over a six-year period and claim the value of these gifts in the year or years in which it is most advantageous to do so. Under the deduction available prior to 1988, the optimal strategy turned on the year in which the taxpayer expected to pay tax at the highest marginal rate, in which year the deduction would be most valuable, subject to the offsetting cost associated with a delay in obtaining the value of the deduction. Since the enactment of the two-tier credit in 1988, the optimal strategy may involve “bunching” claims in a single year, since taxpayers can thereby maximize the amount eligible for a credit at the higher rate, subject again to the offsetting cost associated with a delay in obtaining the value of the credit.

Although the impact of this optional carryforward on amounts actually donated to charities is uncertain, this amendment is likely to have decreased the incidence of claims made in any particular year and increased the average size of claims when made. In addition, by making the value of the deduction or credit depend not only on the amount contributed but also on the year in which the amount is claimed, this carryover has significantly increased the planning and record-keeping costs that taxpayers are likely to face in claiming charitable contributions for tax purposes. While at least some carryforward seems justified so long as the charitable credit is non-refundable, it is unclear why this carryforward should be optional and not limited to the amount of any excess that cannot be claimed in the taxation year of the gift.

In addition to this carryforward, the Income Tax Act also authorizes a limited carryback for charitable gifts made in the year of the taxpayer’s death. According to subsection 118.1(4) of the act,\footnote{147} a gift made in the year in which the taxpayer dies may be claimed in the year preceding the taxpayer’s death to the extent that it is not claimed in the year of the taxpayer’s death. Since charitable gifts can be quite large relative to one’s income in the last year of one’s life, and obvi-
ously cannot be spread out over subsequent years, it seems reasonable to allow a limited carryback in this circumstance.

*Transfer of Receipts*

According to the act, charitable contributions must be claimed by the individual who makes the gift. As an administrative practice, however, the CCRA allows either spouse to claim charitable donations made by either spouse or their dependants, regardless of the name to whom the receipt is issued. As a result, as Arthur Drache explains, “[u]nder the deduction system, it always made sense for the higher income spouse to claim the donations for tax purposes.” Likewise, under the two-tier credit introduced in 1988, it makes sense for one spouse to claim charitable contributions made by both spouses and their dependants in order to maximize the amount eligible for a credit at the higher rate.

Since individual members of a family could easily arrange for only one member of the family to make all charitable donations, the CCRA’s administrative practice makes sense as a way of extending the advantages of aggregation to less sophisticated taxpayers who might not adopt this behavioural response. If the credit were converted to a flat rate, however, much of the incentive to transfer receipts would disappear, although it would remain where the income of the actual donor is too low to pay tax or the aggregate amount of the actual donor’s gifts exceeds the income-related ceiling for the year. In any event, the ability to transfer receipts, like the ability to carryover claims from one year to another, is likely to decrease the frequency of claims among taxfilers and increase the average size of claims made by each taxpayer claiming the credit. As a result, statistics indicating that only 26.9 per cent of taxfilers claimed charitable contributions in 1996 cannot be read to suggest that only 26.9 per cent of individuals made charitable donations in 1996. Nor do statistics showing an average donation of $728 among taxfilers claiming charitable contributions in 1996 suggest that these individuals actually contributed an average of $728 to charities in 1996. Whether the CCRA’s administrative practice affects either the frequency or amount of claims or (more importantly) the frequency and amount of charitable donations is uncertain.

**Rationale and Design**

Having examined the history and structure of the Canadian tax credit and related provisions governing the tax treatment of charitable contributions by individuals, I now consider the reasons why these gifts
might be taken into account in computing a taxpayer’s income tax and the resulting manner in which these gifts should be taken into account. This section evaluates four possible rationales for recognizing charitable contributions in the income tax – defining income, rewarding generosity, encouraging donations, and promoting pluralism. It considers possible design characteristics suggested by each of these rationales and develops a conceptual framework to evaluate the Canadian credit.

Defining Income

In computing an individual’s income for the purposes of an income tax, deductions are generally allowed for reasonable expenses that must be incurred in order to produce the income. In computing a taxpayer’s income from a business or property, for example, the Income Tax Act allows taxpayers to deduct outlays or expenses “made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property.”

In addition, income taxes often allow further deductions for involuntary expenses, such as necessary medical expenses, which reduce the taxpayer’s taxable capacity. These deductions ensure that tax burdens are distributed in an equitable manner, consistent with a reasonable measure of each taxpayer’s ability to pay.

In this light, it would appear, provisions recognizing a taxpayer’s charitable contributions cannot be justified as being necessary to the definition of an equitable measure of taxable income but must be explained on the basis of some extrinsic social or economic purpose that the provisions are designed to achieve. Indeed, when the Canadian deduction was introduced in 1930, its apparent purpose was not to ensure that each taxpayer’s ability to pay would be defined in an equitable manner but to “encourage wealthy taxpayers to contribute to ‘useful, philanthropic and religious purposes’” and to promote “public policy and the general good of the community.” Likewise, the design of the two-tier credit and increases in the income-related ceiling for creditable donations were designed to “maintain a substantial incentive for charitable giving” and to “encourage larger donations to charitable organizations.”

Notwithstanding this conclusion, advocates of a deduction for charitable contributions have advanced three reasons why such a deduction should be regarded as a necessary measure for defining taxable income. First, as U.S. tax theorist Boris Bittker has argued, “charitable contributions represent a claim of such a high priority” that they should be regarded as largely involuntary obligations that
should be excluded “in determining the amount of income at the voluntary disposal of the taxpayer in question.” Alternatively, as U.S. tax theorist William Andrews has argued, to the extent that tax burdens are based on the aggregate of a taxpayer’s personal consumption and accumulation, they should not apply to charitable gifts that enter into the consumption of needy recipients (in the case of “alms for the poor”) or provide non-exclusive or public goods and services (in the case of “philanthropy more broadly defined” to include contributions to hospitals, education, and culture). Similarly, as one Canadian commentator has argued: “the tax deduction simply removes the tax penalty which would otherwise result if taxpayers had to pay taxes on income which they had voluntarily chosen not to receive personally but to redirect to registered charities or other qualified donees.” Finally, as Bittker has also argued, a deduction for charitable contributions maintains equity both between individuals who donate non-taxable services to charitable organizations and individuals who earn taxable income from which they make donations of cash or property and between individuals who are able to make charitable gifts of large capital sums, the income from which is not subsequently subject to tax in their hand, and individuals who must make charitable contributions out of income as it is earned.

With respect to the first argument, that charitable donations should be regarded as involuntary obligations, one may respond that whatever sense of obligation may underlie the motive to make charitable gifts is itself a matter of choice and not involuntary in any legal or practical sense. In this respect, as several commentators have observed, charitable contributions can be characterized as a form of consumption expenditure much like any other, which is properly subject to tax. Moreover, while the conception of charitable donations as involuntary obligations may have influenced the original design of the Canadian deduction, which was limited to 10 per cent of the taxpayer’s income in accordance with “the Mosaic law and the practice of tithing,” subsequent amendments increasing the level of this ceiling to 20 per cent, 50 per cent, and now 75 per cent suggest a very different rationale.

With respect to the second argument, that charitable donations are properly taxed in the hands of the recipients, rather than of the donors, for whom the money or property is “no longer available,” one can respond that this conception of the income tax misconstrues both its purpose and its proper scope. As opposed to Andrews’s view that the income tax is intended simply “to divert economic resources away from personal consumption and accumulation” to government
uses,\textsuperscript{170} for example, several tax theorists contend that the income tax is best understood as expressing a social claim to a share of each taxpayer’s annual gains from participation in the market economy.\textsuperscript{171} As a result, while Andrews argues that tax burdens should be allocated according to personal welfare as measured either by the aggregate of a taxpayer’s personal consumption and accumulation\textsuperscript{172} or by personal consumption alone (as he argued in a later article),\textsuperscript{173} advocates of the income tax argue that tax burdens should be allocated according to each taxpayer’s receipts over a specified accounting period, allowing deductions only for the costs of earning this revenue or for involuntary expenses that reduce the taxpayer’s ability to pay.\textsuperscript{174}

From this perspective, it follows, the argument that amounts donated by a taxpayer to charities are not the income of the donor ignores that fact that the donor is legally entitled to these amounts before making the voluntary choice to give to charity. To the extent that the income tax is based on amounts to which taxpayers are legally entitled, therefore, it is simply incorrect to view donations as the income of the recipient rather than of the donor. Indeed, as Bromley himself notes, “taxpayers are giving away their own money.”\textsuperscript{175} If the donation is, in fact, “their own money,” it should be taxed in their hands and paid out of after-tax income, not in the hands of the recipient.\textsuperscript{176}

As for the third argument, that a deduction for charitable contributions is essential to an equitable income tax, one can respond that donors who contribute money out of earned income are not similarly situated to donors to make gifts of services or contribute large capital sums, the subsequent income from which belongs to the charitable organization, not the donor. With respect to donations of services, time devoted to volunteer work may compete not with time devoted to taxable income-earning activities, but with time devoted to non-taxable leisure. More generally, while it is true that donors of services are not subject to tax on the imputed value of these services, this turns not on an implicit deduction for this imputed value, but on a more basic principle against the taxation of imputed income.\textsuperscript{177} Indeed, to the extent that tax assistance is designed to encourage charitable gifts and subsidize charitable activities, it is arguable that it is inequitable for the income tax to recognize donations of cash and property but not gifts of services.\textsuperscript{178}

With respect to donations of capital, it is worth noting that these donations may or may not be used by the recipient organization to derive a regular stream of income. Conversely, smaller donations made out of earned income may be added to the recipient’s capital account to generate future income. As a result, the nature of the gift
to the donor says nothing about its character to the donee. In any event, to the extent that the charitable recipient does use the charitable gift to derive subsequent income, it is clear that this income, unlike the income from which a donor makes annual gifts, is legally that of the charitable organization and no longer that of the donor. Since the donor of the capital gift has parted with his or her entitlement to the income from the capital, while the individual who makes annual donations out of earned income retains the legal right to contribute or not contribute in any year, it is odd to equate the position of the former with that of the latter. Here too, therefore, tax equity does not require a deduction for charitable contributions.

*Rewarding Generosity*

If tax equity does not mandate a deduction for charitable contributions, tax recognition of charitable gifts must be justified, if at all, on the basis of some social or economic policy extrinsic to the equitable definition of taxable income. One such policy might be to reward generosity as a form of virtuous behaviour. Among other arguments for a charitable deduction, for example, Bittker suggests that “something can be said for rewarding activities that in a certain sense are selfless, even if the reward serves no incentive function.” Similarly, Richard Goode has referred to the charitable deduction in the United States as a “reward” for charitable giving.

Although the goal of rewarding charitable donations might justify some method of recognizing the value of these donations in computing the donor’s income tax, it is doubtful whether this recognition would take the form of a deduction, the value of which depends more on the donor’s income than on the donor’s relative generosity. On the contrary, as Paul McDaniel has argued, “if there is to be a reward for charitable giving, the incidence and amount of the reward should bear some rational relationship to the act of charitable giving. The reward should be the same for persons who make a similar sacrifice, however measured.” Indeed, since low-income people who give to charities tend to give a larger portion of their income than do high-income taxpayers, this rationale suggests that a deduction, the value of which increases as the donor’s income rises, has the reward structure backwards.

As opposed to a deduction, therefore, the reward rationale might suggest a credit that diminishes as the donor’s income increases, on the basis that the sacrifice associated with a dollar contributed to charity by a low-income taxpayer is greater than the sacrifice of a one-dollar gift by a high-income taxpayer. Neil Brooks, for example, suggests that a tax credit for charitable contributions “could be set at 30 per cent for
those with incomes over $35,000; 40 per cent for those with incomes from $25,000 to $35,000, and so on, down to those with incomes under $10,000, where the credit might be set at 100 per cent.”

Alternatively, to the extent that the policy objective is to reward individuals based on the proportion of their income contributed to charities, a credit might apply at an increased rate based on the percentage of the donor’s income contributed in each year. On this basis, for example, McDaniel proposed a matching grant for charitable donations rising from 5 per cent of aggregate donations from donors contributing less than 2 per cent of their incomes to charities to 50 per cent of aggregate donations from donors contributing more than 10 per cent of their incomes to charities. Similarly, some commentators have proposed an income-related floor, as opposed to a ceiling, below which charitable contributions would not be recognized for tax purposes. In 1969, for example, the Treasury Department proposed that the charitable deduction in the U.S. Internal Revenue Code be available only for contributions exceeding 3 per cent of the donor’s income. Similarly, the Carter Commission in Canada considered, but rejected, a floor set at 1 per cent of the donor’s income. In addition to targeting the “reward” to the most generous contributors, such a floor might also be expected to reduce administrative costs associated with tax assistance for charitable giving.

However, to the extent that low-income individuals who contribute to charities are able to finance these gifts from accumulated or inherited wealth, one might wonder whether the ratio between donations and income is a satisfactory measure of the donor’s personal “sacrifice.” If the goal is truly to reward individual generosity, therefore, one might imagine a credit based on the ratio between donations and a combined measure of income and wealth. Such a measure, of course, would be difficult to define and even more difficult to administer.

More generally, one might wonder why the tax system should be designed to reward persons for their generosity. Although generosity is undoubtedly worthy of praise, it is not clear that it merits monetary rewards. On the contrary, as critics from different perspectives have observed, to reward generosity through monetary means contradicts the spirit underlying the virtue of generosity, “corrupt[ing] the essential dignity and altruism of a simple gift” and “accentuat[ing] the purely selfish goal of reducing one’s own tax burden.”

**Encouraging Donations**

Another reason to allow taxpayers to claim a charitable deduction or credit is to encourage individuals to make donations to charitable
organizations. As economic analysis suggests, a deduction or credit for charitable gifts increases the donor’s after-tax income from which gifts may be made (the income effect) and decreases the after-tax cost or price of charitable gifts to the donor (the price, or substitution effect). To the extent that charitable giving is what economists refer to as a “normal good,” a decrease in its price will increase the quantity demanded and thus the aggregate level of charitable donations. The higher the rate of the deduction or credit, moreover, the lower the after-tax cost of charitable giving and the greater the encouragement to these kinds of gifts.

The extent to which donors increase the quantity of charitable giving in response to a decrease in its after-tax cost is defined as the “price elasticity” of giving. A negative price elasticity, which is characteristic of a normal good, suggests that donations will increase in response to a decrease in their price. A low price elasticity indicates a slight increase in charitable giving in response to a decrease in its after-tax cost. A high price elasticity suggests that the quantity of charitable donations is highly responsive to changes in the after-tax cost of these gifts. A price elasticity of negative one indicates a corresponding increase in charitable giving in response to a given reduction in its after-tax cost.

Since reductions in the after-tax cost of charitable gifts are financed by forgone tax revenues, the price elasticity of charitable giving measures the cost-effectiveness of the tax incentive (whether a deduction or a credit) as a means of funding charitable organizations. While a price elasticity less then negative one indicates that the cost of the tax incentive in terms of forgone revenues exceeds the resulting increase in charitable donations, a price elasticity greater than negative one implies that the increase in charitable donations attributable to the tax incentive exceeds the resulting reduction in tax revenues.

A voluminous literature has developed over the past thirty years as economists have attempted to obtain reliable estimates of the price elasticity of charitable giving. Although the earliest studies reported relatively low price elasticities of charitable giving, suggesting that tax incentives are a relatively inefficient means of funding charitable organizations, subsequent studies have reported price elasticities greater than negative one, suggesting that tax incentives may be a cost-effective method of funding charitable organizations. More recent studies using different methods have reported much lower estimates of price elasticities, again calling into question the efficiency of tax incentives as a method of funding the charitable sector.

With respect to the relationship between the price elasticity of charitable giving and other variables, early studies concluded that
elasticity increases as income increases, suggesting that a deduction is a more efficient method of encouraging charitable donations than a flat-rate credit. Subsequent studies indicate that low- and middle-income taxpayers may be more responsive to the after-tax cost of charitable giving than previously thought, suggesting that a deduction may be inefficient. Most studies, however, indicate that the price elasticity of charitable giving is much lower for donations to religious organizations than to other charities, suggesting that tax incentives of any kind are an inefficient way to fund religious organizations. Finally, although empirical studies do not appear to have confirmed the result, one might expect that donations of capital property are more responsive to the price of giving than contributions out of annual income, which are more likely to reflect a sense of personal obligation. Indeed, the assumption that donations out of capital are more price elastic than donations out of income appears to explain recent amendments to the Income Tax Act lowering the rate of capital gains tax on gifts of publicly traded securities.

To the extent that tax provisions recognizing charitable gifts are designed to encourage individuals to make charitable donations, economic analysis suggests that the most cost-effective method of so doing is to provide the greatest incentive to those categories of donors and/or donations for which the price elasticity of giving is greatest. While these efficiency considerations may suggest larger incentives for gifts of capital property and smaller incentives for gifts to religious organizations, they challenge the assumption that a deduction is more efficient than a credit in encouraging charitable donations.

Efficiency, of course, is only one goal of tax policy and must be weighed against other important values such as equity. Although it might be more cost-effective to reduce or eliminate tax incentives for gifts to religious organizations, such an approach might be considered inequitable. Likewise, while lower capital gains taxes on gifts of appreciated property may be a cost-effective way to encourage gifts of capital property, this incentive is arguably inequitable and arbitrary, providing the greatest benefit to taxpayers in the highest tax brackets who have property that happens to have appreciated most in value.

Moreover, the use of tax incentives to encourage donations to charitable organizations raises deeper questions as to the kinds of organizations donations to which should be encouraged and why these donations should be encouraged in the first place. As the final section of this chapter suggests, the ultimate rationale and the appropriate design of a tax incentive for charitable donations depend on the answers to these questions.
Among economists, the charitable sector is generally regarded as a provider of quasi-public goods and services – the key characteristics of which are non-rivalness, meaning that enjoyment by one person does not preclude enjoyment by another, and non-excludability, meaning that it is difficult or impossible to exclude a person from enjoying the benefit even if he or she refuses to pay for it.\textsuperscript{210} To the extent that a good or service is relatively non-rival and/or non-excludable, economic analysis suggests that private markets will either oversupply the good or service (in the case of non-rival but excludable goods and services) or undersupply the good or service (in the case of non-excludable goods or services). In either case, the resolution of these “market imperfections” is the main economic justification for the existence of a public sector that provides these public goods and services directly, distributing their costs among individual beneficiaries through taxes and other levies.\textsuperscript{211}

In addition to the public sector, the charitable sector represents another response to the existence of market imperfections, providing goods and services such as culture, education, health, and welfare, the benefits of which tend to be relatively non-rival and/or non-excludable.\textsuperscript{212} Indeed, since charitable organizations enable individuals to select public goods and services according to their own values and preferences, this sector may have distinct advantages over the public sector in providing a mix of such goods and services more compatible with the demands of a diverse society.\textsuperscript{213} Moreover, to the extent that the charitable sector is more innovative and service-oriented than the traditional public sector, it may provide a more efficient vehicle for the delivery of certain public goods and services.\textsuperscript{214}

As well, by relieving the public sector from sole responsibility for providing public goods and services, the charitable sector lessens the fiscal burdens of the public sector,\textsuperscript{215} making it better able to perform the important redistributive, allocative, and stabilization functions that only it can effectively fulfil.\textsuperscript{216} From this perspective, fiscal subsidies to the charitable sector may be justified on the grounds both that they increase the supply of public goods and services provided by this sector to levels reflecting their positive public benefits or “externalities” and that they finance alternative methods of delivering public goods and services vis-à-vis those employed by the traditional public sector.\textsuperscript{217}

If one concludes that fiscal subsidies to the charitable sector are justified, however, it is not obvious why these subsidies should be provided indirectly to charitable donors in the form of credits or deduc-
tions rather than directly to charitable organizations in the form of sustaining grants or matching grants. Indeed, in one of his contributions to this volume, Neil Brooks offers a number of reasons why direct sustaining grants are generally preferable to direct matching grants and direct matching grants generally preferable to indirect tax expenditures as methods of subsidizing the charitable sector, emphasizing that sustaining grants allocate scarce public funds more rationally than matching grants or tax expenditures and are most consistent with the criteria that are normally applied to government funding, such as accountability, controllability, and transparency.

While these arguments support a significant role for direct government grants in financing the voluntary sector, they do not rule out direct matching grants or indirect tax expenditures as additional sources of fiscal support. Indeed, to the extent that these methods of financing allow individuals to select the charitable organizations to which they wish to direct public support without having to obtain the agreement of a political majority, they are preferable to direct sustaining grants in promoting the very diversity and innovation that underlie the charitable sector’s unique advantages to the traditional public sector and are less susceptible to political manipulation by a governing party or coalition. Moreover, although it might be argued that direct matching grants are as consistent with this objective as indirect tax expenditures, the latter are more likely than the former to withstand the kinds of political controls that would undermine their effectiveness in promoting pluralism. As a result, even if tax incentives were a less cost-effective method of subsidizing charitable organizations than direct government grants, it is arguable that the former are preferable to the latter on broader policy grounds. As Harold Hochman and James Rodgers have written: “Public policy involves much more than whether an additional dollar of subsidies can generate more than a dollar of charity.”

As for the design of these tax incentives, the rationale of subsidizing charitable organizations that provide quasi-public goods and services suggests a structure of deductions or credits corresponding to the degree of “publicness” of the particular good or service provided by the charitable organization to which the donation is made. Thus, as one Canadian commentator has suggested: “it would be desirable to disaggregate within an expenditure category and confer different rates of credit on items that contribute different amounts of social benefit. Not all charitable activities, for example, may yield the same degree of social value, in which case a policy of differentiated tax
credits is called for.\textsuperscript{226} Indeed, by exempting capital gains tax on gifts of cultural property,\textsuperscript{227} the Income Tax Act, it might be argued, reflects an implicit judgment that gifts of this type provide greater social benefits than other charitable gifts. A similar distinction may underlie the absence of income-related ceilings on gifts to the Crown, gifts of cultural property, and gifts of ecologically sensitive land.\textsuperscript{228}

With respect to the choice between a deduction and a credit, some have favoured a deduction on the grounds that it provides a larger tax subsidy to charitable organizations favoured by high-income donors (hospitals, higher education, and cultural institutions), which are assumed to be “richer contributors to the social, cultural, and intellectual mosaic” than the charitable organizations most favoured by lower-income donors (religious organizations and social welfare).\textsuperscript{229} Faye Woodman, for example, suggests that a deduction “gives more support to charities that do what government would otherwise have to do” than does a credit.\textsuperscript{230} To the extent that Canada’s two-tier credit operates much like a deduction, the same argument might be made in its favour.

To others, however, it is unlikely that the charitable organizations generally favoured by high-income donors generate greater positive externalities than those more favoured by low-income taxpayers.\textsuperscript{231} On the contrary, as a recent study concludes: “Available evidence ... seems to suggest that the activities of the nonprofit organizations and charities typically supported by the rich do not produce higher valued externalities than do those supported by lower income earners. In fact, the converse may be true: universities and cultural organizations are charities that may be viewed as more ‘local’ than churches and religious organizations. Thus larger giving by high income earners should be discouraged on efficiency grounds, while smaller gifts by low income earners should be encouraged.”\textsuperscript{232} Moreover, although lower-income donors tend to devote a larger share of their donations to religious organizations, U.S. studies suggest that 20 per cent of these funds go to non-sacramental purposes such as social welfare.\textsuperscript{233} In a pluralistic society, moreover, who is to say that the public benefits associated with religious activities are any less than those associated with higher education?\textsuperscript{234}

Indeed, to the extent that pluralism itself is regarded as a public good, it is arguable that a tax incentive for charitable contributions should not discriminate among different activities or organizations, except to deny charitable status to organizations advocating values contrary to those of a free and democratic society.\textsuperscript{235} In any event, where a decision is made to discriminate in favour of certain kinds of charitable activities (such as higher education) and against others
(such as religious organizations), this decision should be transparent, not concealed in the form of a deduction or the current two-tier credit.\textsuperscript{236} As Neil Brooks has written: “If certain activities are to be favoured over others, that choice should be clearly reflected on the face of the instrument chosen.”\textsuperscript{237}

Finally, although a flat-rate credit might be regarded as more compatible with the goal of promoting pluralism than a deduction or the current two-tier credit, it is arguable that such a credit fails to take pluralism as seriously as it might. On the one hand, donors with little or no taxable income obtain no benefit from the non-refundable credit.\textsuperscript{238} On the other hand, high-income donors who are able to contribute more to charities can obtain substantial tax assistance up to whichever income-related ceiling may apply. Though pluralistic in name, therefore, the distribution of charitable donations among income groups may foster a form of “philanthropic paternalism” in which the mix of goods and services provided by the charitable sector is shaped more by an affluent minority than by the community as a whole.

From this perspective, one might wonder whether recent increases in the income-related ceiling for allowable credits from 20 per cent to 50 per cent and now to 75 per cent are fully compatible with the goal of promoting pluralism.\textsuperscript{239} In contrast, a more meaningful kind of pluralism might be fostered by restructuring the charitable credit along the lines of the tax credit for political contributions, which equals three-quarters of the first $100 contributed, half of the next $450, and one-third of the next $600, for a maximum credit of $500 on a contribution of $1,150.\textsuperscript{240} Indeed, a recent Canadian study has considered this possibility, suggesting that “[a]ll gifts, whether to charities or political parties, should in principle be treated on the same basis.”\textsuperscript{241}

CONCLUSION

The design of any income tax provisions taking charitable gifts into account in computing a donor’s tax liability should reflect the underlying purpose of the provisions, which should themselves be rationally related to the purposes of an income tax. This chapter has argued that a deduction for charitable contributions cannot be justified as a necessary provision to define income nor as a means of rewarding generosity, encouraging donations, or promoting pluralism. To the extent that Canada’s current two-tier credit is little more than “a deduction masquerading as a credit,”\textsuperscript{242} moreover, similar criticisms may be directed at this approach as well.
Having concluded that tax equity does not mandate a deduction for charitable contributions, this chapter considered three alternative reasons for recognizing charitable gifts in computing a donor’s tax: rewarding generosity, encouraging donations, and promoting pluralism. While each of these goals suggest various characteristics for the design of specific tax provisions, a combination of the second and third provides the best rationale for a tax incentive for charitable giving.

Taking seriously the goal of promoting pluralism, finally, this chapter has argued that a refundable credit with a declining rate based on the amount claimed in each year would be preferable to a deduction, to the existing two-tier credit, or to a non-refundable flat-rate credit. From this perspective, recent amendments that have increased the annual ceiling on creditable gifts and decreased the rate of capital gains tax on gifts of appreciated property, though consistent with the goal of encouraging donations, are difficult to justify.

NOTES

I am indebted to Elizabeth Moore for research assistance in the preparation of this chapter. Bruce Chapman and Lisa Phillips provided helpful comments on an earlier draft.

1 RSC 1985, c. 1 (5th Supp.) as am.
2 SC 1984, c. 1, sec. 49(2), repealing former paragraph 110(1)(d). At the time of its abolition, this deduction, which was established in 1957, applied to charitable donations and medical expenses. Although it originally included union, professional, and other dues as well, these items were excluded from the standard deduction in 1965. On the history and rationale of this optional standard deduction, see below.
3 SC 1985, c. 45, s. 54(1), amending former paragraphs 110(1)(a), (b), and (b.1). Prior to 1984, individuals could deduct amounts up to five years after the year of the gift only when their net income did not exhaust the deduction. Before 1981, the carryforward was limited to the taxation year immediately following the year of the gift. On the history and structure of these carryovers, see below.
4 See SC 1997, c. 25, s. 26 (increasing the limit to 50 per cent), and SC 1998, c. 19, sec. 22(14) (increasing the limit to 75 per cent). These limits appear in the definition of “total gifts” in section 118.1(1). The limit is increased by 25 per cent of any taxable capital gain or recaptured depreciation resulting from a gift of appreciated property for which tax relief is claimed and rises to 100 per cent for the taxation year of the
donor’s death and the subsequent taxation year. These limits do not apply with respect to qualifying gifts of cultural property designated under the Cultural Property Export and Import Act (“total cultural gifts”), gifts of ecologically sensitive land (“total ecological gifts”), or gifts to the Crown (“total Crown gifts”). On the history and structure of these ceilings, see below.

5 See paragraph 38(a.1), added by sc 1998, c. 19, s. 6. On the history and rationale for this provision, see below. With the reduction in the capital gains inclusion rate in the federal budget of 2000 from three-quarters to two-thirds, the taxable portion of gains on donations of publicly traded securities is reduced from three-eighths to one-third.

6 See former paragraphs 110(1)(a), (b), and (b.1), repealed by sc 1988, c. 55, s. 92. As I explain below, the value of a deduction under an income tax with graduated or progressive rates is worth more to a high-income taxpayer paying tax at a higher marginal rate than to a low-income taxpayer subject to tax at a lower marginal rate.

7 Subsection 118.1(3) (added by sc 1988, c. 55, s. 92) provides for a credit against tax otherwise payable equal to 17 per cent of the first $200 of total gifts for the year and 29 per cent of amounts exceeding $200. To the extent that the credit is not refundable and therefore of no value to donors whose income is such that they pay no tax, its value may also depend on the donor’s level of income.

8 See S. Avrin McLean, R. Kluger, and R. Henrey, Charitable Contributions in the OECD: A Tax Study, (Alexandria, Va: Interphil, 1990). While some countries (such as Sweden) provide no tax recognition for charitable contributions by individuals, most countries (for example, France, Germany, Japan, and the United States) allow for a deduction in computing of the donor’s income for the taxation year in which the contribution was made or certain other taxation years. In Spain, tax credits are available for a limited category of donations of heritage property to the Spanish government, to other public entities, or to qualified recipients.

9 sc 1917, c. 28.

10 See paragraph 5(1)(j) of the Income War Tax Act, sc 1917, c. 28, as amended by sc 1930, c. 24, s. 3.

11 Income War Tax Act, sc 1917, c. 28, paragraph 3(1)(c).

12 sc 1920, c. 49, s. 5.


14 See former paragraph 110(1)(a), enacted by sc 1970–71–72, c. 63, s. 1. The evolution of this ceiling is examined more fully below.

15 See subsection 118.1(3), added by sc 1988, c. 55, s. 92.

16 See paragraph (a) of the definition of “total gifts” in subsection 118.1(1). This ceiling is examined below.
See R. Watson, “Charity and the Canadian Income Tax Act: An Erratic History,” Philanthropist 5, 3 (Spring 1985), 8–9. Although the initial amendment proposed that the deduction be available only for donations to “any church, university, college, school or hospital in Canada,” the more general words “charitable organization” were substituted after concern was expressed that contributions to many worthy causes, such as the Red Cross and community funds such as the Federated Charities of Montreal, would not qualify.


Revenue Act of 1917, 73, s. 1201(2), 40 Stat. 300, 330, permitting a deduction for: “Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of fifteen per centum of the taxpayer’s taxable net income as computed without the benefit of this paragraph.”


55 DTC 385 (TAB).

rsc 1952, c. 148.


See also Interpretation Bulletin IT-297R2, “Gifts in Kind to Charity and Others” (21 March 1990).

Ibid., para. 6.

See Slobodrian v. The Queen, [1998] 3 CTC 2654 (TCC), rejecting the taxpayers claim for a charitable contributions credit in respect of unpaid labour performed for the Université Laval on the grounds that a “gift” involves the transfer of property and services are not property. See also Interpretation Bulletin IT-110R3, “Gifts and Official Donation Receipts” (20 July 1997) para. 15(d): “A gift must involve property. Contributions
of services (that is, time, skills, effort) are not property and do not qualify.” Since the act refers only to “the fair market value of a gift,” not to “the fair market value of a gift of property,” it is questionable whether this result is mandated by the words of the statute.

See, for example, Goode, The Individual Income Tax, 166.


34 The arguments against the taxation of imputed income are both ethical and administrative. First and foremost, to the extent that an income tax applies and should apply to market activities, it is inappropriate to subject non-market activities to tax. Moreover, since non-market activities are extremely difficult to value in any objective manner, it is difficult in practice to include such activities in an income tax. For an excellent presentation of the argument against taxing imputed income, see T. Chancellor, “Imputed Income and the Ideal Income Tax,” Oregon Law Review 67 (1988), 561. For a persuasive response to the argument that a deduction for charitable contributions is necessary to equalize the position of taxpayers who contribute cash and those who contribute services, see M.G. Kelman, “Personal Deductions Revisited: Why They Fit Poorly in an ‘Ideal’ Income Tax and Why They Fit Worse in a Far from Ideal World” Stanford Law Review 31 (1979), 831, 838–44.

35 See, for instance, P.R. McDaniel, “Federal Matching Grants for Charitable Deductions: A Substitute for the Income Tax Deduction,” Tax Law Review 27 (1972), 396, suggesting that “federal assistance could match contributions in services just as it could contributions in cash” if it is desired “to encourage volunteer work.”

36 Although this deduction for medical expenses, like that for charitable contributions, was converted to a credit in 1988, it continues to apply only above a minimum amount, which is currently the lesser of $1,500 (adjusted for inflation after 1988) and 3 per cent of the taxpayer’s income for the year. See subsection 118.2(1) of the act.

37 See paragraph 27(1)(ca) of the Income Tax Act of 1952, added by sc 1957, c. 29, s. 7(3). In 1972, this provision became former paragraph 110(1)(d).


39 Hon. W. Harris, Minister of Finance, Budget Speech (14 March 1957), 13.

40 According to McGregor, “Charitable Contributions,” 449, 62 per cent of returns filed by taxable individuals claimed the standard deduction the
year after it was enacted. By 1980, the proportion had increased to 88.7 per cent. Calculated from Revenue Canada, *On Individuals: 1980 Tax Year* (Ottawa: Minister of Supply and Services, 1982).

41 Bird and Bukovetsky, *Canadian Tax Reform*, 8.


43 Ibid., 11 (Table II).

44 sc 1965, c. 18, s. 7(1), repealing then subparagraph 27(1)(ca)(i).

45 Other more persuasive explanations for a long-term decline in the frequency and amount of charitable donations include an increasing proportion of younger taxpayers, rising personal incomes, and reductions in top marginal tax rates in 1972 and 1977, which increased the after-tax cost of making charitable donations. To the extent that charitable contributions correlate positively with age, increase less rapidly than growth in personal disposable income, and correlate negatively with the cost of giving, these developments are likely to have been as significant as the optional standard deduction, or more so. For a brief summary of empirical studies on the impact of age, income, and the cost of giving on charitable contributions, see K. Scharf, B. Cherniavsky and R. Hogg, *Tax Incentives for Charities in Canada*, Working Paper No. CPRN 03 (Ottawa: Canadian Policy Research Networks, 1997), 11–17.


47 *Report of the Royal Commission on Taxation* (Carter Report), vol. 3 (Ottawa: Queens Printer, 1966) 224. The commission considered, as an alternative to the optional standard deduction, allowing the deduction only on amounts exceeding 1 per cent of the donor’s income. It concluded, however, that “a limit of this nature might tend to restrain charitable giving by upper income taxpayers that the allowance is designed to encourage.”

48 Ibid., 224.

49 Ibid.

50 sc 1984, c. 1, s. 49(2), repealing former paragraph 110(1)(d) of the act.


53 Ibid., 2 (Table 1).

54 See Deeg, “How,” 17 (Table IIIf); and Hall and Bozzo, “Trends,” 2 (Table 1).

55 Calculated from figures presented in Deeg, “How,” 17 (Table IIIf).
See paragraph 38(a) as it read prior to 1988. See also paragraph 39(1)(a), which defines a “capital gain,” and paragraph 40(1)(a), which contains a verbal formula setting out the computation of a gain.


58 Carter Report, 57.

59 See paragraph 69(1)(b), which applies to gifts *inter vivos*, and subsection 70(5), which applies to capital property transferred at death.

60 See Carter Report, 225–60.


62 Ibid., 25.

63 See former subsection 110(2.2), added by sc 1973–74, c. 14, s. 35(7). This rule is now subsection 118.1(6).

64 See Bird and Bucovetsky, *Canadian Tax Reform*, 26.

65 Ibid., 26–8.

66 Ibid., 24–5.


70 See paragraph 39(1)(a)(i.1), added by sc 1974–75–76, c. 50, s. 48, proclaimed in force from 6 September 1977.

71 See, for instance, *Friedberg v. The Queen*, [1989] 1 CTC 274, 89 DTC 5115 (FCTD), where the taxpayer claimed charitable deductions in respect of two textile collections acquired for $67,500 and $12,000 and donated to the Royal Ontario Museum immediately thereafter at average appraised values of $496,175 and $229,437. At a 50 per cent marginal tax rate, the tax value of the resulting deductions would have been roughly $250,000 for the first collection and $115,000 for the second, representing after-tax profit of 270 per cent on the first donation and 86 per cent on the second!

On appeal, [1992] 1 CTC 1, 92 DTC 6031 (FCA), the Federal Court of Appeal questioned the accuracy of the appraised values but found no basis to interfere with the trial judge’s findings of fact in this respect. None the less, although it upheld the taxpayer’s claim for the second donation, it rejected his claim in respect of the first, on the basis that he had never acquired title to the textiles, which were donated directly to the museum, though paid for by the taxpayer.

For other cases in which artworks have been purchased at one price and immediately thereafter donated to a charitable organization at appraised values significantly in excess of their acquisition price, see *Arvisais v. M.N.R.*, [1993] 1 CTC 2473, 93 DTC 506 (TCC); *Ball v. The Queen*, [1993] 2 CTC 2474 (TCC); *Ball v. The Queen*, [1993] 2 CTC 2475...
For a critical evaluation of these kinds of transactions, see H. Erlichman, “Case Comment: Profitable Donations – What Price Culture?” *Philanthropist* 11 (1992), 3. Many of these transactions benefited from the rule under paragraph 46(1)(a) of the Income Tax Act deeming the adjusted cost base of personal-use property to be the greater of $1,000 and the amount otherwise determined. Following the most recent federal budget, this rule will no longer apply to property acquired after 27 February 2000 as “part of an arrangement in which the property is donated as a charitable gift.”

72 See subsection 118.1(10), added by 1994, c. 7, Sch. II (1991, c. 49), s. 88(3), applicable to gifts made after 20 February 1990.

73 See paragraph 38(a.1), added by sc 1998, c. 19, s. 6. Following the most recent federal budget, this inclusion rate is reduced to one-third for donations of publicly-traded shares after 21 February 2000. The budget also proposes to extend this low inclusion rate to qualifying gifts of ecological property.

74 Department of Finance, *Tax Measures: Supplementary Information* (18 Feb. 1997). Although donations of appreciated property are fully exempt from capital gains tax in the United States, the Canadian Department of Finance explained that a three-eighths inclusion rate for these capital gains would produce a comparable level of tax assistance in Canada because the top marginal rate of tax in Canada is greater than that in the United States, resulting in a lower tax price of donations in Canada.


77 See, for example Thirsk, “Giving Credit,” 37: “Under the present system, the price of charitable donations is significantly cheaper if made by a wealthy donor rather than a poor one. Consequently, the charities favoured by the rich receive greater encouragement than those patronized by the poor.” See also Wolkoff, “Proposal,” 286–7.


79 See former subsection 117(1), enacted by *sc 1970–71–72, c. 63, s. 1*.

80 See former subsection 117(5.1), added by *sc 1976–77, c. 10, s. 52(2)*.

81 See former subsection 117(5.2), enacted by *sc 1980–81–82–83, c. 140, s. 75(2)*.

82 See former subsections 117(5), (5.1), and (5.2).

83 Since provincial income taxes increased these marginal rates, the differential in combined federal and provincial tax assistance for charitable giving was greater than that suggested by these federal rates alone.


86 See, for example, Thirsk, “Giving Credit.” If the value of the credit is to depend solely on the amount donated to charity and not on the donor’s income, the credit would have to be refundable so that individuals whose income is too low to pay tax would be eligible for a tax refund on a percentage of the value of their charitable donations. See Brooks, *Financing*, 23–4. See also Brooks, chapter 14 in this volume.

87 See former subsection 117(5.1), repealed by *sc 1985, c. 45, s. 62(1)*.

88 R.D. Hood, S.A. Martin, and L.S. Osberg, “Economic Determinants of Individual Charitable Donations in Canada,” *Canadian Journal of Economics* 10 (1977), 653, 667. The conclusion that aggregate donations and forgone tax revenues would change little appears to assume that low-income donors’ responsiveness to a reduction in the after-tax cost of donations offsets that of high-income donors to an increase in after-tax costs. This issue is examined below. In addition, since the proposed tax credit on which this estimate is based appears to have been non-
refundable, a flat-rate refundable tax credit would have to be set at a lower rate in order to maintain a similar level of aggregate donations and a similar level of federal assistance to charities in terms of forgone tax revenue.

90 Ibid.
91 Ibid.
92 Carter Report, 222.
93 Ibid., 222.
94 While the assumption that a credit would be set at a rate lower than the top marginal rate might have been reasonable – since the cost of federal assistance in terms of forgone revenues might have been expected to increase significantly otherwise – the commission might have made this assumption clear.
95 Carter Report, 222.
96 Until the mid-1970s, the prevailing view appears to have been that low-income taxpayers were largely unresponsive to changes in the after-tax cost of charitable giving. See, for example, H. Aaron, “Federal Encouragement of Private Giving,” in Tax Impacts on Philanthropy, Symposium Conducted by the Tax Institute of America (Princeton, N.J.: Tax Institute of America, 1972), 211. Subsequent studies are much less certain; for instance, C.T. Clotfelter, Federal Tax Policy and Charitable Giving (Chicago: University of Chicago Press, 1985), 66–71. I return to this issue below.
99 Ibid., 573–4.
101 Ibid., 32.
102 See text accompanying notes 91 and 97.
103 For 1994 and subsequent taxation years, this threshold was lowered to $200. sc 1995, c. 3, s. 34.
104 Wilson, Tax Reform 1987, 32.
105 Department of Finance, Supplementary Information Relating to Tax Reform Measures (Ottawa: Minister of Supply and Services, 1987), 10.
106 See subsection 117(2), added by sc 1988, c. 55, s. 90(2). The rate brackets established by this provision are partially indexed by section
and are now $29,590 and $59,180, respectively. The most recent federal budget announced a return to full indexing of rate brackets beginning in the year 2000, and a gradual reduction in the middle rate to 25 per cent in 2000 and 24 per cent in 2001. For the 2000 tax year, therefore, the applicable rates are 17 per cent on taxable income up to $30,004, 25 per cent on taxable income between $30,004 and $60,009, and 29 per cent on taxable income exceeding $60,009.

See subsection 118.1(3), added by sc 1988, c. 55, s. 92.

While a $100 deduction would be worth roughly $50 to a taxpayer paying tax at the top marginal rate, for example, the credit is worth roughly $25 on an annual contribution of $100.

Department of Finance, *Supplementary Information Relating to Tax Reform Measures*, 10.


See Hall and Bozzo, “Trends,” 2 (Table 1).

See note 105 and accompanying text.


Watson, “Charity,” 9, citing comments by Leader of the Opposition R.B. Bennett.

I return to this argument below.

See, for instance, Bird and Bucovetsky, *Canadian Tax Reform*, 17: “it seems highly probable that this limitation was motivated by the desire to reduce the possibility of abuse of the deduction for purposes of tax avoidance.”


Ibid., 115.

Ibid., 117.

Ibid., 110–17.

See former paragraph 110(1)(a), enacted by sc 1970–71–72, c. 63, s. 1. This increase went beyond the recommendation of the Report of the Carter Commission (223–4), which suggested 15 per cent.

sc 1997, c. 25, s. 26.

sc 1998, c. 19, s. 22(14).

Department of Finance, *Tax Measures: Supplementary Information* (6 March 1996). See also Department of Finance, *Tax Measures: Supplementary Information* (19 Feb. 1997), suggesting that the increased
ceiling would “encourage more donations by providing an enhanced
ability to claim tax assistance in the year of donation for the most
generous donors.”

125 sc 1939–40, c. 6, s. 1.
126 sc 1941, c. 18, s. 7.
127 See paragraph 26(1)(aa) of the Income Tax Act of 1948, added by
sc 1950, c. 40, s. 10. This provision became paragraph 27(1)(b) of the
1952 act and former paragraph 110(1)(b) of the 1972 act.
128 sc 1967–68, c. 38, s. 1(2).
129 See subparagraph 39(1)(a)(i.1), added by sc 1974–75–76, c. 50, s. 48,
proclaimed in force from 6 September 1977.
130 sc 1974–75–76, c. 50, s. 50, adding former paragraph 110(1)(b.1).
131 sc 1988, c. 55, s. 77(1). On the conversion from a deduction to a
credit, see above.
132 See paragraphs (b) and (c) of the definition of “total gifts” in subsection
118.1(1), as well as the definitions of “total Crown gifts” and “total
cultural gifts” in subsection 118.1(1).
133 See paragraph (d) of the definition of “total gifts” in subsection
118.1(1), as well as the definition of “total ecological gifts” in subsection
118.1(1), added by sc 1996, c. 21, ss. 23(3) and (4), applicable to
gifts made after 27 February 1995.
134 Department of Finance, Tax Measures: Supplementary Information
(27 Feb. 1995). The most recent federal budget provides further
couragement to these kinds of donations by reducing the inclusion
rate on capital gains from the disposition of ecological gifts to half the
rate otherwise applicable.
135 See subparagraph (a)(iii) of the definition of “total gifts” in subsection
118.1(1), as amended by sc 1997, c. 25, s. 26, applicable to 1996 and
subsequent taxation years, and sc 1998, c. 19, s. 22(4), applicable to
taxation years beginning after 1996.
136 See subparagraph (a)(ii) of the definition of “total gifts” in subsection
118.1(1), added by sc 1997, c. 25, s. 26, applicable to 1996 and subse-
quent taxation years.
137 Department of Finance, Tax Measures: Supplementary Information
(6 March 1996).
138 Ibid.
139 Ibid.
140 For a useful demonstration of this point, at a time when half of
each capital gain was taxable, charitable contributions were deductible,
and the ceiling was 20 per cent of the taxpayers income, see
Very Personal Views,” Philanthropist (Fall 1984), 5, 7–8, explaining that
if a taxpayer with annual income of $100,000 donated shares worth
$1 million acquired at a cost of $100,000, he or she would have to include an additional $450,000 (1/2 x $900,000) in computing income but be eligible for a deduction of only $110,000 (0.2 x ($100,000 + $450,000)), creating a serious tax disincentive to the making of such a gift.


sc 1957, c. 29, s. 7(1), amending then paragraph 27(1)(a) of the 1952 act.


sc 1980–81–82–83, c. 140, s. 57(1), amending former paragraph 110(1)(a). See also sc 1980–81–82–83, c. 140, s. 65(2), amending former paragraphs 110(1)(b) and (b.1).

sc 1985, c. 45, s. 54(1), amending former paragraph 110(1)(a).

Added by sc 1988, c. 55, s. 92.

See the definitions of “total charitable gifts,” “total Crown gifts,” “total cultural gifts,” and “total ecological gifts” in subsection 118.1(1), each of which refers to “a gift ... made by the individual.”


If both spouses pay taxes, it does not matter which actually claims the credit. Since the credit is non-refundable, however, it is of no value to a spouse whose income is insufficient to pay any tax. In this circumstance, it makes sense for a spouse paying tax to claim the charitable donations.

Hall and Bozzo, “Trends,” 1–2.

See paragraph 18(1)(a). As a general rule, deductions are allowed in computing the taxpayers “profit” from the business or property under subsection 9(1). See, for instance, The Royal Trust Company v. M.N.R., [1957] ctc 32, 57 dtc 1055 (Exch. Ct). Limitations on allowable deductions in computing a taxpayer’s income from an office or employment represent a departure from this general principle. See section 8(2) of the act, which limits allowable deductions in computing income from an office or employment to those specifically permitted by section 8.

Until 1988, the Canadian Income Tax Act permitted taxpayers to deduct these expenses to the extent that they exceeded 3 per cent of net income. See former paragraph 110(1)(c), repealed by sc 1988, c. 55, s. 77(1). As with the charitable deduction, this deduction was converted to a credit effective for 1988 and subsequent taxation years. See subsection 118.2, added by sc 1988, c. 55, s. 92. For a persuasive argument that necessary medical expenses should be recognized as a

154 See, for example, McGregor, “Charitable Contributions,” 441: “The allowance of a tax deduction for charitable contributions cannot be justified – and has not been justified – by any concept within an income tax system; any justification it has is social and economic.” See also Rendall, “Taxation,” 152, “the charitable deduction has a very uncertain, and uneasy rationale. It is not a deduction to recognize the cost of earning income, nor a hardship relief to recognize reduced ability to pay tax. Indeed, it really represents a consumption expense. Unlike other expenditures which result from consumption decisions, this one is encouraged by way of a tax deduction. Accordingly, it would seem to be indisputable that the relief should be subjected to some requirement to establish its continuing justification; at the very least, its proponents should be prepared to demonstrate its effectiveness if not to justify its purpose.”

155 See above.


159 Department of Finance, *Tax Measures: Supplementary Information* (6 March 1996). See also Department of Finance, *Tax Measures: Supplementary Information* (19 Feb. 1997), suggesting that the increased ceiling would “encourage more donations by providing an enhanced ability to claim tax assistance in the year of donation for the most generous donors.”


161 Andrews, “Personal Deductions,” 317–31. This definition of the ideal personal income tax base is derived from H.C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago Press, 1938), 50: “Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.”


163 Bromley, “Charity,” 5. See also W.D. Goodman, “Correspondence,” *Canadian Tax Journal* 28 (1980), 399: “When a person makes a charitable donation, the money he parts with is no longer available for his use. ... In plain English, after a person makes a charitable donation, he has less money to live on.”
Bittker, “Propriety,” 166: “Side by side with taxpayers who can satisfy their charitable impulses by making a contribution of their time (from which they report no imputed income), are others who feel the same charitable impulse, but must discharge their moral obligation by contributing cash or property. This raises a question of equity between these two classes of taxpayers.” See also Andrews, “Personal Deductions,” 347–8, referring to a doctor who spends one day a week at a clinic without charging for his services and a lawyer whose skills “are not so directly useful to the poor as those of the doctor” who contributes “part of his fees for distribution among the poor or for the purchase of other services to meet their needs.” Andrews concludes: “The charitable contribution deduction operates to treat the lawyer like the doctor, by taxing him only on the amount of personal consumption and accumulation he realizes from the practice of his profession, not on what he could have realized if he had not given part of his fees away.”

Bittker, “Propriety,” 166: “of two charitably minded persons, one may be able to satisfy his impulse by a transfer of inherited or accumulated property; once he has made his gift, whether in trust or outright, the income from that property is thereafter devoted to the charitable purpose and never again shows up in his tax return. The second person must rely upon contributions out of current earnings to discharge his moral obligation. The deduction helps to equalize their circumstances; its repeal would, in my opinion, create an inequitable disparity between them.”

See, for example, McGregor, “Charitable Contributions,” 442: “Charitable contributions ... are not a vital necessity of life and are voluntary”; and Boadway and Kitchen, Canadian Tax Policy, 71, contrasting medical expenses, “which are almost always involuntary,” with charitable donations, which “are not a vital necessity of life and tend to be made on a voluntary basis.”

See, for example, Rendall, “Taxation,” 152; and Brooks, Financing, 4.

Watson, “Charity,” 9, citing comments by Leader of the Opposition R.B. Bennett.

Goodman, “Correspondence,” 399.


See, for instance, Thirsk, “Giving Credit,” 33.

Bromley, “Charity,” 7.

This result is, of course, subject to any reduction in the donor’s tax that might be introduced for purposes extrinsic to the task of defining income. See the discussion below.

See the discussion at notes 32–5 and accompanying text. See also Brooks, *Financing*, 5–6.

See note 35 and accompanying text.

A possible exception to this conclusion might exist where the donor enters into a legally binding commitment to give a specific amount every year for a certain number of years. This view in fact appears to underlie the British “covenant” system, whereby donors are not taxable on amounts paid to a charity pursuant to a legal covenant that fulfils the requirements of the tax statute. It might be argued, however, that donors who enter into these arrangements are still giving away “their own money” (albeit prior to its actual receipt), which should therefore be taxed in their hands. For an explanation of this system, see McLean et al., *Charitable Contributions in the OECD*, 155–61.

Bittker, “Propriety,” 166.


See Bird and Bucovetsky, *Canadian Tax Reform*, 18 (Table 18), reporting for the 1972 taxation year that, for taxpayers claiming charitable contributions, the percentage of average income among different income groups was 7.8 per cent for donors with incomes less than $5,000, 4.1 per cent for donors with incomes of $5,000–$10,000, 2.9 per cent for donors with incomes of $10,000–$20,000, 2.4 per cent for donors with incomes of $20,000–$50,000, 2.4 per cent for donors with incomes of $50,000–$100,000, and 3.6 per cent for donors with incomes over $100,000. More recent figures from the 1990 taxation year demonstrate a similar U-shaped ratio of charitable donations to income level of donors: 4.1 per cent for donors with taxable incomes less than $10,000, 2.1 per cent for donors with taxable incomes of $10,000–$30,000, 1.4 per cent for donors with taxable incomes of $30,000–$50,000, 1.3 per cent for donors with taxable incomes of $50,000–$100,000, 1.7 per cent for donors with taxable incomes of $100,000–$250,000, and 1.9 per cent for donors with taxable incomes exceeding $250,000. Calculated from figures in Revenue Canada, *Taxation Statistics on Individuals: 1990 Tax Year* (Ottawa: Minister of Supply and Services, 1992).
See, for example, McDaniel, “Federal Matching Grants,” 383; it is “less burdensome for a person with $200,000 to give 10 per cent of his income to charity than it is for a $12,000 a year wage earner to give the corresponding 10 per cent.”

Brooks, Financing, 24.

See, for instance, McDaniel, “Federal Matching Grants,” 394, arguing that the reward rationale “appears to call for a system which increases the reward as the individual sacrifices a greater proportion of his income to charity.”

Ibid., 397.

See, for instance, Bittker, “Propriety,” 169. He suggests that the floor should exclude the least generous 10 or 20 per cent of donors. Goode, Individual Income Tax, 165, comments that such a measure would “focus the reward or incentive more sharply by withdrawing the deduction from persons whose contributions are small relative to income while continuing it for heavier contributions.”


Carter Report, 224.

See, for instance, Rendall, “Taxation,” 159; and Goode, Individual Income Tax, 165.

Bromley, “Charity,” 12.

Brooks, Financing, 13. See also Brooks, chapter 14 in this volume.

See Taussig, “Economic Aspects,” 3, who adds: “Only the price or substitution effect ... can be properly regarded as the result of ... the ... policy variable, since the income effect ... is incidental and could be achieved equally well by a cut in tax rates, an increase in personal exemptions, and by similar alternative devices.”

For a useful introduction to this concept, see Scharf et al., Tax Incentives, 8–9.


See, for example, Rendall, “Taxation,” 158–9; Wolkoff, “Proposal,” 291–3; and Brooks, Financing, 18–21.


200 See, for instance, Scharf et al., *Tax Incentives*, 9 and 14.


202 See, for example, Barrett et al., “Further Evidence,” 332.

203 See, for instance, Aaron, “Federal Encouragement.”

204 See, for instance, Glenday et al., “Tax Incentives.”


206 See, for example, Feldstein, “Income Tax”; Kitchen and Dalton, “Determinants.”

207 For an argument to this effect, though not phrased in economic terms, see Bromley, “Charity,” 14–16.


209 See text accompanying note 68.

210 See, for example, Scharf et al., *Tax Incentives*, 4–5.

211 While market imperfections provide an *economic* justification for the existence of a public sector, there are non-economic rationales as well – for example, ensuring fair distribution of economic resources. The following analysis should not be read to suggest that charitable organizations should or can adequately fulfill this distributive role. On the contrary, as Will Kymlicka explains in chapter 4 of this volume, a liberal conception of justice casts these distributive considerations as matters of justice, not of charity. See also Brooks, chapter 6 in this volume.

212 This sector is often described as the “voluntary sector” to distinguish its method of finance from the public sector, which relies on compulsory


See, for example, Scharf et al., Tax Incentives, 5; “voluntary organizations foster a do-it-yourself culture, which can improve accountability, encourage technological innovation, and promote efficiency in the use of resources, which may be more desirable if government provision is encumbered with a lot of bureaucracy.” See also R. Domingue, The Charity “Industry” and Its Tax Treatment (Ottawa: Minister of Supply and Services, 1995), 3: “At a time when attempts are being made to reinvent government, it should perhaps be recognized that social services could be provided much more efficiently by charitable organizations. It could be that communities and local agencies are in a better position to assess and meet these needs economically than government employees working in a capital city far removed from the people they serve.”

See, for example, McGregor, “Charitable Contributions,” 442, which notes that charitable contributions “relieve the government of some of its responsibilities, and make possible some activities, such as those of a cultural nature, which the government might not feel impelled, or be able, to afford to carry on.”


See Brooks, chapter 14 in this volume.

Indeed, a recent study indicates that direct government funding constitutes a much larger (and increasing) share of the revenues of charitable organizations as a whole than donations. See K.M. Day and R.A. Devlin, The Canadian Nonprofit Sector, Paper No. cprn 02 (Ottawa: Canadian Policy Research Networks, 1997), 15–16, which reports that government funding decreased as a source of revenue for charities from 42.8 per cent in 1989 to 60.2 per cent in 1994, while revenues from donations decreased from 21.8 per cent in 1989 to 11.3 per cent in 1994.

Note the recent controversy in Ontario regarding control of the Trillium Foundation, which distributes roughly $100 million in funds
raised through provincially run lotteries and casinos. Brooks does not consider the controversy’s implications for his argument in chapter 14 that direct sustaining grants are generally preferable to direct matching grants or indirect tax expenditures.

See, for example, ibid. Brooks claims that a system of direct matching grants would be more equitable than the current credit, more visible than a credit or deduction, administratively simpler than a credit or deduction, and more easily policed than a credit or deduction. Yet as he has acknowledged, to the extent that it is considered desirable to vary the rate of the fiscal subsidy with the amount contributed by individual donors, an indirect tax expenditure is preferable to a system of direct matching grants. I return to this point below, in notes 238–41 and accompanying text. See Brooks, *Financing the Voluntary Sector*, 32.

See, for instance, Bittker, “Propriety,” 147–52. “I have very little confidence that a system of matching grants could be administered without administrative and congressional investigations, loyalty oaths, informal or implicit warnings against heterodoxy, and the other trappings of governmental support than the tax deduction has, so far, been able to escape.”And see Goode, *Individual Income Tax*, 163, who considers it “unlikely” that direct matching grants “would be as free of undesirable controls or would serve the values of pluralism as well.”

See text accompanying notes 196–202.


See, for example, ibid., 14: “The proper level of the tax credit depends ... on the ‘external’ content of the benefits that the charity-financed activities confer; it depends, in other words, on the relationship between the marginal evaluations of the primary sharing group, namely voluntary donors, and the community-at-large.” See also Scharf et al., *Tax Incentives*, 9: “we should try to encourage donations to charities that provide goods or services to a large number of consumers.”


See notes 70–72 and accompanying text.

See notes 127–34 and accompanying text.


Ibid., 574.


See, for instance, Bromley, “Charity,” 14: “Religious activities are justifiably ‘charitable’ on the basis that they are beneficial to the community
as a whole because they contribute to bettering the conduct and character of citizens." For a contrary view, see Wolkoff, "Proposal," 288. He argues that most religious gifts “help maintain the donors’ congregations” and are “directed at satisfying the needs of the donor, not at satisfying the needs of society at large.”

Although I have not examined the issue in detail, this argument suggests a much wider definition of “charity” than that currently accepted by the courts and the revenue authorities, which at the very least seems incompatible with the doctrine of political purposes. On the legal definition of charity, see Phillips, chapter 7, Moran, chapter 8, and Phillips, chapter 10 in this volume; on political purposes, see Drassinower, chapter 9, and Chapman, chapter 5; and on the administrative processes surrounding registration and deregistration, see Sossin, chapter 12. For an excellent example of a reasonable limit on acceptable pluralism in a free and democratic society, see the decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the U.S. Supreme Court denied charitable status to a non-profit private school that had a racially discriminatory policy on admissions. For a more thorough examination of this issue, see Moran, chapter 8 in this volume.

See, for example, Wolkoff, “Proposal,” 291. He concludes that “if some institutions are to be favored over others, the decision should be made democratically.”


See McDaniel, “Federal Matching Grants,” 391, who suggests that society would be “greatly enhanced” by extension of this pluralism to all contributors. See also Brooks, *Financing*, who argues for a refundable tax credit; and Brooks, chapter 14 in this volume.

For a contrary view, see Brooks, *Financing*, 24, who emphasizes that “if the pluralism argument is to be taken seriously, the maximum tax credit available to each taxpayer should be limited.”

See subsection 127(3). Bill C-2, which has passed the House of commons, and is before the Senate at the time of writing, proposes to increase the dollar amount eligible for a 75 per cent credit from $100 to $200 and to reduce the amount eligible for a 50 per cent credit from the next $450 contributed to the next $350.

Scharf et al., *Tax Incentives*, 35: “from an equity, efficiency, and simplicity point of view, the difference between the tax treatment of political donations and the tax treatment of charities could be viewed as undesirable.”

Bromley, “Charity,” 5.
Elsewhere in this volume (chapter 6) I argue that in a modern welfare state the voluntary sector should complement government activities and not attempt to replace them. Its complementary role includes responding to local and minority interests, innovating and initiating new ideas, overseeing and monitoring the exercise of power by the state and other dominating institutions in society, and acting as venture capital for social change. I argue that these vital roles are placed at risk when the government “downloads” services to voluntary organizations or contracts with them for provision of public goods and services. In this chapter I argue that, to increase the voluntary sector’s ability to perform these roles, Parliament should repeal the tax credit for contributions to charitable organizations. As a person interested in tax policy, I have tried to make a career out of one simple idea — namely, that the rich ought to pay their fair share of tax. Given this manifest bias — which some people regard as a serious character flaw — it is perhaps unsurprising that I take a somewhat critical view of the tax credit for charitable gifts.

As offensive as not requiring the rich to pay their fair share of tax is allowing them to direct where and on what government spends money — and that, of course, is exactly what the tax credit does. It allows high-income individuals to direct the spending of hundreds of millions of dollars of government money in a way over which neither government nor anyone else has any control, for which there is no public accountability, that is not transparent, and which allows them to buy public monuments and recognition for themselves and to give
legitimacy to social indifference. The tax credit for charitable contributions is one of the most shameful tax concessions in the Income Tax Act.

The charitable tax credit is a system of indirect government matching grants, in which the government writes its cheque to the taxpayer who donates to a charity. Taxpayers who donate, for example, $1,000 to a charity are able to claim a tax credit of about $500 when they file their tax return. Thus, in giving $1,000 to a charity, taxpayers give in effect $500 of their own money and act as a self-designated agent of the government in giving $500 of its money too. That is to say, a taxpayer’s cheque to a charity represents two separate contributions: about one-half from the donor and the rest from the government’s matching contribution. Although taxpayers are initially out of pocket for the full donation, when they file their tax returns and claim the charitable tax credit for their donations, the government essentially reimburses them for $500, in the example above, given to the charity on its behalf, by allowing them to offset this amount against their tax liability.

I develop my argument that the government should not finance the voluntary sector by matching donations in four related sections. First, I examine and critique the standard justifications for the tax credit for charitable donations. Observers have argued variously that the credit serves four principal purposes: promoting pluralism in the provision of public goods and services; encouraging innovation; maintaining independence in the voluntary sector; and promoting altruism. I suggest that it does none of these things. I argue that this method inhibits the attainment of each of these objectives. Second, I argue that the tax credit leads to a serious misallocation of government funds. Vital areas are left underfunded, while substantial sums go to areas that some wealthy individuals feel deserve private funding, whether or not these should have a priority claim on the public purse. Third, I postulate that the tax credit satisfies none of the evaluative criteria normally applied to government spending, such as controllability, accountability, and transparency. Its flaws are so serious that even if the arguments in favour of the credit had some force they could not rescue such a badly designed government instrument. Fourth, I argue that the tax credit represents an inefficient use of government resources. Some of its supporters claim that even though it has flaws as a spending program, it at least encourages philanthropy. Each dollar that government spends induces more than one dollar in private contributions that would otherwise not have been made. Thus the voluntary sector gains more in contributions than the government loses in revenue,
and therefore overall more money is available to provide public goods and services. This argument is factually wrong. The best empirical evidence suggests that the government loses more revenue through the credit that the credit encourages in additional private monies.

Fifth and finally, I discuss two related issues: the ideal method of financing the voluntary sector and the relative efficacy of taxes and charitable donations as devices for promoting citizenship and furthering social cohesion. I make two points. First, a system of direct grants is a much better mechanism for increasing the funding of voluntary organizations than a system of matching grants, including the tax credit for charitable donations. The promotion of pluralism, innovation, altruism, and independence is often given as both the goal of the voluntary sector and the justification for subsidizing it by matching private donations. This represents a confusion of thought. A person might be prepared to accept these goals as justifications for encouraging formation of organizations in the voluntary sector, but not as justifications for this particular method of financing them. I concede that voluntary bodies play these essential roles but suggest that they are more likely to further these goals if the government subsidizes these organizations by direct grants instead of by matching private donations through the tax credit. Second, I suggest that as a nation we would all be much better off if, instead of relying on the rich for charity, we required them to pay their fair share of tax.

**JUSTIFICATIONS FOR THE TAX CREDIT:**

**PLURALISM, INNOVATION, ALTRUISM, AND INDEPENDENCE**

*Pluralism*

Some supporters claim that subsidization of the voluntary sector by means of a tax credit for charitable donations promotes pluralism and dispersion of power through its provision of public goods and services. Citizens decide what institutions in society will receive subsidization for providing public goods and services by in effect voting with their donations. As the Filer Commission in the United States observed, “Governmental encouragements to giving are appropriate ... because giving provides an important mode of citizen expression. By saying with his or her dollars what needs should be met, what objectives pursued, what values served, every contributor exercises, in a profound sense, a form of self-government, a form that parallels,
complements and enriches the democratic electoral process itself.”

If this is the justification for government subsidization of the voluntary sector, it would seem imperative that a method of financing be chosen that permits as many citizens as possible to participate in the decision-making.

As a mechanism for social choice used to determine government spending in a way that promotes pluralism, the tax credit effectively disenfranchises many low-income citizens who have no tax liability with which to offset their potential reimbursement. Thus it gives many of the young, the elderly, and the poor no ability to allocate government funds. This result is clearly unjustified: a taxpayer’s status would not appear, on any political grounds – particularly in a society that purports to value equal participation and influence in the political process – to be a valid condition for eligibility in a scheme designed to allocate government funds to the voluntary sector.

The credit defeats the pluralist objective in other ways as well. A feature that was designed deliberately to discriminate against low-income families limits the Canadian federal government’s matching grant to only 17 per cent for the first $200 of total donations – donations in excess of $200 receive a federal matching grant of 29 per cent. Thus donations made by low-income Canadians, who will often not be able to give in excess of $200, will attract only slightly more than one-half as much government subsidy as donations from those with higher incomes, whose total donations will usually exceed $200. In a feature deliberately designed to benefit wealthy families, if the donor gives publicly traded shares that have accrued capital gains, the federal government’s matching grant can often exceed 40 per cent of the donation. Under these rules, introduced in the 1997 budget, taxpayers are able to direct the spending of up to $650 of federal and provincial government money by giving only $350 of their own money to a charity, if they give eligible capital property that has appreciated in value. Again, since low-income individuals tend not to own a lot of stock that has appreciated in value, high-income individuals have even more ability to determine where government money will be spent.

Finally, the tax credit effectively prevents many lower-income citizens from directing government funds to particular charities, since they are less likely to ask for and keep receipts than high-income individuals and because if they want to direct the government funds they first must pay them to a charity and then wait for reimbursement when they file their tax return. This causes a financial hardship for many low-income families. Present tax laws, therefore, instead of promoting pluralism do just the opposite, concentrating the ability to direct go-
government matching grants in the rich. But whatever the detailed rules of a scheme of matching grants, and even if a dollar contributed by a low-income person attracted the same matching percentage from the government as one given by someone with a high income, the latter would be able to control the disbursement of substantially more government money simply because they have more disposable income to donate.

Under matching grants, in 1996, the average person with income of $25,000 or less directed about $14 of federal money to some charity; by contrast, the typical Canadian with income over $250,000 determined which charities received about $2,830 of federal funds – over 200 times as much as those earning under $25,000. Under this scheme, those earning over $250,000 – about 0.3 per cent of taxfilers in 1996 – directed about 1.4 per cent of allocated government funds. Those earning over $100,000 – about 2 per cent of those filing returns – allocated 25 per cent of the subsidy. Those earning under $25,000 – almost 61 per cent of taxfilers – allocated only 16 per cent of the government’s subsidy. Thus, the top 2 per cent of income earners directed more than 1½ times as much government money as the bottom 60 per cent. Further, the rich will often control the funds even after they have donated the money because they will often be board members of the organizations or foundations to which they contribute. There seems little question that the charitable tax credit serves the process of elitism instead of the cause of democratic pluralism.

Although the rich allocate such a large share of government grants, low-income households donate a larger proportion of their incomes to charities. Thus the donations made by the poor represent a much greater commitment than those given by the rich. The most recent comprehensive survey of charitable giving in Canada found that donors with annual household incomes below $20,000 gave an average of 1.4 per cent of their income to charities and non-profits, while those who earned more than $60,000 donated only 0.4 per cent. Thus poor families gave more than three times as much of their income to charities than the rich. But even these numbers understate the relative intensity of giving, since wealth also helps determine a person’s ability to give. Households with greater income are likely to have substantially greater wealth than low-income families. The Mannix family was reported in 1998 to have made a donation of $100 million to its private foundation and to charities across the country. This was one of the largest gifts ever made in Canada, and it received a good deal of publicity. But the family’s fortune is estimated to be $10 billion. Thus, assuming that it is able to claim the tax credit for its con-
tribution, the gift amounted to 0.5 per cent of its wealth. The bottom 40 per cent of Canadians have almost no wealth; their debts usually exceed their assets. Every time they make a charitable donation, no matter how modest, they give a greater percentage of their wealth than the Mannixes.

By any measure, it is clear that the matching-grant scheme inherent in the tax credit promotes a peculiar kind of pluralism. Control over government spending goes to the very rich. The credit could be changed so that, for example, donations by low-income families attracted a larger matching grant than equivalent donations by high-income families. But at this suggestion, high-income families and many charities begin to lose their enthusiasm for pluralism. It turns out that high- and low-income families do not give to the same type of charities. High-income families tend to give to universities, medical research, symphonies, and museums; those with low incomes to religious and social welfare organizations. Consequently, if the tax credit were made more equitable, universities, hospitals, and high culture would lose some government subsidies, and churches and social welfare organizations would gain substantially. This shift in the use of government funds is one that would simply have to be accepted if the pluralism argument were taken seriously, which is presumably why, although the pluralist rationale is often glibly recited as a justification for the tax credit, no one takes it seriously.

Although the argument for pluralism should not turn on how the funds are spent – pluralism refers to a process rather than to an outcome – letting the rich control a grossly disproportionate share of government funds would not be so objectionable if the expenditures by charities benefited all income groups. Rather surprisingly, no Canadian study of the incidence of charitable spending has been done. However, U.S. research has revealed that only a trivial amount of philanthropy in general goes to the poor. Most, particularly that financed by the rich, went to cultural and educational activities that even the strongest proponent of the “trickle-down theory” would have to admit only remotely benefits the poor.

Innovation

Further essential roles for the voluntary sector – which might be affected by the way in which it is financed – are to foster constructive innovation, provide for diversity, and encourage challenges to established ways of thinking and doing things. Two reasons are often given for supposing that voluntary organizations financed by private donations will be more innovative than those financed by government.
First, some observers argue that voluntary bodies will be more innovative since they consist of people from across the country, with diverse backgrounds and experiences, working in different-size groups, in different circumstances, and, most important, in a form that is likely to be non-bureaucratic. As a result, as a landmark Canadian study on the voluntary sector phrased it, “they constitute a forum for initiating new ideas and processes, a place where people can take chances and experiment.”

But this position misses the point, since it relates to the organizational form of charities, not their method of funding. Even if charities are funded solely by government, their form might be non-bureaucratic. Government funding ought not to be confused with government bureaucracy. Charities would be accountable to government for their expenditure of funds under direct grants, but the degree of government control would depend on the nature and needs of the organization. Thus, if innovation springs from the kinds of people involved in the activity and from the form of organization, this dynamic would not change if the credit for charitable contributions were repealed. Government agencies, instead of individual or corporate donors, would determine which groups received government funding.

Second, allocation by private donors allows voluntary organizations to escape government control and therefore renders them more willing to challenge prevailing political ideas and mores. If all of an organization’s funding comes from government, so the argument goes, it will gradually accommodate itself to the wishes of government. However, if semi-autonomous government agencies allocate government funds, as occurs with most government subsidies to the voluntary sector now, they will be largely free of political control. Also, charities cannot escape some degree of control by donors. No organization that is dependent on outside financing can claim to be wholly autonomous.

The real issue therefore is whether the voluntary sector is more likely to be innovative if it must seek its funding from semi-autonomous government agencies rather than from individual donors and corporations? What is the record of private donors as innovators and harbingers of orderly social change? The conservatism and caution that corporations exercise in granting decisions are well known. Understandably, corporations, because they are accountable to a diverse group of shareholders, are unlikely to contribute to highly visible and controversial projects where the outcome or potential benefits are in doubt. They tend to give to familiar and well-established charities. If the object is to encourage the taking of chances in social reform or cultural expression, it strikes me as being quite naïve to
allow business corporations to allocate the monies. In Canada, most of those bodies that have been confronting established ways of thinking, the marketplace and the media – such as those organizing communities, educating consumers, fighting poverty, and promoting women’s rights, environmental action, and programs for Native Canadians – have been funded by government.

**Altruism**

A society in which strangers care about each other is presumably better than one in which each person’s well-being does not affect the well-being of others. Therefore government policy should encourage, or at least not discourage, altruism. The voluntary sector, it is often said, strengthens the sense of community derived from sharing. When people involve themselves in the work of charitable organizations, this effort undoubtedly not only reflects a sense of altruism and of responsibility towards others but also strengthens these feelings.

Does simply giving money to a charity promote the same sense of altruism? And if so, does the fact that the donor is able to attract a matching government grant enrich that sense of altruism? It does seem unlikely that allowing taxpayers to direct government funding through their private donations is necessary to promoting a feeling of responsibility for others. Generally, people’s perceptions of community expand through voluntary actions that they undertake on behalf of others and for which they assume personal responsibility. It would seem counterintuitive to believe that a person’s sense of altruism and social responsibility will be increased only if they also allocate someone else’s funds. A tax credit, rather than fostering a sense of altruism from giving, seems more likely to accentuate the purely selfish goal of reducing one’s own taxes. Also, arguably, its availability obscures the donor’s motives from the recipient and other citizens. It is not uncommon to hear the speculation that a particular charitable gift was motivated only by the tax write-off. Thus reciprocity and the sense of community that the gift might otherwise foster may be negated by the credit.

**Independence**

The independence of the voluntary sector is assumed to be one of its principal virtues. An automatic matching grant system for government financing, some say, allows charities to maintain their independence. However, no recipient of largesse can escape the donor’s
control. Any association looking for contributors is ultimately dependent on the goodwill of those from whom it receives donations, who thus exercise a degree of control over the organization. Is the voluntary sector more likely to be able to plan and act independent of donors if funded by a government agency or by private donors? Which source of funding is more likely to have strings attached?

Government funds in Canada generally come with fewer conditions attached than private donations. There is very little evidence of government interference with, for example, research undertaken at universities and hospitals or with the policies of cultural organizations. By contrast, there is a constant stream of news stories about the control that private donors attempt to exert over the institutions that they fund. Cultural organizations in particular have often suffered because of donors’ attempts at control. The most recent, notorious example is the attempt by Robert and Signe McMichael to prevent the McMichael Gallery in Kleinburg, Ontario, to which they donated their art collection of the Group of Seven, from purchasing and displaying contemporary art. But even if there is no overt influence, when private donations fund the arts private donors set the direction in art funding. When money comes from semi-autonomous government granting agencies, the arts community sets the direction, since the initiative for projects comes from the arts applicants and decision-making power about awards normally rests with review panels of peer experts.

Universities illustrate the effects of control by private donors, since arguably universities have the greatest need for independence of all non-profit organizations. Historically, even though governments have been the major source of university revenue, there has been little evidence of government interference in the research and educational mission of universities. Over the past decade, as universities have had to turn to private donors for gifts, even though their contributions make up a very small percentage of funding, the fact that their donations come with strings attached is evidenced everywhere on campuses. Buildings, classrooms, chairs, and even courses frequently bear the name of private donors. Although there has been little evidence of outside donors’ overt influence over education and research, the covert influence cannot help but be significant as universities increasingly seek private, usually business or business-related, contributions.

In an attempt to raise funds, universities might well be led to expand in a direction that they might not otherwise have chosen strictly on the basis of their educational mission and priorities. For example, almost every business school in the country is now named after a donor, yet
few fine arts or humanities buildings bear the name of donors. In implementing their educational missions, would universities across the country have chosen to upgrade their business school facilities or programs in the absence of significant private donations? How does pursuit of private donations shape the programs of these schools? When York University’s business school changed its name to the Schulich School of Business as a condition for receiving a donation from Toronto financier Seymour Schulich, the dean of the school, Dezső Harvath, was quoted as saying: “When you make programs relevant, when you are responsive, the business community is very responsive.” Inevitably, as universities rely more on private funding, scholarly activity that cannot, or whose practitioners refuse to, seek private funds will be downgraded.

Even the names attached to facilities can subtly affect a university’s mission by apparently aligning it with the donor’s interests. A university with buildings and classrooms named after large corporations or prominent business people hints at, at the very least, a sympathy with, if not an attachment to, corporate culture. It is more likely to begin to behave like a private-sector body. If a university chair is named the Arthur Andersen Professor of Taxation, for example, after one of Canada’s largest accounting and management firms, whose clients include many of the country’s largest corporations, can one easily imagine its holder taking a position opposed to the interests of those corporations? In an editorial entitled “The Public, Private University,” which expressed concern about the restrictions attached to money donated to universities, the Globe and Mail noted that the 111 endowed chairs at the University of Toronto included chairs for “geo-technical mine design and analysis,” “youth unemployment,” and “medieval Jewish Studies.” It went on to say, “There is nothing intrinsically wrong with any of these areas; it is just that their specificity clearly pushes the university down a certain intellectual track.”

In some of Canada’s largest privately financed “think tanks,” most of which are financed by the government’s matching donations, the consistent, indeed blatant political bias of the research suggests that the research is undertaken with a view to maintaining sources of funding. Generally, the views represented range from the far right to the extreme right. In contrast, the one smallish research institute that relies on funding from trade unions – the Canadian Centre for Policy Alternatives – publishes only research with a left-wing bias. The record of privately financed think tanks would indicate that universities are being naïve if they think that research funds from the private sector come without strings attached.
The universities' mission may be affected in even more subtle ways by their reliance on private funding. For example, their administrators will increasingly be people who can raise private money, as opposed to being committed to an academic mission. In late 1998, when the University of Toronto announced that it would be looking for a new president, a newspaper headline predicted that "U of T job expected to go to one who knows a lot of people, not one who knows a lot." One observer told the reporter that one candidate was particularly well placed since “she’s well thought of among the horsey set.” The reporter also noted that the present president “was seen as a great fundraiser rather than a brilliant thinker ... [who was able to turn] his political, business and social connections into big dollars for the university.”

Aside from the subtle effects that it will have on universities’ educational and research mission, this “monogrammed giving” is mildly irksome because when donors immortalize their names by getting a building, professorship, or classroom named after themselves or their firms the donation should be regarded as a price, not a gift. One can make a strong argument that it should not qualify for the tax credit subsidy at all. Moreover, in almost every case the costs of construction of a building, for example, will far exceed the size of the private gift. Often the university will leverage the gift with direct matching grants, and the tax credit means that the government is also paying for about one-half of the donor’s contribution. At the very least, the business school at York, for example, should be called the Schulich and Canadian Taxpayers’ School of Business.

THE MISALLOCATION OF GOVERNMENT RESOURCES

Even if a system of matching grants, like the tax credit, were more likely to promote pluralism, innovation, and the independence of the voluntary sector – since it allows taxpayers, rather than government officials or appointees, to make decisions concerning the allocation of government resources – we should still judge the credit in part on pragmatic grounds. That is, does it promote a rational allocation of government resources among competing claims?

It would be extraordinary if a scheme for allocating government funds based on private contributions resulted in a sensible allocation of resources. Let us look at a couple of examples. Under the present tax credit for charitable contributions, the total level of expenditures and the allocation of expenditures to various medical research projects depend largely on competing public fund-raising drives. One
could hardly imagine a less appropriate way to decide between— for example, muscular dystrophy, cancer, heart and stroke, trauma, and mental disability, say, than to base the decision on the “pay-off” from competing publicity campaigns. Often the campaigns raise money through such community endeavours as walkathons and telethons unrelated to such criteria as the potential return from spending additional funds on research in particular areas. A charity may send out a letter that has been rewritten and tested countless times by public-relations and direct-mail people and couple it with a perhaps productive mailing list. In 1980 Terry Fox, who had lost part of one leg to cancer, ran half-way across Canada for cancer research, and in response to the extraordinary interest and fund-raising evoked by his effort and his untimely death, the government allocated millions of dollars to the Canadian Cancer Society. However much one admires Terry Fox’s courage, it does appear to be an odd basis for determining how much and where public money is spent on medical research.

More generally, people and corporations tend to give to charitable organizations in their own localities. Thus charities in communities with high per capita income or where corporations have their head offices will receive more government funding than those elsewhere. Hospitals in Toronto are able to attract considerably more private funding than those in smaller cities, which may not have sophisticated fund-raising facilities or a wealthy constituency. In the last few decades an important objective of the federal government has been that public goods and services should be equally accessible to all Canadians, irrespective of region. If a member of Parliament were to suggest that government money for cultural activities, for example, should be allocated disproportionately to those cities in which corporations had their head office this would likely occasion some public debate. However, that is precisely what happens under the present scheme of matching grants without there being even public acknowledgment of that fact.

In the same way that big cities do better than smaller communities in attracting funds under a matching grant scheme, wealthy, high-profile institutions are able to attract a disproportionate amount of funds compared to smaller, less well-known institutions. Thus, when the Ontario government established the Student Opportunity Trust Fund for needy students, in which it agreed to match private donations, Ontario’s 17 universities quite predictably, because of their knowledge, connections, and resources, raised $246.8 million, and its 25 community colleges only $18.2 million.

Another reason why the tax credit results in inappropriate allocation of government funds is that few people plan their charitable
giving. Instead they respond to family or friends’ medical histories, door-to-door collections, the availability of raffle tickets, or the sponsoring of someone in an event without seriously weighing the relative seriousness of the cause or the effectiveness of the particular charitable organization. How could it be otherwise? Even when they are donating substantial amounts, people may give to causes or institutions about which they know personally. For example, in 1999, Vancouver businessman Jimmy Pattison donated $20 million to a research centre for prostate cancer at the Vancouver General Hospital. He explained to a newspaper reporter that he knew and liked Dr Goldemberg, the head of the centre. Assuming that he obtains the full tax benefit for this gift, he gave in effect about $10 million of his own money and $10 million of the government’s. Perhaps giving $10 million of government money to the centre was the most appropriate and effective use of this money in furthering medical research, but it does seem odd that one person, perhaps acting on a whim or as a favour to a close friend, should be able to divert this amount of government money.

CONTROLLABILITY, ACCOUNTABILITY, AND TRANSPARENCY

Three of the most widely accepted criteria for judging government spending are controllability, transparency, and accountability. The matching grant scheme violates each of these criteria. First, the government ought to be able to exercise control over the expenditure of public funds so that it can be held accountable to the electorate for them and to ensure that expenditures reflect governmental priorities. By enacting a spending program through the Income Tax Act, it loses control over the resulting spending. It can never be sure how much it will have to spend. The amount will depend on, among other things, any changes in the marginal tax rates, the enactment of other tax incentives, and the success of charities’ appeals. There is no annual appropriation of money for the program, and so Parliament has no opportunity to evaluate the estimates of the amount to be spent and assess them in the light of the government’s spending priorities. In effect, the activities so financed are immune from evaluation and “prioritization.” It is not obvious that charitable activities should be given this unassailable position.

Government spending should be, second, transparent and, third, accountable. The electorate should be able to determine easily how much a program costs, who is benefiting from it, and whether it is achieving its objectives. The charitable tax credit obscures not only the
answers but even the questions themselves. Even the most basic question – how much government funding will each charity receive? – has no answer. Charities’ activities are seldom subject to public scrutiny. In an extreme case, the Canadian Security Intelligence Service, for instance, suspects that about two dozen charitable groups in Canada are funding world-wide terrorism and ethnic conflict, yet the fact that they receive government money goes almost unnoticed under this scheme.25

Moreover, as Liberal MP John Bryden noted in his report on charities in 1996, the 66,000 registered charities included countless ones that, while they might be doing good work, would not appear to merit public funds.26 He gave as an example the Quimby Foundation, which had issued tax receipts for $69,526 in 1994 and was dedicated to promoting the writing of an obscure 19th-century American spiritual leader. He also wondered about, among others, the Canadian Society for the Study of Names, the Canadian Naturopathic Education and Research Society, the American Civil War Reenactment Society, and the Back to the Farm Foundation. Information about direct government appropriations is readily available, their merits are frequently the subject of public debates, and the government is held accountable for them; however, when Ottawa gives money by means of the tax credit for charitable contributions, those grants are immune from public scrutiny.

Concern over government spending implicit in the tax concession for contributions to charities is not new. In 1863 William Ewart Gladstone introduced a resolution into the British House of Commons to repeal the income tax exemption for charities. Although the exemption was equivalent to a direct subsidy, because it was hidden in the income tax legislation the government had no control over it and could not be held accountable for it. After establishing that the tax exemption was conceptually equivalent to a direct government subsidy, he said:

But if this latter is a portion of the State expenditure, I ask the Committee to consider why it is to be kept up in so strange a form? For many years, we have been passing Bills and adopting administrative provisions, with a view to bringing the whole expenditure of the State, from time to time, within the control, and under the eye, of the House of Commons. If this money is to be laid out upon what are called charities, why is that portion of the State expenditure to be altogether withdrawn from view, to be shrouded within the folds of the most complicated sections of our Act of Parliament, and to be so contrived that we shall know nothing of it, and have no control over it; so that, while to every other object recognized by the State as fit to be provided for
out of the public funds, we apply, and for the most part apply every year, a vigil-
ilant eye with a view to modification or retrenchment, here we maintain from year to year and from generation to generation what we are pleased to term an exemption, that is to say a public grant, but a public grant which we never investigate, and never weight. We plume ourselves upon our liberality; we leave this great expenditure entirely in the dark; we waive in favour of these institutions, not only the receipt of a certain sum of money, but the application of all those principles of philosophical and practical administration, and of constitutional control, which we consider necessary for the general government of the country and management of our finances? Ought we to act thus? 27

Gladstone’s resolution was defeated, but the concerns that he expressed about the lack of government accountability and control over the government spending inherent in the tax exemption for charities (and the tax credit for donations) remain valid today.

THE EFFICIENCY QUESTION: THE INCENTIVE EFFECT OF A MATCHING GRANT SCHEME

Some supporters of matching grants claim that, even though the spending program has design flaws, it is an efficient strategy for encouraging philanthropic contributions. They argue that each government dollar spent through such a program induces more than one dollar in private contributions. Thus the voluntary sector gains more in contributions than the government loses in revenue, and therefore overall more money is available for the provision of public goods and services.

Countless economists have studied the incentive effect of the charitable deduction and have summarized their findings in numerous publications. 28 The studies reach hopelessly irreconcilable results. Some suggest that its efficiency is near zero; for example, researchers at Canada’s Department of Finance found that the government, to raise an additional $1 of private donations, had to spend $5. 29 Other studies find the incentive so efficient that each $1 of lost tax revenue raised $2 of private donations.

We can make some sense of the studies by dividing them into three chronological periods. The first round of empirical studies, in the late 1960s and early 1970s, tended to suggest that reducing the price of charitable giving by providing a tax concession for contributions did little to increase giving. 30 However, in the mid-1970s and the 1980s a series of studies, most notably those by Martin Feldstein 31 and Charles Clotfelter, 32 found tax deductions efficient, stimulating an increase in
giving that exceeded the tax revenue forgone. These studies suggested that, as U.S. marginal tax rates declined dramatically in the 1980s, thus substantially increasing the price of giving to charities, charitable donations would drop. Just the opposite happened. Between 1980 and 1990 charitable giving increased. Intrigued by this fact, researchers undertook a new round of studies which, instead of looking at the cross-sectional data examined earlier, used longitudinal data relating to a panel of taxpayers and could determine whether tax changes affected only the timing of a person’s donations or also the total over a lifetime. In a review of these new studies done in the late 1980s, Richard Steinberg concluded that the earlier consensus on efficiency “has been strongly questioned by recent progress in statistical techniques and by the availability of new data sets. Early analysis from panels of tax data indicate that giving is price inelastic, although further analysis is necessary.” Since then, other studies using panel data have also concluded that a tax concession is inefficient – that is, that governments lose substantially more tax revenue from such a concession than they generate in additional revenue for the voluntary sector.

A tax credit undoubtedly stimulates some giving. However, the best evidence tells us that the amount is considerably less than the government loses in revenue. The tax credit is likely of little significance to most low- and middle-income earners, and most high-income earners probably receive some form of consideration for most of their contributions, if only some form of public acknowledgment. If the government were to repeal the tax credit and allocate the saved revenue through semi-autonomous government agencies to the voluntary sector, much of the charitable sector would have considerable additional revenue. Moreover, at present a substantial amount of money donated goes to religious organizations, which would probably not qualify for direct grants. Consequently, this additional amount would be available for other organizations.

FINANCING THE VOLUNTARY SECTOR AND PROMOTING CITIZENSHIP THROUGH TAXES

Financing the Voluntary Sector

In this final section, I take a step back from detailed arguments and make two additional general points, closely related to the argument set out above. First, having maintained that matching grants, as represented by the tax credit for charitable donations, are not an effective way of financing the voluntary sector, I should state what the alterna-
tive should be. Aside from some form of contractual arrangement, there are essentially two possibilities—matching grants and direct grants. If the former are not effective, we are naturally left with the latter. Governments already use this technique in many areas. The federal government does so via agencies such as the Natural Sciences and Engineering Research Council of Canada, the Social Sciences and Humanities Research Council of Canada, and the Medical Research Council, or through programs in government departments. At the provincial level such granting agencies include the Ontario Arts Council and the Ontario Trillium Foundation.

I leave for another place discussion about the design and funding of grant-giving, semi-autonomous government agencies. Such schemes permit allocation of funds to those areas considered most needy, in a way that allows for transparency of decision-making and effective accountability. It is difficult to imagine that the federal government could not make better use of the approximately $1.6 billion it now gives each year to taxpayers who claim the credit by allocating it to granting agencies, however designed. Funds would go to voluntary organizations according to predetermined criteria related in some way to their merits. This redirection of assistance would result in a more vibrant and relevant voluntary sector.

I am not suggesting that the voluntary sector should somehow be “squeezed out” of our national life. I accept completely the right of donors to give their own money or services to whatever organizations they choose. But should such donors also be able to compel others to contribute to that same group, which is the effect of the tax credit? Public funds are not limitless, and a scheme of matching grants must inevitably operate at the expense of some other, democratically determined public program or result in higher taxes.

Although the idea of bureaucrats’ disbursing public finds to charities might seem anathema to some supporters of the private sector, bureaucrats, though not public bureaucrats, already disburse a good amount of charitable donations. Regional United Ways and other umbrella entities, which offer donors and constituents economies of scale in raising of funds and expertise in allocation of them among charities, operate like semi-autonomous government funding agencies. Whatever the advantages of having individuals choose the charities to which government subsidies go, they clearly do not apply when people give to umbrella organizations, in which a board of directors, often drawn from their own constituents, determines the annual grant to each constituent. This is particularly the case now that their allocation of funds tends to be more program-related, is less discretionary, and gives greater priority to local needs. The same might be said of
donations to large foundations in which boards of directors disburse grants to individual charities based on the bureaucratic judgment of the foundation’s employees.

Comparing Taxes and Donations

Taxes are much more effective at promoting the values of democratic citizenship than are donations. No one can gainsay the extraordinary value of the work done by some charities and the significant contribution they have made to many areas of national life. However, as I argue elsewhere, although charities play a vital role in a modern democratic welfare state, it is a somewhat restricted role: allowing citizens with common interests to come together to explore and enrich their experiences; defining and clarifying issues for public consideration and government action; ensuring that all members of society enjoy equal participation in government and society; improving the processes and competence of government; filling gaps in the delivery of social services in responsive and constructive ways; innovating with new ways for delivering public services and then urging governments to take over; monitoring, overseeing, and bringing to public attention abuses of power in the public or private sector; and advocating and working for social change.

Attempts to transfer to the voluntary sector responsibility for delivery of services traditionally discharged by the public sector will threaten not only the rights of citizenship that the recipients of these services should enjoy but also the unique and valuable characteristics of the voluntary sector itself as a form of social organization. In the words of Jennifer Wolch, “The rhetoric of social change and betterment, so pervasive in the nonprofit world, masks a reality in which the sector is increasingly expected to uphold dominant norms and values, protect existing resource distributions, and shield the state from attacks on legitimacy. Is this the center we would hold? ... Decentering the nonprofit sector [away from dominant institutions, powerful groups, and privileged places], and joining the margins therefore may stand as an alternative – and ultimately more viable – strategy for the weaving of a new, more humane and inclusive social contract.”

I underline this theme by comparing charitable donations and taxes. In recent years the backlash against the welfare state has resulted in denigrating the paying of taxes but glorifying the making of charitable donations. This is most unfortunate. As devices for promoting citizenship, taxes are superior to donations in almost every respect. It is almost impossible to make any sense out of policy
changes that would reduce government services and at the same time increase reliance on the voluntary sector except through the lens of class. After all, society’s economic elite does not need social insurance, it has little to fear from cutbacks in social services, and liberalizing tax concessions for charitable gifts simply allows them more control over government funds and further disenfranchises low- and even middle-income families.

Other significant differences hold between taxes and donations. On average, charities spend 25 per cent of their revenue on raising funds; taxes are collected for little over 1 per cent of the revenue raised. Charitable contributions allow people to pursue their own personal predilections, without close regard to community needs. Conversely, by paying taxes, people contribute to the community without necessarily furthering their personal, perhaps idiosyncratic inclinations. They indicate their willingness to engage in public deliberation about the public good and ultimately to be bound by the judgment of the majority as to how it should be furthered. Paying taxes expresses a confidence in other citizens and acknowledges an intimate link with them.

Donors to charities frequently look for some recognition for their gift – a building bearing their name, a name plate on a seat, or a grateful smile. Citizens pay taxes without a strict accounting of what the bargain is worth for them personally. The only consideration they receive is the furtherance of the public good. In this respect paying taxes is true beneficence writ large.

Charity divides people into beneficent donors and grateful beneficiaries. Taxes, in contrast, erase differences. The services that taxes purchase, such as public education and health care, are available to everyone as members of the community. Social transfers financed by taxes provide entitlements to recipients that strengthen citizenship based on principles of mutual support and universal inclusiveness.

Contributions regarded as charitable imply that donors are sharing income to which they have an ethical claim and their giving an act of personal virtue. It therefore reinforces the justness of the existing social order. Progressive taxes, in contrast, imply that the distribution of income that results from market forces is ethically unjustifiable and socially unacceptable. They signal the intrinsically social nature of everyone’s contributions to society; they underline the fact that what a person is able to earn in the market economy is dramatically affected by morally irrelevant factors such as the accident of being born into a family of wealth, the good luck of remaining able-bodied and working, or the chance event of having invested in growth securities. They emphasize that what people earn in the
market economy bears no relationship to the value of their contribution to others.

By cutting programs and encouraging corporations to step into the breach, neo-conservative governments are taking social decisions away from the people and giving them to an unelected group of corporate officials. Taxes add democratic legitimacy to what individuals undertake together. In addition to demonstrating an undemocratic disposition, the suggestion that taxes should be cut and corporate charitable contributions increased also reflects a confused mind. To the shareholders of corporations, presumably there is little difference between paying taxes and having corporate executives siphon off shareholders’ profits to their own favourite charities. As shareholders they can vote out the management if they think that it is being too generous, but as taxpayers they can do the same to the government.

Charities are unaccountable to their beneficiaries. Some groups who have been advocating devolving of more responsibilities from the government to the voluntary sector have appropriated the rallying cry, "Power to the People." Yet such devolution disempowers the people that they serve. The only people empowered are the charity givers. They can serve those whom they want to and attach whatever conditions they regard as appropriate. In contrast, those who receive benefits that are financed by taxes are empowered. They have the protections afforded by procedural due process and the Charter of Rights.

Charity deals with problems case by case and serves to reinforce society’s narrowly defined idea of who is deserving. It implies that individual acts of charity can substitute for changing the underlying conditions that victimize vulnerable people. The assumption of appeals to help the needy, the homeless, or starving is that they will always be with us but at least a few can be helped. Only with taxes and government action can the conditions that place so many people at risk be eradicated.

Giving to charities is often seen as an act of generosity, while many regard having to pay taxes as an act of coercion, even oppression, on the part of government. This is an odd way to look at the world. Why is it an act of generosity to send a small cheque in a well-publicized case involving a starving child, for example, and yet a symbol of oppression to support a government program that will help all such children, whether publicized or not? Those who support the voluntary sector sometimes assert that it is necessary to rebuild notions of social obligations that have been eroded by the growth of government. It would be more accurate to say that government cutbacks reflect a complete abandonment of notions of social obligation.
When Ontario’s Progressive Conservative government talked in 1995 about introducing dramatic tax cuts, which a majority of residents opposed, government spokespersons were fond of saying that if people did not really want the tax reduction they could give the money to a charity, a church, or some other group that they wished to support. But such a suggestion misconceives the problem of collective action. No one person, not even a large group of people, can solve the social problems facing Ontario. But lots of people might be willing to make a small sacrifice, if others did the same thing, so that together they might achieve some goal that benefits everyone, such as reducing child poverty or eradicating homelessness. This process of saying “I will if you will,” so that the majority’s preferences are respected, is what voting and taxes are all about.

In conclusion, the debate in Canada over tax cuts and the debate over enriching the tax credit for charitable contributions is not about “whether Canadians should be allowed to keep more of their hard earned income” or about “encouraging altruism.” It is about the meaning of citizenship and about concepts of social rights, equality, and entitlement. Also, ultimately it is a debate about who will exercise power in Canadian society. Will the major sources of power be controlled by only a few people acting through private markets and through control of government funds allocated to the voluntary sector, or will they remain with the majority of Canadians, acting through democratically elected governments and their agencies in the public sector?

NOTES

1 See Brooks, chapter 6 in this volume.
2 I have not thought it necessary to detail here either the history or the current workings of the charitable tax credit. For a comprehensive review of both, see Duff, chapter 13 in this volume.
I argue here that the government should repeal the tax credit and generally that it should not match private donations to charities. In a working paper that I wrote almost twenty years ago, which drew on some of these articles, I compared the merits of five possible policy instruments and concluded, by reference to almost every sensible criterion, that direct matching grants were preferable to a tax deduction or credit: see N. Brooks, “Financing the Voluntary Sector: Replacing the Charitable Deduction,” Law and Economics Workshop Series, Faculty of Law, University of Toronto, 1981.

5 For the design features discussed here, see Duff, chapter 13 in this volume.

6 Revenue Canada, Tax Statistics on Individuals: 1996 Tax Year (Ottawa: Revenue Canada, 1998), Table 2.


11 The most notorious story involved allegations that large donations from a drug company influenced the manner in which the University of Toronto’s medical school dealt with a medical researcher, Dr Nancy Olivieri, who wished to publish data suggesting that a drug with which she was experimenting for the drug company was toxic. See B. Livesey, “Dollars and Drugs: The Corporate Takeover of Medical Research May Be Bad for Your Health,” Eye, 7 Jan. 1999.


16 At the University of Toronto, over the past few years a number of donations have been accepted that allegedly gave the donors some direct influence over the direction of university programs they were funding. The terms of these donations were changed after they became public. See T. Cole, “Ivy-League Hustle: The University of Toronto Fundraising Team Is Raking in both Cash and Controversy as They Put the Touch on Corporate Canada,” in Report on Business Magazine (June 1999), 35, and Livesey, “Dollar and Drugs.”

17 L. Kinross, “Business Schools Look to Private Funding Sources,” Financial Post, 24 Apr. 1996. Also, in describing how a new program in the business school at York was initiated, he said, “You set up a steering committee with two or three major banks, insurance companies, and trust companies, and asked: ‘How is the field changing, what are the new requirements, what kind of graduates would you like to see?’ ... From there, it was a short distance to saying, ‘We need some financial support to make it happen.’”


20 His aborted run raised over $27 million. Since then, every year memorial runs take place in communities across Canada and raise millions more. Exactly how large a tax credit these donations attract is of course unknown, but it is reasonable to assume that it is significant.


24 His gift resulted in diversion of more government funds than was implicit in the tax credit. He insisted as a condition that the hospital
match his $20-million gift from its funding foundation and that the B.C.
government spend $152 million to finish constructing a part of the hos-
pital that it had put on hold.

1999.

For other critiques of the current definition of charity see Phillips, chapter 7, and Moran, chapter 8, in this volume.

27 W.E. Gladstone, The Financial Statements of 1853, 1860–63 to which are
added a Speech on Tax-Bills, 1861, and on Charities, 1861 (London: John
Murray, 1864), 436–7.

28 See, most recently, K. Scharf, B. Cherniavsky, and R. Hogg, Tax Incentives
for Charities in Canada, Working Paper No. CPRN O3 (Ottawa: Canadian

688.

30 The study that was regarded as the leading one in the late 1960s con-
cluded that the efficiency of the deduction was near zero. The author
estimated that for every dollar lost in government revenue because of the
tax deduction, charitable contributions increased by only five cents. The
study found that the deduction cost the U.S. Treasury about $42.4 billion
per year but increased charitable giving by only about $81 million over
the level that would have prevailed in its absence. Taussig, “Economic
Aspects of the Personal Income Tax Treatment of Charitable Contribu-

31 See, for example, M. Feldstein, “The Income Tax and Charitable Contri-
butions: Part I – Aggregate and Distributional Effects,” National Tax
Journal 28 (1975), 81.

32 C. Clotfelter, Federal Tax Policy and Charitable Giving (Chicago: University

33 R. Steinberg, “Taxes and Giving; New Findings,” Voluntas 1 (1990), 76.

34 See, for example, W.C. Randolph, “Dynamic Income, Progressive Taxes,
and the Timing of Charitable Contributions,” Journal of Political Economy
103 (1995), 709, and K. Stanton Barrett, A.M. McGuirk, and R. Stein-
berg, “Further Evidence on the Dynamic Impact of Taxes on Charitable
Giving,” National Tax Journal 50 (1997), 321. The results of these and
other studies are discussed and summarized in E. Brown, “Taxes and
Charitable Giving: Is There a New Conventional Wisdom?” National Tax
Association, Proceedings, Eighty-Ninth Annual Conference (Chicago: National
Tax Association, 1999), 153.

35 The fact that religious organizations qualify as charities and that donors
thus qualify for a government subsidy is probably a reflection of the
unaccountability of the government for the spending implicit in the credit. It seems reasonably obvious that allowing a tax credit for contributions to religious bodies shifts the financing of churches from members to others. If separation of state and church means anything, it surely must include the notion that the state ought not compel those who do not belong to religious organizations to subsidize those who do.


37 This is the total projected cost to the federal government for 1998 of the tax concessions for charitable giving. The federal government’s costs for the tax credit for individuals is estimated to be $1.3 billion. Government of Canada, Department of Finance, *Tax Expenditures 1999* (Ottawa: Finance Canada, 1999), Table 1, 16. The annual cost of the deductibility of charitable donations for corporations is estimated to be $300 million. Ibid., Table 2, 22. The tax credit for charitable contributions also costs the provincial governments approximately $650 million in lost tax revenues.

38 This is not an idea with which the wealthy, who benefit most from the tax credit, are likely to agree. In interviews with eighty-eight wealthy donors, Francie Ostrower found that almost all (over 90 per cent) “emphatically rejected a hypothetical proposal that would eliminate the incentive for giving, and have government use the increased revenue to support the types of cultural and welfare activity that have benefited from philanthropy.” The interviewees added comments such as “I’d absolutely hate that,” ‘that would be awful,’ ‘I think it would be sad,’ and ‘that’s socialism.” F. Ostrower, *Why the Wealthy Give: The Culture of Elite Philanthropy* (Princeton, NJ: Princeton University Press, 1995), 114.

39 Just as bureaucrats at the United Way do not differ substantially from those in government, many employees probably regard the payroll deduction for their contribution to the United Way as little different from a tax.

40 See Brooks, chapter 6 in this volume.


42 A number of the following ideas probably had their source in Rick Salutin’s weekly column on the media and culture in the *Globe and Mail*. Over the years, in various contexts, he has written perceptively about charity and collective responsibilities.
PART FOUR

Regulatory Challenges
At one time it was convenient to divide society into three sectors: public, private, and “non-profit.” In recent years, however, the distinctions between the sectors have become blurred, mainly because phenomena previously regarded as unique to the private sector have begun to emerge in the other two sectors. The public sector has introduced practices such as competition and reliance on financial incentives, and the non-profit sector, which includes the charitable sector, has experienced increased “commercialization,” often in response to cuts in government grants to charities.

The term “commercialization” has a number of meanings, but in the charitable sector frequently refers to charitable entities’ engaging in commercial activities – i.e., providing goods or services in exchange for valuable consideration. This phenomenon is sometimes called “social enterprise” and encompasses a wide variety of activities. Familiar forms of social enterprise include small-scale bake sales and car washes, the sale of Girl Guide cookies, the operation of gift shops and food stands by hospitals or museums, and the rental of unused real property by charities of all kinds. More innovative forms include charging user fees for social services, using a charity’s staff to provide services to corporate clients at market prices, selling membership lists, and licensing trademarks to for-profit corporations.

This chapter focuses on the legal regulation of social enterprise.¹ The first section outlines the current legal regime.² The remainder of the chapter examines the benefits and the dangers associated with permitting charities to engage in social enterprise and the advantages and
disadvantages of various methods of taxing the income that it generates. I conclude by outlining a proposal for reform of the current regime.

THE CANADIAN LEGAL REGIME

Overview

The legal rules that govern charities’ commercial activities are actually quite complex. Like much of the law of charities, these rules seem to have evolved piecemeal over a long period in response to pressures created by specific abuses. For instance, charities may engage in commercial activity either directly or indirectly (i.e., through the vehicle of a non-charitable intermediary), with differing legal consequences. Moreover, both the federal and the provincial governments exercise jurisdiction in this area. The primary source of regulations concerning the commercial activities of charities is the federal Income Tax Act, but provincial legislation also contains important restrictions.

The Income Tax Act

The Income Tax Act allows a charity that complies with certain regulations to become a registered charity and thereby entitled to an exemption from income tax and the right to issue donation receipts that in turn allow their holders to claim certain tax benefits. The Income Tax Act divides registered charities into two classes: charitable organizations, whose main purpose is to engage directly in charitable activities, and charitable foundations, which have greater latitude to disburse funds to charitable organizations. There are both public foundations and private foundations, and the latter have particularly stringent rules governing their commercial and investment activities because it has proven difficult to prevent them from distributing income or property to people who do not deal with them at arm’s length.

The act restricts registered charities’ commercial activities in two ways: by requiring that they be “exclusively charitable” and by explicitly restricting their business activities. These rules bar private foundations from carrying on any kind of business. However, charitable organizations and public foundations may engage in “related businesses.” First, for the purposes of determining whether a charitable organization (but not a charitable foundation) has complied with the exclusively charitable standard, the organization is deemed to be
devoting its resources to charitable activities to the extent that it carries on a related business. Second, the act prohibits charitable organizations and public foundations from carrying on only businesses that are not related businesses.

The act does not define “related business” other than to say that it “includes a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for their employment.” In the leading case on point, *Alberta Institute on Mental Retardation v. The Queen*, a majority of the Federal Court of Appeal suggested that an enterprise carried on by a charitable foundation was a related business because all of its income went to charitable purposes and the foundation was not “the vehicle of a substantial commercial business.” As Justice Pratte pointed out in dissent, the majority’s definition of a related business would render the provision barring a foundation from carrying on an unrelated business virtually redundant. This is because, leaving aside cases involving substantial commercial businesses, the majority’s “destination of profits” test would allow the minister to cancel a registration on the grounds that a business was not related only if the foundation were not using the income for charitable purposes. In that case, however, the foundation would have breached its obligation to operate exclusively for charitable purposes.

The Canada Customs and Revenue Agency (ccra) has not fully accepted the *Alberta Institute* decision. Instead, it has suggested that it views an activity as a related business so long as it does not become a “substantial commercial endeavour” and the following conditions are substantially met: “the activity is related to the charity’s objects or ancillary to them; there is no private profit motive since any net revenues will be used for charitable activities; the business operation does not compete directly with other for-profit businesses; and the business has been in operation for some time and is accepted by the community.” By including the first, third, and fourth conditions, the ccra has adopted an interpretation of the act somewhat inconsistent with that taken by the majority in *Alberta Institute* (although those conditions were probably satisfied on the facts of that case). Consequently, it is unclear to what extent the act permits charities to engage in commercial activities directly.

By contrast, it seems relatively clear that the act contains few restrictions on charities’ ability to undertake commercial activities indirectly, through a taxable, for-profit entity in which it has invested. In fact, the act contains only one explicit restriction on charities’ investment activities: foundations that “acquire control” of a corporation may have
their registration revoked.\textsuperscript{15} Moreover, the act defines “control” narrowly as occurring when the foundation has acquired for consideration more than 5 per cent of the issued shares of any class of the corporation and, either alone or in concert with non-arm’s-length persons, holds 50 per cent or more of its voting shares.\textsuperscript{16} This suggests that foundations are permitted to acquire control of a corporation by way of receiving a gift. The act also seems to permit foundations to acquire control of businesses that are not organized as corporations with share capital.

The act provides only one penalty for a charity engaging in unauthorized commercial activities – deregistration. This draconian rule stands in sharp contrast to the prevailing U.S. rules, which simply require charities that engage in “unrelated” business activities to pay tax on the income from those activities.\textsuperscript{17}

\textit{Ontario Law}

In Ontario the most significant restriction on charities’ ability to engage in commercial activity appears in the Charitable Gifts Act.\textsuperscript{18} That act is triggered whenever an “interest in a business” is “given to or vested in a person in any capacity for any religious, charitable, educational or public purpose.”\textsuperscript{9} Where that interest represents more than a 10 per cent interest in the business, section 2 of the act requires the holder to dispose of the excess.

There is some uncertainty regarding the scope of this ostensibly sweeping prohibition. For instance, at least one court has endorsed the view that the act does not prohibit a charity from acquiring a business that is directly related to its objects.\textsuperscript{19} Moreover, some legal practitioners are of the view that section 2 does not apply when a charity receives a gift from a for-profit corporation that is indirectly controlled by the charity, so long as a non-profit corporation controlled by the charity serves as an intermediary. It has also been suggested that having a trustee acquire ownership of a business for the benefit of the charity may circumvent this provision.\textsuperscript{20} However, both these tactics seem to be caught by section 2(5), which deems an interest in a business to have been vested in a person for a charitable purpose “so long as the interest or proceeds thereof or the income therefrom is to be used for any such purpose at any time and even though before any such use is made thereof the interest or the proceeds thereof or the income therefrom is to pass into or through the hands of one or more persons or is subject to a life or other intermediary interest.”

Charities’ investment activities may also be governed by the stipulations of trust law, as embodied in either the common law or the
Trustee Act. Trust law will apply if the charity is organized as a trust, if the charity is organized as a corporation but holds specific funds on trust, or one adopts the somewhat controversial view that all the property of an incorporated charity is held subject to the requirements of trust law. Most of the common law and statutory rules that govern trustees’ investments are default rules that can be ousted by sufficiently explicit provisions in the charity’s constating documents. However, no such provision can oust a trustee’s duty to exercise sufficient care and prudence. A trustee is also barred from delegating responsibility for making investment decisions to others.

THE BENEFITS OF SOCIAL ENTERPRISE

There are two potential benefits associated with permitting charities to engage in commercial activity. First, that activity might, either directly or indirectly, help the charity to fulfil its charitable purposes. Second, in some circumstances it may be efficient to have commercial activity conducted by charitable rather than by non-charitable entities. I assess each of these benefits in turn.

Facilitating Charitable Activity

There are two ways in which a charity may enhance its ability to fulfil its charitable purposes by engaging in commercial activity. First, some forms of commercial activity are intrinsically charitable. For instance, the provision of goods or services at a price that is less than or equal to their market price is both a form of commercial activity and a well-recognized form of charity. For example, a charity that provides psychiatric counselling to low-income people for a nominal charge is, at least according to the definition set out above, engaging in commercial activity, but it is probably doing charity at the same time. Generally, where a charity provides goods or services at a price that is below both their cost (to the charity) and their market price, the activity is likely to be intrinsically charitable. Second, commercial activity may be intrinsically charitable when it involves the use of inputs provided by members of a disadvantaged group. In this case, where the beneficiary of the charitable purpose is a supplier rather than a customer, the charitable purpose may entail providing goods or services to customers at a price that equals or exceeds their market price. As a general rule, however, when a charity provides goods or services to other parties at a price that exceeds their cost to the charity – i.e., with a view to making a profit – the activity is unlikely to be regarded as intrinsically charitable. None the less, to
the extent that the activity is ultimately profitable one might argue that it indirectly enhances the charity’s ability to fulfil its charitable purposes by increasing the amount of funds that it has available to use for charitable purposes.

*Promoting Efficient Commercial Activity*

A second potential benefit of social enterprise is that it may be efficient. It is fair to presume that, all things being equal, the state has an interest in formulating legal rules that tend to encourage efficient and to discourage inefficient commercial activity. But what do we mean by “efficiency” in this context? One possible definition implies that individual charities would be better off (and no one else in society would be worse off) if charities were permitted to engage in commercial activity (Pareto efficiency). Another definition implies that society as a whole would do better under such a legal rule, even if some parties became worse off as a result (Kaldor–Hicks efficiency). Any claim that it is Pareto efficient to permit charities to engage in social enterprise implies that charities’ commercial activities are likely to be profitable. A claim that permitting social enterprise is efficient in the Kaldor–Hicks sense corresponds roughly to a claim that charities can provide certain products at lower cost than non-charitable entities.

The connection between these ideas is that if charities are relatively low-cost suppliers of a product, they are likely to provide it in a manner that is not only Kaldor–Hicks efficient but also lucrative. This is likely to occur if charities differ in some economically significant way from other entities and/or they enjoy economies of scope in certain commercial activities.

As for the first point, the most significant difference between charities and many other entities is that charities are non-profits. This means that they cannot use the money or property left over after they satisfy fixed claims for anything other than charitable purposes. Specifically, they may not distribute residual money or property to parties that supply them with either capital or labour. This “non-distribution constraint” is designed to ensure that the individuals who control charities actually use donated capital and labour to serve charitable purposes rather than their own.

A number of scholars have analysed whether non-profits are likely to perform certain commercial activities more efficiently than other entities. Most notably, Henry Hansmann has argued that they may be relatively well suited to mitigating the effects of information asymmetries between consumers and producers of certain goods or services. He
reasons that the non-distribution constraint limits the incentives for non-profits’ members to seek pecuniary benefits by exploiting informational asymmetries.\textsuperscript{26} To the extent that customers are aware of this situation, non-profits will find it less costly to induce their customers to trust them than will for-profit organizations. Thus, for example, a non-profit ostensibly devoted to famine relief in developing countries may be trusted not to divert funds to other uses because its managers are relatively unlikely, compared to the managers of a for-profit firm, to benefit by diverting the funds.\textsuperscript{27}

As useful as it may be in some contexts, Hansmann’s theory is of limited utility for our purposes because it seems to apply only to charities that engage in commercial activities without any intention of earning a profit. This bodes well for charities that engage in commercial activities as a form of charity. However, for Hansmann’s purposes, charities that engage in commercial activities with a view to earning a profit – even one to fund charitable activities – seem more analogous to for-profit organizations. For example, if the non-profit described above undertook famine relief solely to earn a profit to subsidize other charitable activities, then its managers might have an incentive to divert funds from famine relief to other purposes. In other words, the fact that the absence of a profit motive may enhance efficiency in providing certain goods or services is of little relevance when a profit motive is present.

Even if there are no economically significant innate differences between charities and non-charitable entities, some charities may enjoy economies of scope that make their commercial activities efficient. Such economies arise whenever it is less costly for an organization to perform both charitable and commercial activities than it would be for separate organizations to perform the same activities. Generally speaking, economies of scope are possible whenever there are common costs associated with fulfilling the charitable purpose and providing other goods or services. For example, the fixed costs required to construct both a museum and a gift shop or both a hospital and a parking lot may overlap. Similarly, the fixed costs of assembling a team of psychiatric counsellors to serve low-income persons may overlap with the costs of creating a similar group to service high-income customers.

Of course, some economies of scope are more apparent than real. Charities may incur greater fixed costs than are strictly necessary to fulfill their charitable purposes and then attempt to justify those costs as facilitating the performance of commercial activities. Take, for example, a charity whose object is to operate a museum but that owns a building larger than required to house its collection. It may be able
to operate both a museum and a gift shop under the same roof at a lower aggregate cost than if it used the building solely to house its collection and another group operated a gift shop nearby. Its ability to spread the fixed costs of a building over both charitable and commercial activities seems to represent an economy of scope – but this economy might be illusory if the charity initially had the option of obtaining a smaller building. If the additional cost of obtaining the larger building exceeded the cost to any other organization of acquiring a structure suitable for use as a gift shop, then it would have been efficient for the charity to obtain a building just large enough to house its collection. Apart from such complications, however, there may sometimes be economies of scope between certain charitable and commercial activities that it is efficient, in any sense of the word, to permit charities to exploit.

THE DANGERS OF SOCIAL ENTERPRISE

The potential dangers associated with social enterprise have received as much as or more attention than the potential benefits. The most pressing concerns seem to be that permitting social enterprise is either unfair or inefficient or will compromise charities' ability to fulfil their charitable purposes.

Unfair Competition

One of the most frequent complaints about charities that engage in commercial activities is that they compete “unfairly” with for-profit entities. The putative unfairness arises from their exemption from many forms of taxation and their frequent reliance on donated capital and volunteer labour to conduct commercial activity. These factors seem to allow at least some charities to provide goods and services at a lower cost than for-profit entities, but it is less clear that they should worry lawmakers.

It is particularly difficult to argue that using donated capital or volunteer labour amounts to unfair competition. If it is unfair for a firm to rely on capital or labour supplied at below-market rates by arms'-length donors, then it should also be unfair for a firm to rely on capital or labour supplied by individuals who do not operate at arms’ length, including blood relatives. Thus it would become unfair for a firm to rely on so-called love money or to employ family members at below-market rates. This change would entail a remarkable recharacterization of the practices of many small businesses. In addition, barring the use of donated capital or volunteer labour would be
highly inefficient, because it would prevent many individuals from realizing non-pecuniary benefits from gratuitous or partially gratuitous transfers that they make.

By contrast, charities’ exemption from many forms of taxation does seem to give them an unfair advantage.\textsuperscript{28} In this context, opponents of the hybridization of charitable and commercial entities have made two distinct appeals to fairness. The first claim is that the state should treat similarly participants in for-profit enterprises and the beneficiaries of charities that raise funds through commercial activities. However, the two classes of individuals are not similarly situated and so do not require equal treatment.\textsuperscript{29} One could in fact argue that the beneficiaries of charity are particularly deserving of subsidies from the state,\textsuperscript{30} although those who disagree may argue that provision of assistance to the beneficiaries of a charity should not fall to the subset of society whose fortunes happen to be tied to the fortunes of the charity’s competitors.

A second version of the complaint about unfair competition is that allowing charities to engage in commercial activity at a competitive advantage distributes economic opportunities unfairly among for-profit enterprises that compete with charities (at a disadvantage) and those that do not. This second claim has more merit than the first, because these classes of persons appear to be similar in all relevant respects and so it is difficult to justify a legal regime that allows them different economic opportunities. However, this claim seems valid only to the extent that some for-profit enterprises are more exposed to “unfair” competition from charities than others. Therefore, if all for-profits compete with charities at a disadvantage, then there can be no complaint about comparative disadvantage.

Although concerns about unfair competition may have legitimacy, Susan Rose-Ackerman suggests four reasons why they may be overblown. First, “if an industry were perfectly competitive with easy entry and exit of firms, complaints of ‘unfair competition’ would always be invalid. A for-profit firm that was losing money in competition with a non-profit would simply leave that industry and earn the competitive rate of return elsewhere.”\textsuperscript{31} Second, participants in for-profit enterprises who accurately anticipate the extent to which they will compete at a net disadvantage will probably take that fact into account when settling the terms on which they participate in the enterprise. It seems reasonable to assume that they will not participate in an enterprise that faces such competition unless they expect to receive the same benefits as they would have in one that did not face such competition. These particularly clairvoyant individuals will be unable to claim that they are any worse off than they would have been if they had chosen to participate in another enterprise.
Third, even if some charities have a competitive advantage, it is not clear that they will exploit that advantage in a way that harms some for-profits more than others. For-profit enterprises that compete with charities will be harmed only if the charitable entity uses its lower marginal costs to lower prices (and expand production) and thus reduce the profits of competitors. However, profit-seeking charities that have an absolute advantage over for-profit enterprises in a number of industries have an incentive to avoid entering any single industry on such a scale that they affect market prices. Instead, subject of course to any legal restrictions, those charities have an incentive to enter a number of industries on a relatively small scale and sell their products at the price that would prevail if only for-profit firms were to compete.\textsuperscript{32}

Fourth, it is not clear how many charities have a significant net advantage over for-profit enterprises. Although charities sometimes enjoy competitive advantages as a result of their tax-exempt status and access to donated funds and volunteer labour, they may also face offsetting disadvantages. For instance, as I mention below, charities may generally be less efficient at providing goods and services than for-profit enterprises. In principle, these innate inefficiencies may completely offset the impact of the factors that give charities a competitive advantage.

Even if there is legitimate concern about unfair competition, the solution is not necessarily to exclude charities from commercial activity. In fact, removing rather than extending the prohibition on carrying on unrelated businesses should tend to mitigate the consequences of unfair competition by encouraging charities to enter a broader range of industries on a relatively small scale.\textsuperscript{33} Ultimately, however, the only way to put to rest concerns about unfair competition is to “level the playing field” by denying charities that engage in commercial activity any special privileges.

\textit{Promoting Inefficient Commercial Activity}

Another danger associated with allowing charities to engage in commercial activity is that they will do so inefficiently. Would restricting their commercial activities be efficient? The answer may depend on one’s definition of efficiency. For Pareto efficiency, it is relatively difficult to justify any significant restrictions on commercial activities. Strictly speaking, it would be Pareto efficient to prohibit charities from engaging in commercial activity only if we could be confident that charities themselves were likely to be better off as a result. In other words, the Pareto standard justifies prohibiting charities only from
engaging in commercial activities that are unlikely to be profitable. However, even if charities are capable of producing goods and services at a profit, restricting their commercial activities might be efficient in the Kaldor–Hicks sense if they can be expected to earn systematically lower profits than similar for-profit enterprises. In this second scenario one could argue that society as a whole would be better off if the prohibition were imposed, because this would maximize overall profits earned from commercial activity, even if the funds available to charities decreased as a result.\footnote{34}

As for Pareto efficiency, it is not completely implausible that charities might systematically tend to engage in unprofitable commercial activities. All charities are by definition non-profits, and so their managers are not accountable to a group of (presumably) self-interested residual claimants. The conventional wisdom is that in the absence of a class of residual claimants it is difficult to induce managers to maximize their employer’s income from commercial activities,\footnote{35} mainly because there are few other private parties with either adequate resources or the appropriate incentives to make and follow through on threats to monitor managers and terminate or sue the ones who fail to maximize profits.\footnote{36} Charging a public official with the responsibility for disciplining the managers may overcome these problems to some extent. However, even if an obligation to maximize profits were a component of the fiduciary duties owed by charities’ managers, it might be difficult for even a well-funded public agency to enforce that obligation, which is so difficult to define in any given context. For instance, it is reasonably clear that a charity should not engage in commercial activities that are expected to yield a lower return than it can anticipate obtaining by investing equivalent resources in risk-free, publicly traded securities. However, it also seems clear that, at least in some cases, any obligation to maximize expected financial returns should be qualified by an obligation to consider both the value of doing charity earlier rather than later and the riskiness of the activities in which the charity engages.\footnote{37} Therefore it will be very difficult for anyone who is not intimately familiar with a charity’s operations to determine whether its employees are carrying on commercial activities so as to maximize its ability to fulfil its charitable purposes.\footnote{38}

The Kaldor–Hicks definition of efficiency provides a more compelling basis for restricting charities’ commercial activities than does the Pareto definition. First, even if non-profits’ relatively high agency costs are not so great as to prevent them from earning a profit, they may cause non-profits to be less profitable than for-profits that have access to equivalent amounts of capital and labour. Second, non-
profits may also be unprofitable in relative as opposed to absolute terms because of their inability to issue equity. In some cases – for example, when expected cash flows are highly variable or debt levels are already high and the firm has few assets to offer as collateral – the marginal cost of equity financing is likely to be lower than that of debt financing. Consequently, non-profits’ average cost of external capital will be relatively high. This will tend to make them less profitable than for-profits unless they have sufficient internal – presumably donated – funds to finance their operations or can conduct commercial activities through a for-profit subsidiary that is able to issue equity to outside investors.

These efficiency-based arguments weigh in favour of restricting charities’ commercial activities. However, they are subject to qualifications. First, there may be some goods or services that non-profit charities can produce at lower cost than for-profit firms, presumably because they can exploit economies of scope unavailable to for-profits. Second, it is difficult to see how agency costs could significantly impair charities’ ability to make relatively low-risk passive investments. Third, the argument that Kaldor–Hicks efficiency is best served by restricting charities’ commercial activities implicitly assumes that the stock of capital and labour in society does not vary according to whether non-profits are permitted to engage in commercial activity. That assumption may not be valid, however, vis-à-vis the stock of labour in society. Many people seem to derive greater satisfaction from donating labour to a charity than they would from donating, for example, its money equivalent. Thus if non-profits were barred from engaging in any commercial activities using volunteer labour, the displaced volunteers would not necessarily choose to supply the same amount of labour to a for-profit firm and then donate the resulting income to charity. Some might find an additional hour of volunteer work preferable to an additional hour of leisure, but an hour of leisure preferable to an additional hour of paid work, even if they would donate the income from that work to charity. Therefore barring charities from commercial activities, or at least those that rely on volunteer labour, might effectively reduce the amount of labour supplied in a society.

Fourth, the claims that social enterprise is inefficient are based entirely on theoretical rather than on empirical analysis. It would be imprudent to base public policy on unsubstantiated theoretical claims, and so far empirical studies have failed to reveal significant differences between the performances of for-profit and of non-profit firms. These findings may simply reflect shortcomings in the studies. However, the theoretical analyses may be deficient. A number of
mechanisms probably reduce the impact of the absence of residual claimants in the non-profit sector. For example, both Henry Hansmann and Mark Schlesinger discuss how competition from for-profit firms disciplines managers of non-profit hospitals. Bruce Chapman also considers the extent to which non-profits substitute screening mechanisms for monitoring by residual claimants – for instance, the low wages offered in the charitable sector probably attract managers who earn non-pecuniary benefits from pursuing the charities’ mission and help screen out individuals likely to pursue other agendas. Therefore, although concern about inefficiency should influence regulation of social enterprise, an outright prohibition seems inappropriate at this time.

Compromising Charitable Purposes

Although considerations of efficiency and fairness should affect the design of legal rules to govern charitable activity, it is not clear that either value ought to be a central concern. Rather, intuition suggests that the principal object of the law of charities, including the rules governing charities’ commercial activities, should be to facilitate the doing of charity.

There are two ways in which charities’ engagement in commercial activities might harm their charitable activities. First, it may unduly reduce the amount of resources – financial or otherwise – available for charitable purposes. This concern is essentially identical to the concern discussed above that charities will tend to engage in unprofitable commercial activities.

A second concern is that charities’ commercial activities might be too profitable, rendering them less reliant on donated funds, so that they can “drift” away from the types of charitable activities preferred by donors. Fearing this sort of “mission drift,” commentators such as Bruce Chapman support rules that force charities to return constantly to their donors for support by restricting commercial activities and mandating regular disbursements.

One difficulty with Chapman’s analysis, however, is that it blurs the distinction between malign and benign forms of mission drift. Some charities accept donations dedicated to one set of charitable purposes and then use them to fulfil different charitable purposes. Such opportunistic behaviour, if it became routine, would deter many potential donors from making donations or force them to take costly precautions. Either response would tend to reduce donations. Legal rules clearly ought to be designed to prevent this malign form of mission drift. However, restricting charities’ commercial activities would over-
shoot that goal. Such limitations would prevent charities not only from using donations for unintended purposes, but also from using their original endowment as intended and applying new funds to new purposes.

This form of drift seems quite benign. Indeed, there is little evidence that the law of charities is designed to grant a charity’s original set of donors such sweeping control of its affairs after its objects have been settled. For instance, donors generally do not have standing to enforce the fiduciary duties owed by the charity’s managers. Furthermore, on Chapman’s theory, granting managers the authority to attract funding from any new source would undermine the control of the original donors. However, neither Chapman nor anyone else seems willing to support a blanket prohibition on soliciting funds from new donors.

Not only would it be unorthodox to prohibit what I consider a benign form of mission drift, it would also be positively undesirable. Prohibition of this kind of mission drift would force managers to establish a new organization every time they wanted to pursue charitable purposes that diverged from the ones favoured by their original donors, even if they had spent all the previously donated funds in pursuit of the original purposes. Such a regime would entail significant transaction costs and would privilege the interests of one set of donors over a presumably more general public interest in having all sorts of charitable purposes fulfilled.

It also is not clear that Chapman’s prescription is necessary to prevent the malign form of mission drift – namely, opportunistic alteration of purposes before donations have been used. First, the relative cost of developing new sources of funding as opposed to raising funds from previous donors would strongly discourage charities from abandoning previous donors. Even if charities are permitted to seek out new sources of funding, previous donors may have enough leverage to prevent opportunistic drift. In addition, concerned donors can protect themselves by making donations to a separate legal entity dedicated to their preferred purpose or purposes. Alternatively, the “donor” could enter into a contract binding the charity to perform the specified charitable works in consideration for the donor’s funds.

Although the need to control mission drift may not require limiting charities’ commercial activities, it may justify some regulation. Specifically, the law should compel charities to disclose the extent to which they have used donated resources to support commercial activities and should forbid them to use donated resources to finance commercial activities unless the donor has explicitly consented. This requirement
would prevent one type of malign mission drift – namely, use of
donated funds to support commercial activities contrary to the
donor’s wishes.

Such a regime is necessary because donors’ views may vary on how
they wish their charitable donations to be used. Some may wish their
donations to be used exclusively and directly to support charitable
activities,\(^4^7\) others may be willing to support commercial activity that
will in turn finance charitable activities.\(^4^8\) In order to cater to donors’
varying preferences (and thus maximize donations) it seems appropriate
to give donors the option of indicating whether they wish to support
commercial activities.

This raises the issue of how to set the appropriate default rule – i.e.,
the rule that will apply unless donors indicate that they do not wish it
to apply. If left to their own devices, many donors would be unaware of
the default rule and would not think about the charity’s supporting
commercial activities. Many others might not know how to ensure that
the charity complies with their wishes. Yet managers of charities are
familiar with the intricacies of the law of charities and will presumably
seek authority to allocate donated resources to commercial activities
whenever this is in the best interests of the charity (and perhaps in
other cases as well). Under these circumstances the appropriate
default rule would bar use of donated funds to support commercial
activities. Managers would have to request authority to do so. Simply
by making such a request, the charity will inform donors of the possi-
bility of their refusing.\(^4^9\) By contrast, a default rule that permitted
charities to use donations to support any commercial activities they
saw fit would allow them to use funds contrary to the wishes of some
unwitting donors.\(^5^0\)

**TAXATION OF CHARITIES THAT ENGAGE IN
COMMERCIAL ACTIVITY**

Even if we assume that charities ought to be permitted to engage in
commercial activities, how should they be taxed? The answer depends
heavily on the values that one hopes to promote through the tax
system. For instance, if the sole purpose of the tax regime were to
promote charity by maximizing the amount of wealth under the
control of charitable entities, then it would be logical to exempt all
charities from taxation. By contrast, eliminating unfair competition
arguably requires taxing charities in exactly the same way as other
entities.

The concept of Pareto efficiency is not helpful in this context
because moving from one tax regime to another is almost certain to
make some parties worse off.\textsuperscript{31} Kaldor–Hicks efficiency is, however, relevant and supports taxing charities in much the same way as other entities, because the structure of the tax system can significantly affect the pattern, and thus overall efficiency, of economic activity. For instance, taxing charities’ income from commercial activities less heavily than for-profit enterprises will encourage potential donors to give to charities (for investment in commercial activities) instead of investing in a for-profit enterprise and then donating the resulting income to charity. Similarly, if charities’ income from some activities is taxed at lower rates than their income from other activities, they will have an incentive to invest in activities that generate the less heavily taxed type of income. In each case the regime in question is Kaldor–Hicks inefficient, because it tends to push capital towards entities or activities that attract preferential tax treatment, even if others would generate more pre-tax income and so create more wealth for society. The easiest way to avoid such distortions is to tax charities in the same way as other entities and to tax all income derived from commercial activity at the same rate.

There is one caveat: if it is efficient for a charity to invest in an activity that is taxed at a relatively low rate, then it may not be essential from an economic perspective to tax that activity more heavily. The relatively low tax rate simply gives the charity a potentially redundant incentive to take the efficient course of action. In principle therefore, lawmakers could attempt to identify a class of commercial activities in which it is efficient for charities to engage and tax those activities at a low rate without compromising efficiency. Presumably the class would be roughly coextensive with the class of activities in which charities appear to enjoy economies of scope or access to volunteer labour.

Given the inherent limitations of judicial and legislative processes, lawmakers are likely to find it difficult to legislate the class of commercial activities that can safely be taxed at a relatively low rate. Hence, whenever possible, it is best to tax charities in the same way as other entities and to tax the income that charities derive from all commercial activities at the same rate. However, it is difficult to tax charities’ income from commercial activities efficiently, particularly ones in which charities can believably claim to enjoy economies of scope, which are most likely where certain common costs must be incurred to generate commercial income and to pursue charitable purposes. Taxation of commercial income will encourage charities to minimize their taxable income by allocating as much as possible of those common costs to their commercial rather than to their charitable activities.\textsuperscript{52} However, refusing to permit charities to deduct such common costs
would deter them from some efficient investments. One way to address this problem is by requiring that charities’ allocation of common costs be “reasonable.” But an even simpler solution would be not to tax income from activities in which a charity clearly enjoys economies of scope.

RECOMMENDATIONS FOR REFORM

The preceding analysis illustrates the possibility of reconciling the values of charity, efficiency, and fairness in setting restrictions on charities’ commercial activities. To the extent that a society wants to promote charity, it should permit charities to engage in any commercial activities that are either intrinsically charitable or likely to generate funds for charitable purposes. The only caveat should be a requirement that they obtain donors’ consent before using donated resources to support commercial activities. Taking Pareto efficiency into account leads to a similar conclusion, but pursuing Kaldor–Hicks efficiency does not, since there may be activities that charities conduct profitably, but less profitably than do non-charitable entities. It is difficult, however, to identify with any confidence the commercial activities for which charities are relatively unsuited. Consequently, it is difficult to use the Kaldor–Hicks principle to justify restrictions on their commercial activities. Finally, although concerns about unfair competition might justify changes in taxation of charities that engage in commercial activities, they provide little basis for restricting such activities.

Unfortunately, it is more difficult to determine how charities’ income from commercial activity ought to be taxed. As I indicated above, promoting charity is not compatible with taxing such income. Both Kaldor–Hicks efficiency and fairness, however, seem to require taxing it much like income earned by other entities. Where does this leave us? A partial solution is to exempt from taxation charities’ income from commercial activities that appear to exploit economies of scope or make substantial use of volunteer labour and that, for whatever reason, do not unfairly compete with for-profit enterprises. All other income from commercial activities would be subject to taxation. Such a proposal might prove difficult and costly to administer and might tax commercial activities in which a charity has no apparent comparative advantage. However, other solutions seem to entail more significant compromises.

Building a workable legal regime based on these normative foundations is quite feasible. First, that regime would permit charities to engage in commercial activities that are intrinsically charitable. This
rule may or may not be compatible with efficiency considerations – Hansmann’s theory suggests that it is – but the fact that these sorts of activities are well-recognized forms of charity suggests that our society long ago decided that, in this area at least, the intrinsic value of charity outweighs other considerations. Second, as for other commercial activities, because of the agency problems arguably inherent in the non-profit form, it may be appropriate to take a cautious approach, except for activities that are highly likely to be profitable. This implies that charities ought to be routinely permitted to engage in activities in which they experience economies of scope or in which the majority of the participants are volunteers, so long as consent from the relevant donors is obtained. However, attempts to engage in other sorts of activities should be subject to stricter scrutiny. Whether or not those activities are prohibited entirely ought to be dictated by experience. Third, as for taxation, the best, though not necessarily optimal, solution would exempt charities’ income from commercial activities in which they are likely to enjoy economies of scope or they make significant use of volunteer labour and where there is no concern about unfair competition. This compromise would delineate a reasonably broad set of commercial activities in which charities could engage free from either significant regulatory scrutiny or taxation.

Adopting these recommendations would require a number of specific changes to the current legal regime. First, it would entail defining the term “related business” under the Income Tax Act to include only commercial activities that are intrinsically charitable or those that both are highly likely to be profitable, because they involve either economies of scope or the use of donated labour, and do not generate any concern about unfair competition. This may not require a significant departure from current practice, but other aspects of the foregoing analysis have more radical implications. For instance, adopting the principles set out above would require repealing the Charitable Gifts Act and amending the Income Tax Act to permit charities to participate in unrelated businesses, so long as those businesses are fully taxable and subject to oversight by either federal or provincial regulators. Those regulators would have a role similar to that of Ontario’s Public Trustee in ensuring that trustees’ investments comply with the provisions of the Trustee Act. In addition, either federal or provincial regulators would have to enforce a requirement that charities obtain donors’ explicit consent before using their donations to support commercial activity.

Charities subject to this kind of legal regime would always have the option of pursuing commercial ventures, but definitely would not be
obliged to do so. Such a regime might deter many charities from unrelated commercial activity, which would expose them to additional regulatory scrutiny and the prospect of income taxation. Even related businesses might become relatively uncommon, given my proposal to ban the use of donations to sponsor for-profit ventures without donors’ consent. In fact, it is difficult to predict whether implementing this proposal would accelerate or decelerate the widely noted erosion of the boundaries between the charitable and the for-profit sectors. This is just one of many intriguing questions that future research in this area might explore.

NOTES

I am grateful to Bruce Chapman, GuyLaine Charles, Jim Phillips, Alan Slivinski, participants in the conference on Charity and Charities Law, and to students in a class on Non-Profit Management and Leadership at the Schulich School of Business at York University for their comments on an earlier draft of this chapter. I have also benefited from helpful conversations with Brenda Gainer, Edward Iacobucci, and Arnold Weinrib. Any errors or omissions are my own.

1 For the sake of convenience, I focus on the laws applicable in Ontario.
4 Some may distinguish these two sets of rules by claiming that only the former regulates charities’ commercial activity, while the latter deals with their investment activities. However, while the activities addressed may differ in form, they are often functionally equivalent. Consequently, in the absence of a coordinated effort to regulate both activities, any attempt to regulate one activity may be subverted by actors who simply switch to the other.
5 For a discussion of the boundaries between federal and provincial jurisdiction over charities, see OLRC, Report, 1–19.
6 Charitable organizations, unlike charitable foundations, may not make grants to other qualified donees totalling more than 50 per cent of their income in any one year.

7 The makeup of their executive and the identity of their major donors distinguish charitable organizations and public foundations from private foundations. First, more than half of the executive of a charitable organization or a public foundation must deal with each other, and with each of the other members of the executive, only at arm’s length. Second, not more than 50 percent of their capital may have been contributed by one person or by one group of persons who do not deal with each other at arm’s length. See the Income Tax Act, section 149.1 (1), “charitable organization” and “public foundation.” For public foundations created before 1984 or designated by the minister under sections 149.1(6.3), 110(8.1), (8.2) of rsc 1952, c. 148, the figure is 75 per cent.

8 The exclusively charitable rule takes slightly different forms for charitable foundations and for charitable organizations. A charitable foundation must be “constituted and operated exclusively for charitable purposes.” By contrast, “all the resources” of a charitable organization must be “devoted to charitable activities carried on by the organization itself” – s. 149.1(1): “charitable organization” and “public foundation.”

9 S. 149.1(6). Because this provision does not apply to charitable foundations it is theoretically possible for a foundation to breach the exclusively charitable standard by carrying on a related business.

10 S. 149.1(4)(a)

11 ss. 149.1(2)(a) and 149(3)(a).

12 87 dtc 5306.

13 Alberta Institute, per Heald, J.


15 ss. 149.1(3)(c) and 149.1(4)(c).

16 S. 149.1(12)(a).

17 On the Canadian rule, see Sossin, chapter 12 in this volume. The American regime is briefly discussed in the OLRC, Report, 321–2.


19 Re Centenary Hospital Association and Public Trustee (1989) 69 or (2d) 1 (hc) at 19.


Charities that conduct commercial activity with a view to making a profit may still do so in ways that fulfil a charitable purpose. For example, they might set prices below profit-maximizing levels with a view to conferring a benefit on their customers. Alternatively, they may go out of their way to serve particular populations. To date these conjectures do not appear to have been tested empirically, and so the potential benefits remain highly speculative. See further R. Steinberg and B. Weisbrod, “Pricing and Rationing by Nonprofit Organizations with Distributional Objectives,” in Weisbrod, ed., To Profit or Not to Profit, 65–82.

The conventional definitions of Pareto and Kaldor–Hicks efficiency are discussed in J. Coleman, Markets, Morals and the Law (New York: Cambridge University Press, 1988), chap. 4. The definitions employed in the text unconventionally use “charities” rather than individuals as the units of analysis and assume that the welfare of a charity is unambiguously improved by an increase in its wealth (and vice versa). This assumption obscures, among other things, the fact that individual members of a charity (such as its managers) may become better off if a charity is permitted to engage in an unprofitable commercial activity.


In this example, the organization’s “customers” are donors who are characterized as purchasing famine relief.


Rose-Ackerman, “Unfair Competition,” 1020.

This argument could be extended to justify the provision of a tax credit for charitable donations. For a critical discussion of such tax credits, see Brooks, chapter 14 in this volume.

Rose-Ackerman, “Unfair Competition,” 1025.

Ibid., 1029; Hansmann, Ownership, 610–12. This analysis is valid only for charities that engage in commercial activities with a view to making a profit. Charities that do so with a view to conferring a benefit on their customers will typically sell their products at below-market prices.
In the American context, Rose-Ackerman, “Unfair Competition,” argues that removing the tax on income from unrelated business activities would have a similar effect.

The increased profits resulting from a prohibition would be more than sufficient to pay charities the amount of money that they would have received if they had been allowed to engage in commercial activity. However, so long as we make the strong assumption that wealth generates the same amount of utility whether it is held by charities or other entities, the prohibition will be Kaldor–Hicks efficient even if charities do not receive this kind of compensation.

Why might managers of a charity not act in its best interests when making decisions about the extent and nature of the charity’s commercial activities? Some might simply want a quiet life and so will be inclined to shirk their responsibilities altogether. Others might find commercial activity more glamorous and personally satisfying than charity. Still others might prefer to engage in commercial activities so as to ensure that the charity has sufficient income to continue to employ them. As for why some might not be capable of selecting profitable commercial ventures, it would not be surprising if managers selected for their ability to perform charitable activities were not ideally suited to engage in commercial activities.


This last point may require some clarification. Determining a charity’s appropriate attitude towards risky opportunities is no easy task. To begin with, one must determine the nature of the relationship between a charity’s income and its ability to carry out its charitable purposes. A charity’s capacity for charitable activity will not necessarily be a constant function of the amount of its income from commercial activities. Take for example a charity formed for the sole purpose of providing room and board to a fixed number of individuals. Its ability to fulfill its charitable purpose may not increase constantly in proportion to the amount of income it earns from commercial activities, because it may need a certain minimum amount of income to provide an acceptable level of service to its beneficiaries. Reducing its income below that level will significantly reduce its capacity to fulfill its charitable purpose; an equivalent increase will not have a proportionate effect on its ability to do charity. Therefore, once its income exceeds the level required to provide the minimum acceptable level of service, its ability to engage in charity may be a concave function of its income from commercial activities. However, if the same charity’s income is very low, its capacity for
charity may be a convex function of its income because a small increase in income may significantly increase its ability to do charity by making it functional, whereas an equivalent reduction would not affect its inability to function. Whether a charity’s ability to do charity is a concave or convex function of its income will determine whether it should be averse to or prefer risky commercial activities. Another factor to consider is that a charity must assess the riskiness of a given investment opportunity in the context of all its other sources of income, paying due regard to the benefits of diversification. See further, M. Johnson, “Note, Speculating on the Efficacy of ‘Speculation’: An Analysis of the Prudent Person’s Slipperiest Term of Art in Light of Modern Portfolio Theory,” *Stanford Law Review* 48 (1996), 419.

38 Verifying compliance with such an obligation might be a daunting task. First, it is always difficult to obtain information about the rate of return and level of risk associated with engaging in a given commercial activity. Second, it will be difficult to calculate the appropriate rate at which to discount the expected returns from a project, because detailed knowledge of a charity’s operations and values will be required to determine its appropriate stance towards risk and forgoing the opportunity to do charity immediately. Third, it may be difficult to determine what sort of non-financial resources, such as agents’ labour, have been devoted to commercial rather than to charitable activities and how much charity those resources could have performed.

39 Under these circumstances it may be more costly to obtain financing through debt than through equity, because use of debt increases the likelihood of insolvency, with its attendant costs. See R. Brealey and S. Myers, *Principles of Corporate Finance*, 5th ed. (New York: McGraw-Hill, 1996), 484–98.

40 This may also occur if labour markets are such that people find it difficult to increase the amount of paid labour that they perform.

41 For instance, Hansmann concludes that managerial agency costs “do not seem to be exceptionally high” in non-profit firms with self-selecting boards of directors. See Hansmann, *Ownership*, 238. For a review and critique of the empirical literature, see M. Schlesinger, “Mismeasuring the Consequences of Ownership: External Influences and the Comparative Performance of Public, For-Profit and Private Non-Profit Organizations,” in W. Powell and E. Clemens, eds., *Private Action and the Public Good* (New Haven, Conn.: Yale, 1998).

42 Schlesinger, “Mismeasuring,” Schlesinger also discusses the impact of various forms of “institutional isomorphism.”

43 Chapman, chapter 5 in this volume.
This is not the occasion to address the problems inherent in defining the mission of any given charity. In other words, how does one determine whether a charity has strayed from the pursuit of any given set of purposes?

See Chapman, chapter 5 in this volume.

That entity could even be an existing charity holding the property on trust for the specified purpose.

Some donors may see commercial activities *per se* as antithetical to the purposes that they wish to promote.


The law-and-economics literature refers to this sort of rule as a “penalty default.” In a seminal article, Ayres and Gertner observed that in many contractual or quasi-contractual settings one party is better informed than the other and has an incentive strategically to withhold its superior information. In some of these cases it is possible to induce the better-informed party to reveal its private information by setting a “default rule” that the informed party does not favour. See I. Ayres and R. Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,” *Yale Law Journal* 99 (1989), 87.

In this scenario, the affected donors probably would not include large donors or donors who make regular contributions. Large donors would have an incentive to acquire better information about the ways in which their donations may be used. As for regular donors, charities may be unwilling to jeopardize future donations by having the donors discover that their donations have, contrary to the donor’s wishes, been used to support commercial activities. Consequently, regardless of the default rule, charities may go out of their way to ascertain whether regular donors wish their donations to be used to support commercial activities.

For example, in Canada the income that charities earn from related businesses is exempt from taxation. However, the income earned by corporations in which charities have purchased shares is not exempt from taxation. This can cause charities to allocate inefficiently large amounts of resources to related businesses as opposed to portfolio investments. To see this, consider a charitable entity with excess funds that can use those funds either to purchase a minority stake in an existing spaghetti company, the income of which is subject to taxation, or to establish its own tax-exempt spaghetti company. Assume that the existing firm can be expected to use the funds to earn a before-tax rate of return of 12 per cent. By contrast, an investment in a new company can be expected only
to earn 10 per cent. However, the marginal tax rate on the income of the existing company is 25 per cent. In this case, the charity would do better to establish its own firm, with after-tax return of 10 per cent. If it invested in the existing company, it would get 9 per cent after tax. This last outcome is inefficient because the social rates of return on the two investments are 12 per cent for the existing company and 10 per cent for a new company.

For evidence that American non-profits respond to this incentive, see J. Cordes and B. Weisbrod, “Differential Taxation of Nonprofits and the Commercialization of Nonprofit Revenues,” in Weisbrod, ed., To Profit or Not to Profit, 83–104.


In principle, the allocation rule should ensure, with the common costs, deductibility of only the incremental costs of carrying on both the charitable activity and the taxable activity, as opposed to just the non-taxable activity. In practice, however, this principle will prove difficult to apply, as it requires the tax authority to determine a hypothetical value – namely, the costs that the charity would have incurred if it had engaged solely in the charitable activity. See Sansing, “Unrelated Business,” 297–8.

Another difficulty arises where a charity engages in commercial activities that cause it to incur opportunity costs. Opportunity costs are often difficult to observe and verify, and so it may be difficult for charities to deduct them from their gross income. The inability to deduct opportunity costs can undermine charities’ incentives to behave efficiently. For example, a charity that allows its name to be used to promote other firms’ products may not incur any direct expenses but may incur a real opportunity cost in the form of reduced donations. Unless the charity is allowed to deduct that cost from its taxable income, any positive level of taxation will deter it from making certain efficient investments in commercial activity. See Sansing, “The Unrelated Business Income Tax,” 298–301. Sansing’s model allows him to identify the inefficiency that arises from the non-deductibility of both pecuniary and non-pecuniary opportunity costs. However, for practical purposes, only the non-deductibility of charities’ pecuniary costs seems to be a pressing concern, as the entire tax system can be criticized for inefficiently failing to allow taxpayers – charitable or otherwise – to deduct non-pecuniary costs from their gross income.

Neither the presence of potential economies of scope nor the use of volunteers guarantees that a charity will actually conduct an activity profitably or even more profitably than a non-charitable entity. For example, economies of scope are obviously involved when a charity licenses its
name to a corporation for marketing purposes. However, a charity's managers may still enter into arrangements that so greatly dilute the value of their employer's name that the increased revenue does not compensate the charity for the loss of donated capital or labour.

Steps will also have to be taken to ensure that charities cannot escape taxation of their commercial income by having ostensibly taxable subsidiaries make large tax-deductible donations to the parent charity.
16 Flirting with the Devil while Doing God’s Work: The Regulation of Charitable Fund-raising

RICHARD JANDA, CARA CAMERON, CHARLES-MAXIME PANACCIO, AND ANDRÉE LAJOIE

Recently heard at work: “Why don’t we do old stuff anymore at McGill? Why did we hire a modernist for Art History and merge that department with the Communications Programme?” “The university received a substantial gift from a donor who wanted to highlight the quality of contemporary Chinese art, handicraft and cultural expression.”


We view our topic, the regulation of charitable fund-raising, as a mirror held up to the academic who works in a university. Over the last twenty years, fund-raising has become increasingly crucial to the continued existence of our universities. Its range and character have become staggeringly complex. The unadorned, unconditional gift now finds itself in the company of joint ventures, patent protection, consultancies, research grants, sponsorships, training contracts and partial privatizations. Today’s university – a charitable non-profit institution – finds itself between state and market and is proliferating hybrid institutional forms apace. Whereas its setting may represent among the most elaborate examples of public–private partnership in the charitable sector, it is also part of a broader transformation of civil
society. That sea change involves recharacterization of the role and ambitions of the state, renewed emphasis on charity as a means of assuring operation of public institutions, willingness to extend the ambit of markets, and high levels of tolerance for plural and overlapping normative orders – state, charity, market – within institutions.

As charity administrators come to embrace the new modes of funding, it is worth considering in what manner and to what degree these modes of funding will reshape the underlying activity of the charity. Our two introductory quotations sound a cautionary note that rings throughout this chapter. Gifts can change us, particularly if we seek them out. In the university, they can help set the agenda for teaching and research and on occasion can help redefine the contours of disciplines. LaFontaine’s cobbler discovered that even a substantial gift with no strings attached changed his relationship to his work and created unforeseen anxiety.

This chapter develops the idea that the regulation of fund-raising should aim to ensure that charities continue to pursue charitable goals for their own sake and that funds facilitate rather than deflect them away from the accomplishment of those goals. The university remains the backdrop for this inquiry and provides a brief case study. The operative conception of regulation that we use is deliberately broad. We have in mind not only the formal state instruments of command and control but also, and principally, efforts by charities to put in place their own mechanisms for assessing whether gifts are changing them for good or for ill. The discussion also spills over into the subject of “social enterprise,” since fund-raising for gifts in practice now includes discussion of joint projects with prospective donor-investors.

In pursuing this inquiry, we sketch out, in the first section, the resurgence of charity in Quebec as a means for fulfilling public purposes and examine, in the second, the tension between publicly identified goals of distributive justice and privately identified charitable purposes. The third section deals with the origins of secular fund-raising, using the emblematic example of Pierre Abélard’s paradoxical vows of poverty when he established his university in Paraclete relying on students’ gifts. This leads in the fourth section to a discussion of the transformation of the gift relationship into the fund-raising opportunity, where we examine the nature of attenuated or conditional altruism and describe the spectrum of fund-raising techniques, ranging from pure gift to pure bargain. We use principles of regulatory practice derived from the generally acknowledged characteristics of altruism to classify and characterize regulatory issues and traditional approaches. The tendency of the law to protect the donor...
rather than the charity focuses institutional regulation on the relationships between non-profit institution and donor almost to the exclusion of those within the non-profit institution and among non-profit institutions. Finally, in the fifth section, we test the proposed regulatory principles against the regulatory practice in all three loci of one reasonably sophisticated non-profit institution – McGill University – so as to draw general conclusions about the ideal orientation of fund-raising regulation within the non-profit institution and for the non-profit institution.

THE RESURGENCE OF CHARITY

La révolution tranquille

For someone living in Quebec, there is a special irony to stating that charity is resurgent and increasingly crucial to the funding of public institutions. Only one generation separates Quebec’s effort to construct a modern welfare state from a time when social services were provided principally through charity. Schools, universities, hospitals, orphanages, and poor houses were operated in large part through churches – notably, the Catholic church. Central to la révolution tranquille was an effort to substitute professional, public-funded universal social services for the charity regime.\footnote{1} Given Quebec’s history, it is not surprising that the reform of 1994 that produced the Civil Code of Quebec abandoned the nineteenth-century terminology of “charitable trust” in favour of an expansive notion of the “social trust.”\footnote{2}

However, in Quebec, as elsewhere, successive cuts to governments’ social spending budgets have produced renewed reliance on charity – in some instances, with explicit legislative support. For example, Quebec guarantees universal access to publicly funded elementary and secondary schools. However, budgets no longer permit the purchase of certain basic materials – paper, pencils, pens, books – and so parents now must purchase such items themselves. It is part of the routine business of Conseils d’orientation – parent–teacher school governing committees – to authorize fund-raising campaigns for a variety of school purposes. A provincially sanctioned mechanism allows for establishment of charitable foundations that work in tandem with the public school and fund special projects that budgets may not cover. This situation gives rise to difficult and complex debates about whether any particular foundation project – for example, the purchase of computers for classrooms – might simply allow the school board to redeploy funds that it would otherwise have to use for the
purpose. This dilemma has led some people to oppose in principle the creation of school foundations.

If budget cuts to existing programs create pressure to supplement public spending with charitable gifts, so does creation of new programs. For example, the Quebec government, with some fanfare, has implemented a scheme of $5-a-day daycare so as to make child care accessible and affordable. However, the limited public funds available to subsidize daycare constrain the quality of service, producing very high teacher–child ratios and very low wages for teachers. Consequently, parents who want high-quality service – typically levels of service that existed prior to the new scheme – are seeking to make charitable contributions to the daycare centre. Parent daycare administrators are now in the awkward position of soliciting additional funds from the very people who thought they were getting relief for child care expenses. However, the provincial government has been discouraging daycares from accepting charitable donations by threatening to reduce its contribution in proportion to the charitable contributions. Thus tight public budgets, combined with uncertainty surrounding charitable donations to daycare, have made certain daycare budgets more precarious than they were in the days of strict fee for service.

In both institutions – public school foundations and daycare centres – parents are in essence using charitable gifts to purchase personal services for their children. Non-parent donors are extremely rare. The purpose of fund-raising in these cases is to sell the higher-quality product – basic service, supplemented with charitable funds – and to overcome a significant and persistent “free-rider” problem by creating a bandwagon effect. The government justifies the use of charity to supplement universal, publicly funded programs by claiming that there is still a public funding dimension to the tax relief afforded to charitable donations and that donations are not mandatory or pegged at any particular level. However, what they leave without comment is the emergence of considerable variation in the resources available to individual schools or daycares as a result of differential success in fund-raising. The implication is that distributive justice, the cri de cœur of la révolution tranquille, can be achieved only in rudimentary form: that is, the provision of a minimum service baseline. The state deploys charity as a second-best outcome in order to extend service beyond that baseline, albeit unevenly.

*The Unrealized Ambition of L’État providence*

Here is one way of telling the story of the genesis of la révolution tranquille. What Quebec did in the 1960s, and what took place elsewhere
earlier and in varying degree, in effect substituted the state for the
church, thereby secularizing and universalizing charity. The secular-
ization of charity has a long and complicated pedigree. It is a reason-
able shorthand statement that the early Christian church in a number
of its manifestations reproduced the earlier, Jewish understanding of
*Tsedakah* (charity). In practical terms, small church communities redis-
tributed wealth among members and among churches. But very soon
(inevitably?), the task of redistribution in the name of God was for-
malized in monastic institutions, which accumulated wealth for that
purpose. This in turn produced the corruption of church luxury and
the failure of church alms. Even assuming that the accumulation of
property corrupts all human relations, not merely those involving a
church, there is something particular about the devotion of property
to God that undermines charity. Formulaic devotion to God obscured
the doing of charity for other people and justified all manner of abom-
ination in the name of rooting out heresy. This ultimately produced a
response from that creation of human law, the state – for example,
destroying the monasteries of England and favouring individual dona-
tions to state-sanctioned public purposes – grammar schools, hospitals,
and poor houses. Of course this was in large part an expropriation on
behalf of the king’s treasury and thus an equal and opposite form of
corruption.

But the major transformation effected by this secularization was that
it heightened personal responsibility for one’s fellow citizens. And
democratic accountability eventually came to constrain (in what
measure?) use of the state’s taxation power for the private gain of
those controlling the state apparatus. As the state sought increasingly
to fulfil the public purposes that it had identified for charitable gifts,
secularization culminated in the universalization of charity as welfare.

The singular feature of Quebec’s *révolution tranquille* is that it col-
lapsed several stages of this transformation into a very brief period and
with relative social peace. Thus, for example, the monasteries in
Quebec were in effect “closed” by the state when they were allowed to
languish. Those who, in an earlier generation, would have entered a
religious order instead entered social work and other professions to
help set up the expert bureaucratic agencies that replaced the
church. Some of the most magnificent empty buildings in Quebec are
the old church properties.

Here is one way of telling the story of what happened to *la révolution
tranquille*. The welfare state, *l’état providence*, had held out the promise
that by designing the right set of formal legal instruments and setting
them in motion, it could cure any social ill. Law had become pro-
grammatic: each legislative and regulatory social initiative required the state to deploy financial resources. The distributive function gained ascendancy over the state’s narrow, corrective function.

The welfare state had notable successes attenuating social ills. But the more it became laden with expectations and claims for just distribution, the clearer the limits of its range of possible action became. Thus, for example, the war on poverty rechannelled but did not eradicate the problem of poverty. The bureaucracy and resources deployed to solve the problem became identified, tendentiously, as a significant cause of poverty. More significantly, the broader the social goals of the state, such as eradicating poverty, the broader and more complex the set of human relations the state had to steer. Many of these relations escaped the reach of formal, centralized law. The state’s effort to steer them simply revealed the panoply of actors, institutions, and interactions implicated in the issues addressed. And the omniscient, omnipotent state, rich as it became, fell short of the resources needed to accomplish everything dreamed for it. The state came of age and started limiting its ambitions, privatizing and deregulating with a vengeance. It became generally accepted that the state was but one actor among others, and often not a very able one at that.7

The Problematic Return to Charity

The “hollowing out” of the state does not entail simply a return to older forms of charity that the state at its zenith had sought to supplant. Where the state had entered fields occupied under the traditional heads of charity – relief of poverty, advancement of education, or other beneficial public purposes (notably health care) – it has not simply departed.8 It has instead more recently tolerated or even encouraged development of hybrid arrangements through which non-profit and even for-profit institutions work in partnership with the state to achieve public policy objectives.9 This phenomenon transforms again the relationship between the state and charities when the welfare state itself became a major contributor of funds to charities. Whereas in the years of flush coffers, governments designed grants made through funding programs typically to pay fully for the service offered by the charity, today partnership leverages scarce government funds for services for which it can only partly pay.10

Fund-aising for charities in these hybrid relationships thus extends the state’s purchasing power for social services. Yet some charitable community groups, notably those working with the poor, conclude that their central purpose should be to lobby for more government
monies for services rather than to supply services themselves. But the withdrawal or diminution of government grants necessarily changes the agency’s orientation towards raising funds from private donors or from government. Health care is in some ways an exception, since the federal government’s proclaimed effort to maintain universal service without user fees rules out some of the hybrid public–charity–private partnerships observable in education spending. Yet just as universities are selectively privatizing in the wake of budget cuts, so too removal of certain non-essential health services from public payment schedules effects a selective privatization.

A Provocative Characterization

As compared with the welfare state, which at once supplanted charities and co-opted them to government purposes, the state today is becoming a charitable intermediary or foundation and charities are becoming state actors. Where the state no longer views itself as sole or even principal provider of some public services, it becomes a part-supplier of funds for public purposes in a market of fund suppliers. Its role becomes indistinguishable from that of the charitable foundation, which attempts to prioritize and do distributive justice among a broad range of good causes soliciting its support. Contributions to the state “foundation” through taxes are compulsory, however, and this “foundation” is accountable to all citizens. Observe nevertheless that individuals increasingly change their residence or citizenship and thus choose where to direct their taxes – i.e., tax contribution to a particular state “foundation” is not strictly obligatory. Some countries, such as Germany, still incorporate a residue of the “tithing” scheme into public taxation by providing a voluntary check-off for a charity contribution to a church on the tax return, and so many taxpayers do give to church foundations as part of paying taxes. Payroll deductions for “united fund” charities in Canada are arguably close cousins to taxation. In other words, it is not in principle inconsistent with foundation status that foundation funds be generated out of taxes. Furthermore, church foundations accountable to congregations or united funds accountable to a broad cross-section of the public face the same issues of accountability as does the state in its distribution of tax resources. Finally, taxpayers may choose to make contributions to state coffers in excess of their tax liability as a matter of charitable donation. In other words, the state is already explicitly characterizing itself as a charitable organization.

When the charity becomes a provider of a public service as well as the locus of collection and disbursement of public monies for that
service, it becomes the way that the state acts. The “intermediation” of
the state effects a shift towards charities as the ultimate state actors.
With fully intermediated state funding, charities would no longer be
supplementary, discretionary add-ons to state provision of services.
They would instead become the executive arm of the state.

We intend this provocative characterization as a heuristic device to
highlight the hybrid character of state–charity relations today. The
state is taking on characteristics of charity and vice versa. This
hybridization suggests that no actor, either the state or charities, will
pay undivided attention to the identification and achievement of
public purposes. The state will be too busy trying to leverage its limited
funds through partnership with other donors, and the charity will be
seeking to ensure that it is the final destination of funding. How and
why priority should be given to any particular purpose will depend on
what services emerge from the polycentric bargaining among funding
agencies. The state will have attenuated influence as part-funder, and
the charity may become rudderless, pulled in a variety of directions by
contributors.

DISTRIBUTIVE JUSTICE VERSUS CHARITY

An Objection

The discussion above may give rise to the objection that the role of the
state – to ensure distributive justice – cannot be placed on a contin-
uum with the role of charity, which is to do good works for anonymous
others out of altruism. It is one thing to respond to claims of distrib-
utive justice, which will generate a relationship of entitlement,
grounded in property rights, between the beneficiary and the state. It is
another to appeal to our better selves in the name of morality and
to hope that some (or most) will want to do good. If one posits a pri-
ority of the right over the good, one will conclude that distributive
justice must be the backdrop for any private choices to do good. Distrib-
utive justice must be done for all. The charitable giver palliates
extraordinary needs. To use charity to meet the obligation to do dis-
tributive justice is to render distributive justice precarious, since justice
will be done, or not, depending on willingness to give. But this is no
distributive justice at all, because precariousness cuts to the heart of
what distributive justice must be: giving to all their due. Furthermore,
to use charity to meet the obligation to do distributive justice is to
drain charity of its virtue, since the givers are then doing only what is
required, not something magnanimous. But this is no charity at all,
because doing one’s duty is not love of the other. Thus to put the
role of the state and the role of charity on a continuum is perverse, since it undermines what is essential to each.

Charity, Imperfect Distributive Justice, and Imperfect Social Solidarity

Yet to rule out state–charity “hybrids” and to insist on the pure form of distributive justice and the pure form of charity is to idealize human institutions and human behaviour in a way that fails to engage the workings of the world. Perfected distributive justice would eliminate the need for charity, because, once all have their due, no one can want. But this is not so and will not be. Perfected charity would eliminate the need for distributive justice, because if each cares fully for the other, no one can fail to have his or her due. But this is not so either, nor will it be. Thus the relationship between distributive justice and charity is better described as follows: Those who are altruistic despite limited social solidarity, ought, in the name of the good, to supplement the state’s only partly successful attempts to do distributive justice. Those whose magnanimity ought in conscience to be engaged most are those who are best off under the existing, imperfect scheme of distribution. This characterization acknowledges the precariousness of distributive justice without abandoning the state’s obligation to do it equally for all at the same time as recognizing the mixed motivations for charity (duty/love) without draining it of virtue.

In addition, some have argued that not only is the state incapable of pursuing distributive justice perfectly, it ought not to try doing so. Godbout and Caillé claim that “the state is not competent to fill some of the roles it has inherited [from social networks], particularly those that owe most to gift.” Cohen and Arato postulate that the attempt to perfect distributive justice in the state, and thus to project social solidarity exclusively through the state, produces a “reification of human relations” that undermines civil society. Civil society is composed of “self-limiting democratizing movements seeking to expand and protect spaces for both negative liberty and positive freedom and to recreate egalitarian forms of solidarity without impairing economic self-regulation” and is the locus par excellence of democracy. According to this argument, it is illegitimate for the state to crowd out civil society, which is essential to human flourishing. If there is to be space for civil society, then there must be space for charity. Charity is one of the functions performed by the associations that arise within civil society, which should maintain its own integrity without becoming completely independent from the state or the economy. The bonds of solidarity formed in civil society entail that “each must take respon-
sibility for the other, because as consociates they all share an interest in the integrity of their common life context.”

The Trade-off

These critiques of efforts to replace charity by state-centred distributive justice suggest that there is a trade-off implicit in the attempt to reconcile distributive justice and charity. A heightened effort to pursue distributive justice through the state, consistent with the priority of the right over the good, will prompt an attempt to centralize the identification and pursuit of public purposes so as to effect the requisite distributive ranking among purposes. This effort will seek to achieve such a centralization with only moderate levels of bypass. That is, if charitable spending tends to bypass rather than align itself with the centralized ranking of priorities and substitutes other priorities significantly out of line with them, it too greatly weakens distributive justice. Thus distributive justice will require levels of centralized public spending that are credible enough to establish an overall ranking of priorities. But private altruism will then tend to diminish because individual donors may see public spending effected through taxation (forced gift) not only as the means through which charitable goals are met but also as removing individuals’ responsibility to identify and ameliorate social needs.

Public “overspending” will tend to require appeals to self-interest rather than to altruism for the purposes of eliciting public support. For example, health care, followed in descending order by primary and secondary education, by postsecondary education, and by relief of poverty, is now the implicit ranking of public purposes for “reinvestment” of government surplus monies. This may demonstrate the shift away from responsibility for others effected by a high-spending welfare state. That is, the public tends to believe that we should maintain as priorities those features of the welfare state on which each of us is most likely to draw personally. The hierarchy within the traditional judicially interpreted heads of charity is probably just the opposite. As Weisbrot argues, a welfare state may thus justify charity on the grounds that only a minority is willing to pay for high levels of other-regarding social service.

We can see the difficult search for an equilibrium point between public and charitable spending reflected in states’ efforts to use public spending as leverage to gain matching charitable spending. What level of public taxation and spending, together with the residual willingness to give to charity, will produce the highest total levels of social spending to cure social ills? The answer will probably vary from society to society and over time. However, the fact that willingness to give is
elastic, except for the saintly or hardhearted few, places special emphasis on fund-raising. If successful raising of funds increases potential donors' willingness to part with their money, it becomes a way of offsetting individuals' diminished responsibility for others.⁹¹ It thus becomes an important independent variable in achieving the appropriate equilibrium between state spending and charity. The next section explores the origins and nature of charitable fund-raising, and the section following it traces the uneasy transition from gift to fund-raising opportunity.

ABÉLARD’S PARADOXICAL VOW

The phenomenon of fund-raising, which emerges whenever good works are to be performed without full public funding (church or state), is wrapped in paradox. How can I claim that I am doing charity when I ask you for money? Pierre Abélard’s efforts to do good works at his own school, Paraclete, which was unconnected with a church monastic order, provide an early example of the conundrum. Abélard vowed poverty – that is, to be utterly other-regarding and thus completely charitable, at least with respect to God. Yet, he writes, alluding to the parable of the unjust steward in the Gospel of Luke, that “unbearable poverty compelled me to run a school since ‘to dig I was unable and to beg I was ashamed.’”³⁰ It may be shameful to beg for funds to do what is inherently good, but one needs to attract support to make it possible to do good. To avoid shame, one casts the good performed as a service to be paid for rather than as something that is in any event to be pursued for its own sake. Already Abélard, in his need for support of his true charity (to be a hermit), felt obliged to pursue another good purpose (education) in order to attract donors (his students). He was uncomfortable about and apologized for having to establish his school. This was because his teaching was an act of fund-raising that compromised his vow of poverty.

Abélard was arguably relying only minimally on fund-raising, since he expected that his students would spontaneously account for his needs and was not, as far as we know, organizing or directing the manner in which they would give of their time and resources. He had a face-to-face relationship with his students but did not cultivate a donor-donee relationship. However, there is historical record of at least one occasion on which they threatened to leave their “hard master,” suggesting that he and they understood the relationship of dependence on funding. In the modern context, the non-anonymous, face-to-face relationship with donors that charities must cultivate produces explicit dependence for the charity and extends all the way towards outright bargaining with the donor for provision of services.
This is what Abélard, in uneasy fashion, strove to avoid. Abélard’s solution was: do good; do not look at who gives; and allow yourself to be supported. His only solicitation was to engage in an activity (education) that givers could themselves decide was beneficial and to hold out that he was in need. This strict and principled solution to the paradox of charitable fund-raising would have to be loosened to accommodate the broad range of existing fund-raising practices today. Abélard’s example thus puts before us the problem on which we want to focus: once we accept the need for charitable fund-raising as part of the state–charity relationship, how can the charity remain focused on a charitable purpose to be pursued for its own sake rather than drifting towards fulfilling the needs or wants of its donors?

FROM GIFT TO FUND-RAISING OPPORTUNITY

What then are the implications of constituting the relationship between donor and charity through fund-raising? On the one hand, raising of funds will tend to transform the charitable gift into a bargain and thus apparently taint its altruistic character.\textsuperscript{31} If the gift is altruistic and thus purely charitable, it is made without expectation of recompense or reward, which fund-raising may, by contrast, trade on.\textsuperscript{32} On the other hand, fund-raising organized by the donee may overcome some of the donee’s dependence on altruistic charity. For the donor, in the “pure” gift relationship, it is the making of the gift, not so much its receipt, that is the virtuous act. The gift thus necessarily places the donee in a situation of dependence and potentially in a situation of humiliation or shame – at the mercy, if you will, of the donor.\textsuperscript{33} Professional fund-raising would appear to eliminate the possibility of humiliation because the fund-raiser can be cast as an intermediary between the giver and the donee and by making a “case” for contribution can set the terms of the gift by specifying what is required, and for what purpose.\textsuperscript{34} However, there are varying degrees to which the terms of the gift will be bargained. This can be the origin of the power that the donor can exercise over the donee.

\textit{Donor–Donee Relationships}

Variable degrees of donees’ bargaining with the donor emerge in the various forms of relationship that depart from the “pure,” anonymous altruistic gift. Such relationships commonly aim at one or more of the following goals, ranging roughly from least to greatest dependence by the donee on the donor’s approval of its activities:
• celebrate the donor or another in name
• reinforce the goodwill and reputation of donor and donee
• create social solidarity or pressure (giving to match what others are giving)
• provide against future possible needs of the donor
• further the social agenda of the donor
• reorient the activities of the donee
• retain the donee to provide a service.

If the charity enters into any or all of these relationships as it seeks funds, it will find itself bargaining its “case” with the donor. If the donee adjusts its case so as to receive funds, the problem of mission drift arises. There may be instances in which a private benefactor assists a charity in staying truer to its mission by spurning a case that caters to specific narrow interests rather than to the broader purposes of a charity. However, the dynamic will often work in the opposite direction. In 1999 the Panel on Accountability and Governance in the Voluntary Sector characterized the problem this way:

As governments have redefined and reduced their roles, new demands have been placed on voluntary organizations. They must not only deliver more services, but also serve new groups of people who often have more complex needs. New sources of funding have had to be found and, with more groups chasing private and corporate donations that are growing (but only modestly), competition in fundraising has become intense. Not only must voluntary organizations compete with each other, but with governments which increasingly are raising charitable dollars to pay for special projects, disaster relief and other public services. Corporate funding, although only a small part of the total income of the sector, has shifted to a large extent from unconditional philanthropy to philanthropy with conditions attached and, increasingly, ‘cause marketing’ – support or sponsorships tied to specific activities that help sell a product or build a positive image among a target group of potential consumers. The lack of stable funding often makes it hard for an organization to avoid being diverted by chasing project money, attached to priorities determined by the funder rather than the organization or its constituency, and to stay true to its mission with the ability to undertake long term and strategic planning.

Governments, Charities, and Corporations: Contrasting Sources of Funding

We can see the reconfiguration of the roles and responsibilities of governments, charities, and corporations to which the panel alludes if we
contrast the traditional modes of funding for each institution and note the extent to which these now overlap. For governments it is taxation; for charities, the gift; and for corporations, investment (bargain). There are implications for governance in each of these traditional forms of funding – no taxation without representation, no gift without trust, and no investment without return.

Table 16.1 shows that taxation, gift, and investment are not the exclusive domain of politics, civil society, and markets, respectively. The general implication of overlapping funding techniques, which is outside the scope of this chapter, is that the actors in politics, in civil society, and in the market are in some measure and perhaps increasingly mutually substitutable. The more specific implication, which we explore below, is that charities, as they depart from funding based on the pure form of altruistic gift, create significant regulatory problems.

**REGULATORY PRINCIPLES**

So as not to fall prey to Abélard’s paradox, regulation of charitable fund-raising, whether internal or external to the charity, ought to reinforce altruistic giving and to monitor self-interested giving for compatibility with the charity’s purpose. To work out the more detailed regulatory implications of this axiom requires a more complete account of altruistic giving, which we attempt to glean from a review of the relevant literature. In many ways the Canadian legal regime today aligns itself with principles of altruism. Our theme here, however, is that the regulatory regime and current reform initiatives emphasize transparency and accountability to protect the donor’s gift – the supply side of the equation – rather than ensuring that the fund-raising charity remains true to its purpose – the demand side of the equation.
Altruistic Giving

Any attempt to account for altruistic giving must first face the objection that there may be no such thing. It is sometimes argued that what appears to be selfless is in fact motivated by an implicit *quid pro quo*. For example, Peter Hammond surmises: “Charitable behavior could be regarded as complying with a social contract. The egoist is worried that, if he breaks the contract, then many others may also decide to break the contract later on, with the result that the egoist’s needs are not adequately met if he should ever require help in the future.”

Alternatively, psychological benefits of giving (such as affirmation by and respect from other people) may produce a “pay-off” that individuals can factor into their calculation of self-interest. In the words of Laura Stoker, this perspective “rejects a narrow (and objective) version of self-interest, while retaining the premise that people do seek whatever it is that they find to be in their interest. It conceives of ... actors as egoists but not as egotistical.” Altruistic behaviour and self-interested behaviour accordingly collapse into a single category – rational egoism.

One could say much to counter this view – for example, to establish the existence of Bruce Chapman’s *homo socioeconomicus*. However, if the donor claims and appears to be acting selflessly, the charity receiving funds is concerned less with fathoming the donor’s true, secret, and mixed motivations for any particular gift than it is with determining how and to what degree a donor’s explicit self-interest might compromise the charity’s purposes. The charity can usefully compare the form of a particular gift with an “ideal” type of altruistic gift. It can then accept non-altruistic gifts provided that it has shielded itself against the possible implications of an interested gift.

The literature on altruism suggests a number of characteristics of the ideal type or pure form of altruistic gift. Hong-Wen Chang and Jane Allyn Piliavin, in a valuable review of theory and research on altruism, note that sociobiologists and game theorists tend to focus on the costs to the altruistic actor, whereas psychologists usually look at intentions. The authors’ “largely motive-based definition of altruism” is a hybrid: “behavior costly to the actor involving other-regarding sentiments; if an act is or appears to be motivated mainly out of a consideration of another’s needs rather than one’s own, we call it altruistic.”

Kristen Renwick Monroe adopts a similar hybrid definition with emphasis on intention, concluding that an altruistic act must meet the following four conditions: it must entail action; its goal must be furthering the welfare of another; its intentions, not its consequences, are...
determinative; and it must carry some possibility of diminishing the actor’s welfare. Bar-Tal reviews the literature on altruistic motivations and concludes that altruistic intent “(a) must benefit another person, (b) must be performed voluntarily, (c) must be performed intentionally, (d) the benefit must be the goal itself, and (e) must be performed without expecting any external reward.” Karylowski distinguishes between “endocentric” altruism – a response to an internal moral imperative – and exocentric altruism – a desire to improve another’s condition. Robert Hancy Scott develops a more problematic account of altruistic motivations, arguing that they take their root in a “preference for inferiority.”

Other definitions consider the form taken by the altruistic gift relationship. Titmuss underlines its anonymity and independence, so that it is not paternalistic and must not place demands on those for whom it is performed.

Derived Regulatory Principles

Each of the foregoing definitions of altruism helps to formulate regulatory principles governing fund-raising. Definitions of altruism that emphasize motivations suggest regulatory principles designed to monitor departures of donative from altruistic intent. Definitions of altruism that emphasize cost to the donor suggest regulatory principles designed to monitor cases in which benefits to the donor exceed the donor’s costs. Definitions of altruism that emphasize the anonymous form of the gift relationship suggest regulatory principles designed to monitor the donor’s control of the donee – or vice-versa.

We suggest the following compendium of regulatory principles applicable to charitable fund-raising, which should apply both to the donor and to the donee, since both ought to be engaged in altruistic behaviour (giving and doing good works, respectively). Yet, regulation of charities tends to focus on providing support to the donor vis-à-vis the charity, rather than vice versa.

There must be an intention to make a charitable contribution. We can see this characteristic of altruism reflected in the doctrine of certainty of intention applicable to charitable trusts: trust law will use only the explicit formulation of intention as a criterion and will not attempt to probe “true” or mixed intentions. It does, however, insist on charitable intention. It thus assesses motivational elements of altruism only to ensure formal consistency with the idea of charity. Having identified charitable intention, trust law then focuses on ensuring the fulfilment of donors’ desires, not of recipients’ needs.
In this respect it departs from the characteristics of altruism in a way that shapes how charities function. For example, Richard Bartlett argues that “[a]n efficient charity sector will produce precisely the charitable services that the donor population wishes, and as much of them as donations will cover.” Enforcement of donors’ intentions assures the functioning of an efficient charity market. For Bartlett, competition here is positive, because it benefits donors and allows them control over how charities act. He also argues that to the extent that large, united charities increase the efficiency of the execution of donors’ wishes, they are more desirable than smaller organizations. The united charity is thus an intermediary that faithfully matches donors’ desires with agencies prepared to carry them out. This is not mission drift; it is mission capture.

It must be voluntary. The concept of voluntariness is closely connected to intention and is reflected in judicial interpretation of the doctrine of certainty of intention applicable to charitable trusts. However, one can intend an act that one feels compelled to perform, such as paying taxes or tithes. Since “endocentric altruism” operates on an internally imposed obligation – do your duty to the other – high-pressure fund-raising can seek to transform the request for contribution into the recognition of an obligation. This is particularly so when what is at stake is a religious or social obligation, which is often accompanied by social pressure manifested in publicized comparisons of differing levels of donation. The simplest form of this is the passing of the church collection plate. Codes of conduct for fund-raising tend to address the problem of high-pressure solicitation. Reinforcing voluntariness is also the goal of statutory disclosure requirements governing solicitation. These measures all seek to protect the donor against the charity.

It must not be for profit. The law of charitable trusts will not recognize an institution operating for profit as a charity unless the for-profit purpose is merely ancillary to the charitable purpose. However, this principle is difficult to apply to fund-raising companies employed by the charity as well as to a wide range of promotional devices, such as token products and services exchanged for gifts. Statutory regulation and informal codes of conduct tend to deal with the role of fund-raising companies, principally to protect the donor. Nevertheless, for example, a ban on commission payments for fund-raising protects the charity as well. Less attention has been paid to the donor fund-raiser, who sells a product or service with profits or part of the profits going to the charity, through which method it could exercise commercial control over the charity. Even less attention has been paid to ancillary profit-making by individuals
within the charity who, for example, engage in consulting activities related to the area of work of the charity and could therefore drift from their principal mission.

There must be benefit for another. The doctrine of public benefit, generally applicable to charitable trusts, has more particular application in regulatory efforts to monitor and control the proportion of funds that go towards charitable purposes, as opposed to paying the costs of fund-raising. Section 149.1 of the Income Tax Act requires regular disbursement. However, the cy-pres doctrine allows charitable funds to be redirected away from the donee’s preferred purpose only under very restricted circumstances, which do not include reorientation of the charity’s own purposes and priorities. In other words, it is the donor who can determine which benefit to another ought to be pursued. Here again, the law errs on the side of protecting the donor against the charity. In cases of a clear personal nexus between the gift and the donor, no public benefit will be found. Otherwise, gifts based on partly self-regarding and partly other-regarding motivations and that can push the charity to compromise its purposes will nevertheless be valid.

The giver should not place demands on those in need. The regulation of charitable fund-raising addresses this principle only indirectly, leaving it very much a matter of aspiration. For example, the Panel on Accountability and Governance in the Voluntary Sector notes: “an informed donor is one of the best ways of promoting ethical conduct” and cites the testimony of one group to the effect that “good charities want educated consumers, as they quickly become enthusiastic supporters of our work.” Implicit perhaps is the hope that information will breed allegiance to the charity’s own definition of its work. Yet at least one code of conduct – Model Standards of Practice for the Charitable Gift Planner – emphasizes that donors should inform the charity of their purposes: “Although Gift Planners frequently and properly counsel donors concerning specific charitable gifts without prior knowledge or approval of the donee organization, the Gift Planners, in order to insure that the gift will accomplish the donor’s objective, should encourage the donor, early in the gift planning process, to discuss the proposed gift with the charity [to whom] the gift is to be made.”

The activity must be conducted for its own sake. This principle is reflected indirectly in the doctrine that mixed and non-severable charitable and non-charitable purpose trusts are invalid. Furthermore, where a charity raises funds as an end in itself, it risks losing its charitable status and having control over its assets sought by the Public Trustee. The Panel on Accountability and Governance drew on the public trust of
voluntary associations to conclude that they were accountable for “establishing an appropriate mission and/or policy priorities and ensuring their relevance.” Establishing the mission and seeking a good governance structure and proper management techniques to implement it are analogous to pursuing the charitable end for its own sake. However, the panel’s instrumental language, together with the notion that it be communicated to “stakeholders,” suggests a kind of bureaucratic rationality rather than devotion to a goal. It is with respect to this principle that Abélard’s paradox takes a more precise form: the charity must raise funds in order to do its charitable works; to be charitable is to pursue the good works for their own sake; fund-raising is not pursued for its own sake; and therefore the charity cannot be charitable. In a perverse way, the traditional common law governing charitable donations by corporations reinforces this paradox: corporate gifts to charity for the sake of the charity alone were *ultra vires*; such gifts had to involve the calculus that the gift would maximize shareholders’ value.

*Six Axes of Analysis*

These six regulatory principles, in the form of sets of axes (altruistic versus interested), can help to gauge departures from the pure form of gift:

- intended for charity versus not intended for charity
- voluntary versus compelled
- given versus bargained
- other-regarding versus self-regarding
- unconditional versus conditional
- devoted to the charitable purpose versus instrumental

This typology may help a charity to clarify the features of fund-raising that ought to attract higher levels of scrutiny as it assesses whether to engage in a particular fund-raising activity. Our working hypothesis is that fund-raising involving more of the first, or “altruistic” characteristics requires less internal scrutiny for mission drift than that involving more of the second, or “interested” characteristics. Table 16.2 gives examples of various possible combinations of these characteristics.

This table offers neither an exhaustive characterization of charitable funding nor a way to pigeon-hole any particular technique. The binary oppositions often involve differences of degree rather than of kind. For example, charitable gambling might be a token sale of a service or a business activity; the heavy regulatory burden on those
### Table 16.2 Regulatory principles: sets of axes (altruistic versus interested)

<table>
<thead>
<tr>
<th>Fund-raising method</th>
<th>Intended for charity</th>
<th>Voluntary</th>
<th>Given</th>
<th>Other-regarding</th>
<th>Unconditioned</th>
<th>Devoted</th>
<th>Not intended for charity</th>
<th>Compelled</th>
<th>Bargained</th>
<th>Self-regarding</th>
<th>Conditioned</th>
<th>Instrumental</th>
<th>Principal regulatory concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pure charitable gift</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Truly settlor’s intention?</td>
</tr>
<tr>
<td>Tithe</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td>✓</td>
<td>✓ ✓ ✓</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Abuse of power?</td>
</tr>
<tr>
<td>Alms-seeking</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td>✓</td>
<td>✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Pressured solicitation?</td>
</tr>
<tr>
<td>Token sale of product or service</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td>✓</td>
<td>✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Remains ancillary to charity?</td>
</tr>
<tr>
<td>Directed purpose gift</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Direct relation to charity’s purposes?</td>
</tr>
<tr>
<td>Donor fund-raiser</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Co-opted to business?</td>
</tr>
<tr>
<td>Naming opportunity</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Over-deference to settlor?</td>
</tr>
<tr>
<td>Monitored grant</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Charity remains autonomous?</td>
</tr>
<tr>
<td>Sponsorship</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Significant business purpose?</td>
</tr>
<tr>
<td>Business activity</td>
<td>✓ ✓ ✓ ✓ ✓ ✓</td>
<td>✓</td>
<td>✓ ✓ ✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Only residual charitable purpose?</td>
</tr>
</tbody>
</table>
conducting it aims to keep it more in the nature of a token sale. Furthermore, some of the broad types of fund-raising activity might be combined. For example, naming opportunities can be linked to monitored grants. The table does highlight the growing importance of protecting the charity’s own purposes as the gift becomes more interested and less altruistic. It also suggests that a wide range of fund-raising techniques can compromise devotion to charitable purposes for their own sake. This is perhaps the regulatory principle both the least possible to enforce strictly and the one requiring most generalized monitoring.

*Institutional Loci for Regulation*

If both formal and informal regulatory regimes tend to protect the donor against the charity, rather than vice versa, this is because these regimes do not seek to deprive the charity of a gift that it could receive without prejudice to the donor. It is left for the charity alone to regulate the way it makes fund-raising consistent with its own purposes.

Alberta’s Charitable Fund-raising Act illustrates this point neatly. Section 2 sets out the following two purposes for the legislation: “(a) to ensure that the public has sufficient information to make informed decisions when making contributions to a charitable organization or for a charitable purpose, and (b) to protect the public from fraudulent, misleading or confusing solicitations and to establish standards for charitable organizations and fund-raising businesses when making solicitations.”

The legislation thus appears to suggest that the only fund-raising issues requiring a code of conduct arise as between the charity and donor and not within the charity or among charities.

Although the Panel on Accountability and Governance cast its own recommendations in the same manner, it did acknowledge other dimensions to the regulation of fund-raising. Thus it noted, for example, that it was unable to make detailed recommendations concerning the competition for donations among charities and with the government. It also called for more emphasis on charities’ articulating and staying true to their purposes. However, it did not seek to identify the link between modes of fund-raising and charities’ missions.

For the charity, however, the implications of fund-raising for the donor–donee relationship are only part of the regulatory burden. Two other loci for regulation – within the charity and among charities – present significant concerns handled appropriately though internal charity directives. Within the charity, issues include who can ask for
gifts? (centralized or decentralized); why can they ask? (strict adherence to mission); and whom can they ask (for example, is an armament manufacturer excluded)? As between charities, the issues include whether charities should “compete” to provide the same charitable service more effectively and whether they should “collude” to co-ordinate fundraising schedules, “prices,” and opportunities. We noted above some issues between the donor and the donee: Is there common cause? Is there sufficient information? Is there trust? Do donors have excessive control? A look at the practices of McGill University vis-à-vis these three loci of regulation can cast light on the neglected aspect of regulation—“demand-side” concern with avoiding mission drift.

THE CASE OF MCGILL UNIVERSITY

McGill University in Montreal was founded in 1821 and now has some 29,000 registered students. In 1999, its total annual operating revenues were $595 million, of which $224 million came from the provincial government grant, $61 million from tuition fees, $113 million from research, $41 million from endowment and investment revenues, and $39 million from gifts, grants, and bequests. Within McGill, broad policy decisions over fund-raising practices and needs are made by the McGill Fund Council, a subcommittee of the university’s board of governors. The Annual Fund, which solicits gifts from every individual alumnus/a, was the main object of our investigations, although fund-raising practices differ only marginally in the other three channels for giving: major gifts, planned giving, and the alumni associations.

Our interviews reinforced two of the chapter’s themes. First, fund-raising practices are tied to the more general problem of evolving state–charity–private sector relationships. “Downloaded” government deficits put further pressure on fund-raisers to make up shortfalls and to transform the university’s relationship with government into a fund-raising relationship. Preparing the “case” for additional government funding is in effect a matter of going back to the biggest donor, which is not quite as prosperous as it once was. Second, fund-raising is increasingly wrapped up in Abélard’s paradox: McGill will inevitably try to play to potential donors’ interests in promoting its educational purposes. For example, one way of attracting gifts is to give potential donors a range of options, through different forms—or levels—of designation. Thus a gift can go to fund athletics, particular faculties or departments, libraries, scholarships, and so on, or simply remain undesignated. Fund-raisers have become quite sophisticated about discerning and playing to the different tastes of donors.
Nevertheless, McGill has developed broad internal standards limiting a donor’s ability to impose his or her own personal tastes on the university, so that it has on a few occasions refused a gift that did not cohere with its objectives and priorities. In particular, in leading up to a major multi-year Advancement Campaign, the university goes through a general exercise of identifying goals and priorities linked to fund-raising targets. Martlet House, the fund-raising arm of the university, lines up potentially interested donors with the particular purposes identified, to cultivate a relationship and make the “ask.” However, the donor’s own interests and the university’s differential success in raising funds for the various purposes mean that the original priority list is not necessarily the one finally implemented.

McGill provides a good illustration of the multiplicity of internal regulatory devices that constrain a fund-raising entity and a charitable community more generally, because McGill is both. In other words, not only is it a single fund-seeker, but it also needs to co-ordinate many potentially competing internal campaigns.

**Within the Charity**

In principle, Martlet House has a monopoly on the “ask.” However, with the proliferation of needs, individual faculties, departments, and research centres have engaged in their own fund-raising activities. More than one unit may target the same donor, which undermines the relationship with the donor and may prevent securing of the maximum donation. Consequently, Martlet House has decentralized its operations and attached liaison officers to each faculty, allowing internal discussion, indeed competition, over which project will approach which donors. Martlet House informally reinforces its monopoly through internal conciliation and persuasion.

Martlet House’s monopoly does not extend to those funding arrangements that are more in the nature of fee for service, such as the negotiation of overhead charges on projects and the planning of “fully funded” or “privatized” programs. There is an internal separation between the agency responsible for gifts and the agencies that enter into bargains. This separation has also permitted a proliferation of new ventures that by-pass the assessment of consistency with university purposes.

Regulations on research policy, on consulting and similar activities by academic staff, on inventions and patents, and on conflicts of interest in proprietary research establish loose limits on permissible research funding, on the amount of for-profit outside activity in which staff members individually can engage, on allocation of profit from
research, and on separation of university activities and commercial development. The rules tend to be hortatory in character and, to the degree they are obligatory, focus on disclosure. For example, the regulations on consulting recognize that a “member of the academic staff may respond to the needs of society outside the University” while seeking to assure that levels of such service are disclosed as “appropriate” in keeping with “direct service to the University through teaching, research and administration.”

Although each donation for a larger project is scrutinized for consistency with university priorities and planning, some have been “fast-tracked” where funding was immediately available or available on a contingent basis. *Ex post facto* review by the Senate’s Academic Planning and Policy Committee is in those cases *pro forma* at best.

*Between Charity and Donor*

McGill’s annual operating budget for fund-raising (on the order of $450,000) is fixed by the McGill Fund Council at the beginning of every fiscal year. This means that McGill uses approximately ten cents of every dollar raised for fund-raising expenses, five cents for gift administration, and the rest (eighty-five cents) for the actual purpose of the gift. The university adheres broadly to the Canadian Centre for Philanthropy’s Ethical Fund-raising and Financial Accountability Code, although it does not maintain strict scrutiny over compliance, on the view that its procedures are beyond reproach. Thus, for example, the Annual Fund broadly expressed the goal of ensuring that “people know where their money went.” It does have a policy of sending tax receipts within five days of receipt of payment. However, solicitation agents will disclose financial information bearing on the gift only when it is expressly requested, and they do not elicit these requests. This practice is consistent with the letter of the Code but may be less so with its spirit – in particular the stipulation that “all fund-raising solicitations by or on behalf of the charity will disclose … the purpose for which the funds are requested.”

One interviewee opined that “no extravagant expenses are tolerated; sobriety prevails in all aspects of the fund-raising campaigns.” This was a matter of tradition and peer pressure rather than of any particular rule.

Martlet House does not employ outside professional fund-raisers, but did for a period report to a vice-principal who had been a professional fund-raiser. Although it now reports to an academic, it is best understood as an in-house professional fund-raising institution where fund-raisers are on salary, not on commission.
Among Charities

Although participants acknowledged the phenomenon of competition among campaigns, they mentioned no specific consultation mechanisms vis-à-vis other charities. This is a subject on which the Panel of Accountability and Governance specifically urges universities to work in the future.

Emerging Structural Problems

McGill’s budget deficit has given rise to signs of slippage away from altruistic principles of charitable giving. Although there are mechanisms in place for academic oversight of most funding initiatives, some initiatives – notably joint ventures and contracts for service – are subject to only minimal scrutiny as long as they generate overhead monies. Increasingly as well, even the formal process of academic oversight is driven by the availability of funds for projects (see introductory quotation). What is too often missing is an *ex ante* test of each new funded activity for its relevance to scholarly and pedagogical objectives. On the contrary, approval is fast-tracked where funding is available, as in, ironically, the recent approval of the self-funded Voluntary Sector Management program. Furthermore, there is minimal oversight of individuals who trade on the reputation of the university to enhance their income. Indeed, this is sometimes encouraged, to compensate individuals for unavailable full-time positions or to address perceptions of inadequate remuneration. The emergence of a variety of part-time, non-tenure-track positions has opened the door to for-profit consultancy, in which the ability to raise project funds will compensate for part-time status. This amounts to a subtle undercutting of Martlet House’s monopoly, since part-timers become fund-raisers for McGill. Once the door opens, even full-time staff go through it, loosely monitored and largely *sub rosa*.

**Conclusion: Benign Flirtations with the Devil?**

The purpose of fund-raising regulation is not simply to enhance confidence in charities so as to maximize giving. That would lead us to a view of a charity as undertaking a contract to perform the service designated by the donor and thus to serve as the donor’s agent. Fund-raising should rather seek to elicit gifts by virtue of a charity’s purposes. From the standpoint of the charity, regulation should seek to
channel administrative decision-making towards continued and principled elucidation of the goals of the charity and appraisal of success in meeting them. It should restrain the charity’s temptation to set goals simply in response to funding opportunities. Self-regulation is the best instrument to achieve these ends, although public regulation, especially disclosure and monitoring, can encourage appropriate self-regulation. For the donor, regulation should facilitate publicly oriented magnanimity by permitting informed assessment of charitable purposes and their performance as well as of under-fulfilled needs consistent with those purposes. It should restrain the donor’s temptation simply to project his or her will onto others. Public regulation is useful in rendering information comparable and accessible but must not be so administratively burdensome as to exclude smaller charities. For the community as a whole, regulation should promote an alignment between the capacity to solicit funds and the significance of the public purpose. It should avoid the contemporary libertarian temptation to view charities as so many conduits for private preferences. The burden of taxation and trust law rules is to fulfil this objective.

These regulatory criteria apply unobtrusively to the funding that made this volume possible. The research undertaken is valuable for its own sake and reflects a scholarly agenda that academics themselves have identified. Funds that were made available to us not only assisted us in the conduct of research – a principal purpose of the university – but also assisted students. In the absence of these funds, we might have established different priorities and research agendas. But the donor’s role here was to signal a need otherwise consistent with the purpose of the university and, more specifically, with the scholarly orientation of those whose work forms the collection.

Unfortunately, one cannot be as sanguine about all the funding opportunities that have crossed university desks over the last few years and that have engaged the life of our faculties. Five features figure too strongly in many university fund-raising schemes:

- the desire to supplement professors’ income
- the need to overinvest resources in donors’ priorities, which brings accompanying opportunity costs
- the absence of strong linkage to scholarly or pedagogical goals
- the danger of participants’ being “co-opted” to express donors’ views or at least views not inconsistent with their preferences
- the marginalization of scholarly activity that cannot itself be cast as a fund-raising “profit centre”
These perverse incentives are all the more problematic in the absence of well-structured cross-subsidization of university priorities from overhead generated on non-governmental funds. A similar story emerges in the health sector as well and is characteristic of hybrid entities lying between state and market. When one raises funds conscious of these perverse incentives, one flirts with the devil.

As he thought about how to fund his monastic university, Pierre Abélard wished to exclude such flirtations categorically. Yet even he recognized that vows of poverty were something of a ruse as soon as donors’ support became the condition for being able to do one’s charitable work. It would be iconoclastic to turn one’s back on fund-raising in the university or non-profit institution. This chapter has sought to identify the regulatory principles applicable within charities, between a charity and a donor, and among charities themselves that can help to keep flirtations benign.

NOTES

We acknowledge the invaluable scholarly assistance of Daniel Downes and Morella Saim and the financial assistance of the SSHRC.

1 For a critical appraisal, see J. Migué, Étatisme et déclin du Québec: bilan de la Révolution tranquille (Montreal: Les Éditions Varia, 1999).

2 Civil Code of Quebec, art. 1270: “A social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose.” The Supreme Court of Canada’s approach to the definition of charity in Vancouver Society of Immigrant and Visible Minority Women v. M.N.R. [1999] 1 SCR 10, rooted in the traditional four heads of charity developed in the Pemsel case, suggests that in Quebec the definition of social trust will work quite differently.


5 Notable in this regard is England’s Statute of Charitable Uses, 1601 (Statute of Elizabeth). For a discussion of it, see S. Bright, “Charity and Trusts for the Public Benefit: Time for a Re-think?” Conveyancer (1989), 28. See also H. Berman, Law and Revolution: The Formation of the Western


8 As for advancement of religion, the state undertook functions that had been performed by churches, which typically received charitable status on the strength not of their contribution to the salvation of souls but rather of their good works: see Gilmour v. Coats [1949] AC 426. The list of charitable purposes set out in the Statute of Elizabeth itself represented an effort to channel donations to the church for purposes preferred by the emergent state, such as development of infrastructure.


10 See F. Kaufmann, “Major Problems and Dimensions of the Welfare State,” in S. Eisenstadt and O. Ahimeir, eds., The Welfare State and Its Aftermath (London: Groom Helm, 1985): “Instead of the state as a singular actor, we have to consider, therefore, the production of welfare as a (partially contingent) result of networks of both governmental and non-governmental, formally public and private corporate actors.”

11 Charitable organizations themselves depend significantly on government funding and so may not see themselves as competing with or substituting for the welfare state: see B. Gidron, R.M. Kramer, and L.M. Salamon, Government and the Third Sector: Emerging Relationships in Welfare States (San Francisco: Jossey-Bass, 1992), 15: “In short, the relationship between government and the nonprofit sector has not been static. To the contrary, it has changed significantly over time, reflecting the evolution of social policy generally. Far from competing with the state, nonprofit organizations were more often significant advocates of expanded state responsibilities and in many cases have themselves benefited from an expansion of state action.”


In *Political Liberalism* (New York, Columbia University Press, 1993), 173ff., John Rawls has clarified his famous defence of the priority of the right over the good (ibid., 174): “[T]he priority of the right means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits have no weight. But surely just institutions and the political virtues expected of citizens would not be institutions and virtues of a just and good society unless those institutions and virtues not only permitted but also sustained ways of life fully worthy of citizens’ devoted allegiance.” Rawls states the principle of distributive justice regarding social and economic inequalities as follows (291): “First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.” Thus, it could not be, for example, that social and material inequalities were maintained so as to allow some to pursue the good by being charitable to the disadvantaged. However, there might be some space for charity between the minimum level of material and social well-being constitutionally required to ensure that all can take part in social and political life and that level of material and social well-being that can assist people to flourish.

Michael Walzer would characterize this as involving a separate sphere of justice – namely, that of security and welfare: *Spheres of Justice: A Defence of Pluralism and Equality* (Princeton, NJ: Basic Books, 1983). See also B. de Souza Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995), who writes of separate domains of justice. As Walzer himself acknowledges, the recognition of the duty to do distributive justice does not in itself identify the level of
needs that must be met (Spheres, 68): “But how much security is required? Of what sorts? Distributed how? Paid for how? These are serious issues and they can be resolved in many ways.” If these issues can be resolved in a number of ways, or imperfectly addressed in any particular state, the need for supplementary charity arises. However, “in the West today, it seems to be a general rule that the more developed the welfare state, the less room there is and the less motivation there is for charitable giving” (91).


18 But see Emmanuel Lévinas, for whom the obligation to the other becomes so absolute as to compel complete devotion: Autrement qu’être; ou au-delà de l’essence (The Hague: M. Nijhoff, 1974).


22 Ibid., 17. See also J. Van Til, “The Three Sectors: Voluntarism in a Changing Economy,” in S.A. Ostrander and S. Langton, eds., Shifting the Debate: Public/Private Sector Relations in the Modern World (New York: Transaction Books, 1987), and N. Gilbert, Capitalism and the Welfare State (New Haven, Conn.: Yale University Press, 1985). Cohen and Arato go on to assert (Civil Society, 27): “It is our central thesis that democracy can go much further on the level of civil society than on the level of political society or economic society, because here the coordinating mechanism of communicative interaction has fundamental priority … It is indubitably certain that the functioning of societal associations, public communication, cultural institutions and families allow for potentially high degrees of egalitarian participation and collegial decision-making.” This begs the question as to the proper relationship between the state and civil society when those bodies become instead spheres of hierarchy and exclusion.
darity, an absence of “a steering resource like money and power” (473). But honour or prestige is a “medium” of voluntary associations that can be a steering resource for them. Exemplary displays of solidarity merit honour and prestige. Honour can be made scarce and distributed unequally, creating levels of worth and excluding some. Indeed, there can often be a direct alignment between honour within the sphere of civil society, money in the economic sphere, power in the political sphere, and certainly an effort to accumulate all three. By underestimating the role of honour and prestige and idealizing solidarity in civil society, Cohen and Arato fail to identify the limits of civil society as a pure “steering mechanism” for the state and the economy. One could just as well idealize politics as the sphere of justice and the economy as the sphere of efficiency, with both needed to steer civil society. For further accounts of the relation between civil society and the state, see Andrée Lajoie, “Contribution à une théorie de l’émergence du droit : 1. Le droit, l’État, la société civile, le public, le privé: de quelques définition interrelâies,” *Revue juridique Thémis* 25 (1991), 103; and Danièle Lochak, “La société civile: du concept au gadget,” in Jacques Chevallier et al. *La Société civile* (Paris: Presses universitaires de France, 1986).


24 Ibid., 679.

25 There is empirical evidence that sectors receiving public spending will also receive non-governmental charitable spending, whereas sectors ignored by the state will also be ignored by civil society: see M. Sosin, *Private Benefits* (Orlando, Fla.: Academic Press, 1986).

26 However, Ware emphasizes the value of the welfare state, especially in assisting the poor, arguing that charity can in practice only play a secondary role: A. Ware, *Between Profit and State: Intermediate Organizations in Britain and in the United States* (Princeton, Nj: Princeton University Press, 1989).


28 In “On Market Failure,” Salamon characterizes the requisite equilibrium as follows (43–5): “In view of their complementarity, neither the replacement of the voluntary sector by government nor the replacement of government by the voluntary sector, makes as much sense as collaboration between the two. This offers an opportunity to combine the service delivery of voluntary organizations with the revenue generating and democratic priority setting advantages of government […] The key is to find a
balance that protects the legitimate public interest in accountability without undermining the characteristics that make nonprofits effective partners of government."

29 See N. Parry, M. Rustin, and C. Satyamurti, Social Work, Welfare and the State (London, 1979), 168: “a mobilization of altruistic capacities is essential if real help is to offered to those most in need.”


32 See R. Schwartz, “Personal Philanthropic Contributions,” Journal of Political Economy 78 (1970), 1264, defining “philanthropic transfer of wealth” as “a voluntarily generated, one-way flow of resources from a donor to a donee; the flow is one-way in the sense that it is based upon no donor expectation that an economic quid pro quo (in the usual sense of that term) will reward his act.”

33 See A. Margalit, The Decent Society (Cambridge, Mass.: Harvard University Press, 1996). Margalit puts it this way: “Begging for alms is humiliating. In contrast, mercy is considered an ennobling emotion. The tension is palpable: on the one hand, mercy has an uplifting quality for the giver; on the other hand, being on the receiving end of mercy is humiliating.”


35 This is a version of what Tocqueville characterized as the American doctrine of self-interest properly understood: Alexis de Tocqueville, De la démocratie en Amérique, vol. 2, part II, chap. 8.


37 The panel reflects this overlap in its recommendations regarding strategic planning by the charity: ibid., 24ff. Mission statements and “results-based” management have become characteristic of “best practices” in both public and business administration. Furthermore, the panel – chaired by a former leader of a federal political party and including members from the voluntary sector, business, and government – exemplified the overlap of sectors. The fact that the voluntary sector could itself take the lead in setting up a body that acted very much like a commis-
sion of public inquiry – hearing evidence and making recommendations – is quite remarkable.


47 R. Titmuss, The Gift Relationship: From Human Blood to Social Policy (London: George Allen & Unwin, 1970). He also notes (89) that while “[n]o donor type can, of course, be said to be characterized by complete, disinterested, spontaneous altruism,” altruistic acts “are acts of free will; of the exercise of choice; of conscience without shame,” thus emphasizing altruistic motivation as well.

48 Charities ought to view as suspect fund-raising that explicitly trades on mixed motivations. A recent example was the largest “Ponzi” scheme in U.S. history set up by Bennett Funding Group Securities to fund U.S. charities: In re Bennett Funding Group Securities Litigation (United States District Court, Southern District of New York).

49 This principle is reflected as well in various codes of conduct governing charitable fund-raising. For example, the Model and Standards of a Charitable Giver, adopted by the National Committee on Planned Giving and the Committee on Gift Annuities, 7 May 1991, sets out in article I: “Primacy of Philanthropic Motivation: The principal basis for making a charitable gift should be a desire on the part of the donor to support the work of charitable institutions.” This statement of principle seems particularly well formulated, since it also preserves the autonomy of the chari-
table institution in identifying its own goals. However, see note and accompanying text.

51 Ibid., 1600.
52 Ibid., 1611.
56 At one end of the spectrum, the Code of Ethics of the Society of Fund Raising Executives contains only this general principle: “A member’s public demeanor shall be such as to bring credit to the fundraising profession.” At the other end, the Canadian Better Business Bureau’s Standards for Charitable Solicitations contains a part on fund-raising practices, including a provision: “Fund raising shall be conducted without excessive pressure. Excessive pressure in fund raising includes but is not limited to solicitations in the guise of invoices; harassment; intimidation or coercion, such as threats of public disclosure or economic retaliation; failure to inform recipients of unordered items that they are under no obligation to pay for or return; and strongly emotional appeals which distort the organization’s activities or beneficiaries.” The Canadian Centre of Philanthropy’s Ethical Fundraising and Financial Accountability Code, to which the Panel on Accountability and Governance recommends that charities adhere, lies somewhere in between. It announces a general principle and puts some onus on donors to articulate its application: “Donor will be treated with respect. Every effort will be made to honour their requests to limit the frequency of solicitations; not be solicited by telephone or other technology; receive printed material concerning the charity.” Similarly, volunteers, employees, and hired solicitors who solicit or receive funds on behalf of the charity shall “cease solicitation or a prospective donor who identifies the solicitation as harassment or undue pressure” (emphasis added). Alberta’s Charitable Fund-raising Act, 1995, c. C-4, ss. 29.1 and 29.2, provides for the promulgation of standards of fund-raising practice to be implemented by registered charities. This approach is recommended by the Ontario Law Reform Commission (OLRC), *Report on the Law of Charities* (Toronto: Commission, 1994), chap. 18.
57 See, for example, section 6 of Alberta’s Charitable Fund-raising Act. For a thorough review of the various statutory regimes, see OLRC, *Report.*

58 See, for example, sections 20–27.1 of Alberta’s Charitable Fund-raising Act concerning “fund-raising businesses.” The Panel on Accountability and Governance devotes much of its discussion of fund-raising to these questions: see Building on Strength, 46–7. The panel notes that it recommends adoption of the code of the Canadian Centre for Philanthropy largely because of how that code addresses fund-raising companies’ practices (46): “It should be noted that adoption of the CCP code would prohibit two controversial practices: percentage based fundraising (ie., where the fundraising company takes a percentage of the money raised, rather than a flat fee) and the selling of donor lists.”

59 See, for example, part III of Alberta’s Charitable Fund-raising Act, which aims to facilitate acts of the donor fund-raiser by not subjecting him or her to the rules on solicitation. Thus, for example, it relaxes disclosure rules, since section 33 provides that a reasonable fee for providing information about the charity may be charged and information withheld if the fee is not paid.

60 The panel drew on figures prepared by Michael Hall of the Canadian Centre of Philanthropy to the effect that “[t]he average cost of fund-raising as a proportion of monies raised is 26 percent; however, 50 percent of charities have fund-raising costs of 12 percent or less of revenues raised.” There is a rich literature on the pros and cons of controlling the proportion of spending by charities devoted to fund-raising. See S. Rose-Ackerman, “Charitable Giving and ‘Excessive’ Fund-raising,” in S. Rose-Ackerman, ed., The Economics of Nonprofit Institutions: Studies in the Structure and Policy (New York: Oxford University Press, 1986), 333. See also R. Steinberg, “Should Donors Care about Fund-raising?” in ibid., 347, and “Economic Perspectives on Regulation of Charitable Solicitation,” Case Western Reserve Law Review 39 (1989), 775. The article that arguably launched the contemporary discussion was K. Karst, “The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility,” Harvard Law Review 73 (1960), 433. See also J. Harvey and K. McCrohan, “Fund-raising Cost-Societal Implications for Philanthropies and Their Supporters,” Business and Society (1988), 15. More recently, the subject has been explored again by L. Espinoza, “Straining the Quality of

61 The recent notorious case of Alexander Yashin, who made a gift to the National Arts Centre in Ottawa linked to the employment of his parents, illustrates the kind of quandary that can face charities.


63 National Committee, Model and Standards, article VII.

64 See Bourgeois, *Law*, 222.

65 Panel, *Building on Strength*, 11; see also 24.

66 See, for example, *Dodge v. Ford Motor Company* 1709 NW 668 (1919).


68 Panel, *Building on Strength*, 49: “The second concern relates to direct competition from governments for fundraising dollars. The voluntary sector has long felt the impact of massive fundraising campaigns by the large institutional charities—hospitals and universities—that may scoop up millions of dollars from a community in a single campaign, earning them the reputation as fundraising ‘trawlers’ among a fleet of dinghies. We are not disputing that the needs of hospitals and universities are legitimate and are growing given the cutbacks in government support most have experienced, but we encourage them to discuss and coordinate in advance their major campaigns with other voluntary organizations in the community. In addition, governments themselves are turning to fundraising from the public, rather than using general tax revenues, to pay for special needs, such as ice storm relief, or particular projects, such as the Canada Innovation Foundation or wildlife conservation. Although the intent is not to undermine donations to the voluntary sector, such competition seems like a triple whammy given the simultaneous government downloading of services and funding cuts of recent years. As noted in our earlier discussion of capacity building, we urge governments to engage in a discussion and reach some understanding with sector leaders about direct government competition for fundraising.”

69 McGill, *Handbook of Regulations and Policies for Academic Staff*. Staff members are not to undertake “substantial consulting” without the written approval of their chairs and deans. As a guideline, activity in excess of four working days per month is normally considered substantial.

70 Canadian Centre, Ethical Fundraising, s. 2.
Probably the predominant form of organization for charities in Canada is the non-profit corporation. It is not known how many organizations are constituted as unincorporated associations, so this form may be as common as or more common than the corporation. In the commercial sector its equivalents are the sole proprietorship and the partnership. The unincorporated association, like its two equivalents, is relatively easy to form and has few formalities concerning its governance. Its legal nature and its proper mode of governance however, are unclear. Its basic governing law is agency law. One might think that its articulation would replicate, with appropriate adaptations, the law of partnership, but it is not at all certain that such is the case. Like its two equivalents, the unincorporated association has no legal personality and therefore no civil capacity. Its members have no general protection against liability contracted or engaged on their behalf by their executive, so what limited liability protection they have must depend on the principles of agency law.

Despite the obvious deficiencies in the basic law governing the unincorporated association, the focus of this chapter is the non-profit corporation. Although both forms of organization badly need reform in almost all Canadian jurisdictions, the corporation is the more critical case. For in both cases the legal framework is inadequate, but corporation law frequently gets in the way. If, as this chapter argues, government’s principal role in the sector is facilitative, then it not only fails to facilitate but actually frustrates.

The non-profit corporation has been the subject of several sustained efforts at reform in Canada. One or two attempts have been successful,
most have not. Research on this form of organization and legal development in this area now lag far behind its business counterpart. The wave of reform of the business corporation that began with the Lawrence Report in Ontario in 1967 and ended with enactment of modern corporations statutes in almost all Canadian jurisdictions has been a major success. Those reforms made the corporate form more accessible, principally by discarding many incoherent English legal doctrines and creating workable and responsive structures of governance. A similar reform is now long overdue in the non-profit sector.

In this chapter, I survey issues affecting the design of law for the non-profit corporation and suggest a framework for and some of the principles of reform. The desideratum should be a law that readily and clearly addresses the organizational needs (in a corporate form) of the sector. Surprisingly, very little theoretical writing on the corporation, in either its for-profit or its non-profit form, addresses normative questions with this goal in mind. If (as I assume) the main value of lawyers to society lies in their ability to design and implement workable and useful structures of co-operation and co-ordination (in both market and government), legal writing on the corporation ought to consider design of the appropriate corporate law. It focuses instead on the subsidiary issue of fiduciary accountability. Like much other writing in the social sciences, it concentrates on facts that fit the research paradigm rather than on how people actually live and work.

This chapter has two main sections – on barriers in the way of reform and on the design of a proper statute. The barriers are political (government inertia) and intellectual (poor conceptualization in English law, the perennial mix-up of trust law with corporate law, and overemphasis on fiduciary responsibility). Section 2 looks at definition and attributes, at formation, at governance, and at fundamental changes, including dissolution. Because of recent reform of U.S. law on non-profit corporations, I draw heavily on that experience. For reasons that I adduce in due course, I think that the Revised Model Nonprofit Corporation Act (Revised Model Act), published by the American Bar Association (ABA) in 1987, would be an excellent starting point for reform in Canada. Even if many aspects of that act are not appropriate for Canada, there is much to learn from it and from the process that generated it.

BARRIERS TO REFORM

Government Inertia

There needs to be greater understanding about the role of government, especially on the part of government, in the non-profit sector
and clearer identification of what government can and cannot do and what it should and should not do. It should be possible to identify the nature of the relationship between government and the sector in such a way that policy can be expressed on key matters and at a level of generality that leaves open the perennial questions, while contributing concretely and positively to the work of the sector. Unfortunately there is very little writing on the relationship between the state and the “third” sector, and what little there is tends to place too great an emphasis on the sector’s tax privileges.

I suggest the following as the four key elements of the government’s role in the sector. The first two are based on the sector’s interests, priorities, or objectives; the second two, on the state’s interests, priorities, or objectives. First, government should do what it is capable of doing to facilitate charitable and other non-profit activity. Principally, this means providing clear, applicable legislative formulations of the basic association laws of the sector to the extent that either actors in the sector designing their own arrangements themselves or courts supplementing legislative activity by applying general rules in concrete contexts cannot do so more effectively. Given the complexity of association laws, it is fairly obvious that government should play a very substantial role here. These laws are the sector’s legal infrastructure without which it would be virtually impossible for the sector to function. Second, government should do what it can to help the sector by also contributing to its work in non-intrusive ways. It could use its law-making and taxing powers to fund research and education, to provide infrastructure to encourage co-operation or co-ordination of activities (by funding umbrella organizations, for example), and to enhance the sector’s credibility (by running appropriate licensing or certification regimes, for example). Third, government should protect the sector against fraudulent or deceptive activities by taking specific protective measures in line with the Crown’s traditional parens patriae jurisdiction. Although the contours of such regulatory activity would be distinctive, it relates to government interest in detection and prevention of fraud generally. Fourth, government should police its own expenditures in the sector – tax deductions and exemptions and grants – to ensure that they remain properly targeted and effective.

Canadian governments, by and large, have seemed uncertain about their role in the sector. They have tended to underemphasize their facilitative, helping, and policing roles; they have tended to overemphasize their protective role. A few examples can serve to illustrate this claim.

- The Office of the Public Trustee in Ontario was involved in the 1980s in a series of high-profile cases involving difficult questions
in the law of charity, many of which it lost because it took a position that, though technically reasonable, ran contrary to common sense (overemphasis on protective role).\textsuperscript{14} 
• The governments of Alberta and Canada developed and advanced reform proposals for non-profit corporation law in the 1980s and early 1990s, only to let them fail, for no apparent reason, in the very final stages (underemphasis on facilitative role).\textsuperscript{15} 
• Similarly, Ontario has not responded to the 1984 recommendations of the Ontario Law Reform Commission (OLRC) on the reform of charitable trust law (underemphasis of facilitative role).\textsuperscript{16} 
• The federal government brought down a budget in the early 1980s aimed at enhancing scrutiny of the charitable tax expenditure, only to retreat in the face of a substantial backlash (underemphasis on policing).\textsuperscript{17} 
• The statistical information on the sector available from traditional government sources is notoriously inadequate (underemphasis on helping). 
• Many provinces lack an agency to supervise the sector, while those that have one, such as Ontario, divide the public authority over several branches and express the statutory mandate incoherently overemphasizing protection (underemphasis of facilitation and helping, overemphasis of protection).\textsuperscript{18} 
• The largest source of revenue for most categories of charity is government, yet supervision of government granting in all provinces is minimal (underemphasis on policing).\textsuperscript{19} 
• Revenue Canada’s policing of the sector is notoriously understaffed (underemphasis of policing). 

The overall impression created is one of awkwardness and ignorance. Why is this the case? There are perhaps three principal reasons. First, there is a lack of public consensus about the nature, meaning, and worth of the sector and, as a result, about its proper relationship with government.\textsuperscript{20} Recently, there has been renewed interest in altruism in economics, philosophy, and sociology and in the non-profit and charity sector in law and political science.\textsuperscript{21} Umbrella organizations, professional fund-raising companies, and university management programs have begun to flourish. These developments bode well.\textsuperscript{22} 

Second, the sector’s vocation is to be, in a sense, the \textit{antithesis} of government. Although it seeks to achieve many of the same goals as government – in education, health, research, and so on – it does so by using forms of co-operation that do not involve legal compulsion.
Moreover, because the sector usually acts on a more personal level, it is by nature particular, prejudiced, and discriminatory; it righteously acts on the basis of concrete value judgments or affiliations of an overtly religious, political, ethnic, or social nature. Government policy-makers naturally display little sympathy for this aspect, notwithstanding the current popularity of diversity and multiculturalism. Alternatively, government intervenes in a manner that is ill-informed and clumsy. There is very little of a direct nature that law can do to help working non-profits flourish, and almost nothing it can do to help the failures, yet there can be much harm in trying either.

Third, there is little of political value in government’s exercising any part of its policy mandate. Few voters see or care about any of the legal infrastructure projects of government, let alone the ones that affect this sector, and the policing and protective activities invariably seem to the sector – the electorate – intrusive and hostile. Why, politicians might wonder, take the chance? They have little to gain from facilitating and helping and much to lose by policing.

Reforming non-profit corporation law is a project that sits squarely within the facilitative mandate. It has surfaced many times. The Lawrence Report in 1967 said that the case for reform was strong and urgent. Yet very little has happened. Some mix of the three types of inertia explains this situation, but perhaps the third is the most important. The reform of law for non-profit corporations – a legal-structure project par excellence – would leave completely open the selection of social goals to those who will use it. The new law merely facilitates the activity of others, often in ways that even they, as non-lawyers, do not appreciate. In a political culture where governments are encouraged to “achieve” and are rewarded for their “achievements,” politicians may well feel that they have little to gain by devoting precious political capital to provide legal infrastructure for the projects of others, especially in a way that only lawyers will really appreciate.

How to move forward? The only constituency with the resources to encourage governments to act is the legal profession. Only lawyers are fully aware that the current law is inadequate, can explain why it is so, have the influence to encourage its reform, and possess the skill to propose a replacement and the organizational resources to promote its adoption. This seems to have been the realization inspiring the Revised Model Act. The ABA’s Business Law Section sponsored the process of revision. It commenced its work in 1979 and ended it in 1987, meeting 32 times and sending out over 1,000 exposure drafts for public comment. Michael Hone, reporter for the Model Nonprofit
Corporation Act, summarized the deficiencies of the earlier Model Act of 1964: “[I]t did not set forth standards of care or loyalty for directors or officers. It did not deal with statutory immunity or protection for directors who acted with due care and did not breach their duty of loyalty. Nor did it provide conflict of interest rules. It did not deal with derivative suits, transfer and purchase of memberships, or the resignation or termination of members. It did not mention delegates or deal explicitly with self-perpetuating boards of directors. It had not been amended to reflect the numerous changes that had occurred in state statutory and case law since its adoption.”

These are all defects that typically only a lawyer would see and be able to describe and remedy. The processes of adoption in several states has also been led mainly by lawyers. Invariably, the state bar associations or their committees take up the challenge of moving governments. So perhaps the problem in Canada is that the legal profession has not really done what it should do for the non-profit sector.

Poor Conceptualization

The objective in this section is to clear away some of the clutter in the way of reform so that the goal and means of reform come more clearly into view. First, I described the clutter, and second, I propose a simpler model of the corporation. What I say applies to the concept “corporation” generally, both profit and non-profit, since it is the concept itself that needs clarification. Since most of our experience with the concept is in its commercial instantiation, that is where courts and writers have done most of their thinking. Hence, in what follows, I emphasize examples from that context, but the same points apply to the non-profit corporation.

In summary, my argument is that the corporation is simply a structure of governance created by its participants to facilitate co-operation and co-ordination in the pursuit of a common purpose. It exhibits one important private law feature – limited liability – which does not, contrary to the clutter, require a very complex intellectual apparatus to derive or explain. In particular, it does not require that the corporation be a person or that personhood and limited liability be benefactions of the state.

With those false ideas out of the way, a corporation statute becomes just another codification of a special contract that facilitates the activity of those who choose to enter it. I apply this general argument in generating ideas for reform in the second section of the chapter – for example, by suggesting that it is obvious that incorporation should be available as of right.
The English Model of the Corporation: The Clutter Described

The inheritance of Anglo-Canadian legal thinking on the nature of the corporation is pretty close to a disaster. This was perhaps realized, even if left largely unsaid, in Canada’s reforms of business corporation law in the 1970s and 1980s. The difficulty that English law had in conceptualizing the corporation is the result in part to its origin in the joint-stock company and, prior to that, in the partnership. Partnership is a centuries-old private-law institution; the limited liability corporation is relatively new. As the latter emerged out of the former, it carried with it inappropriate concepts.

Another element inhibiting conceptualization was overuse of the legal fiction of corporate personality to express the effects of incorporation. This reliance has added a layer of concepts – such as ultra vires and piercing the corporate veil – that are both irrelevant and misleading.

A third contributing element is the process of law making in the common law tradition. Generally speaking, the tradition is not capable of defining complex concepts clearly, since neither the courts nor reforming/responding legislators are often asked to think about and define all the necessary elements of the concept at once. The method instead is incremental and unsystematic in its process and external and consequentialist (rather than internal and coherentist) in its normativity. The result is that complex concepts, such as “corporation,” are badly defined, and the poor definition becomes embedded deeply in legal thinking, on the odd principle that the older the precedent, the stronger its value. Paradoxically, if not unexpectedly, the result is a body of law that frustrates the very activity it is, in theory, intended to facilitate.

If one compares the state of conceptualization of the corporation to modern accounting techniques, the contrast in methods and definitions is remarkable. The comparison is apt. Lawyers and accountants belong to “helping” professions, so it is useful to see how they construct their tools. The law attempts to state the formal or legal relationship among the participants in the corporation, and accountancy, the financial state of the underlying business, both with a view to facilitating the co-operative activity. In the mid-18th century, accounting standards “were inconsistent to the point of chaos.” Companies, for example, created opportunities for dividends by simply not depreciating their assets. The British Parliament intervened in 1868 with a modest and specific reform, but chaos continued until the development of professional accounting standards by professional associations in the United States, the United Kingdom, and eventually Canada. The Generally Accepted Accounting Principles (GAAP) that emerged,
articulated systematically in Canada in the Canadian Institute of Chartered Accountants’ *CICA Handbook* as either basic principles or specific rules, is a highly rational system; while it is not perfect or complete, it is as free as possible, intentionally and by great effort, from irrelevant or irrational concepts. The drafters of this statement, like the drafters of a civil code, tried to be as conceptually rigorous and simple as the subject matter permitted in order to state as clearly as possible the governing norms. In the process, they discarded old conceptualizations that did not work.

Conversely, in a precedent-based conceptual system, the old ideas retain their normative status, and ancient, irrational ideas at the foundation retain their influence. In such a system, there really is no hope of ever stating the formal relationships succinctly and clearly. As good (conceptually) as the modern Canadian business corporation statutes are, most of them still prevent a clear statement of the internal legal relations in the corporation by imposing the greatest possible judicial discretion on the participants in the form of the oppression remedy. The same failure can be seen in modern corporate litigation, which leaves many elementary questions of corporate law unanswered:

- We do not know what a share is.30
- We do not know what obligations directors owe.31
- We do not know who the creditor(s) of these obligations are.32
- We are not certain whether “stakeholders” other than shareholders are also beneficiaries of legal claims against the corporation.33
- We are not certain what is meant by “corporate personality” and in what circumstances it can be ignored.
- We are unsure whether shareholders have rights against each other.34

I describe the basic confusion in order to contrast it with a much simpler and, I believe, more accurate conceptualization in the next section. Since the inheritance is largely English, it is simplest to do this by examining corporations in what might be called the “English model.”35 Corporation statutes in that tradition provide typically that the memorandum of association and the articles, when registered, bind the company and its members “as though each had signed them.” This allusion to agreement establishes a contractual basis for the corporation.36 This foundation in contract, first, allocates powers between the shareholders and directors, as subject to the terms and conditions of the memorandum of association, not of the statute;37 and, second, it vests residual authority in the corporation with the shareholders.38

This contractual basis, however, exists alongside four other founda-
tional rules, established in a series of well-known decisions. The effect of the rules is to make the contract characterization seriously misleading and to make the ultimate conceptualization completely and utterly confusing.

_Foss v. Harbottle_ held that the corporation was not the same thing as the aggregate of its members and that a wrong done to it – such as misapplication of funds by directors for their own benefit, as in that case – had to be vindicated by the corporation, not by individual shareholders suing on behalf of the shareholders. Later cases extended the holding to a range of corporate irregularities, which, construed exclusively as wrongs to the corporation, were held to be under the ultimate control of the corporation. There are two rules in this line of jurisprudence – first, the corporation is a separate legal person from its shareholders, and, second, shareholders, as shareholders, have no standing to sue for wrongs done to the separate legal person. The second rule does not necessarily follow from the first – it depends on the rights constituting a share. I leave that issue aside for the moment and observe only that the fiction of legal personality (the first rule) was used in this line of cases to reason, inappropriately, to the second result.

_Northwest Transportation v. Beatty_ held that a majority of shareholders is able to ratify a voidable transaction entered between the company and a director. _Burland v. Earle_ affirmed and extended the holding. In _Burland_, Lord Davey formulated an “internal management rule” pursuant to which courts must eschew interference with the internal management of the corporation. In _Pender v. Lushington_, Lord Jessel, Mr., articulated the same principles as a “selfish ownership rule,” so that shareholders may vote their shares as they please, without regard to the interests of other shareholders. Recent decisions have continued in this line. The courts in _Hogg v. Cramphorn_ and _Bamford v. Bamford_, for example, held that the general meeting could ratify directors’ breaches of their duty.

These and other cases imply a third rule: all aspects of the contract establishing the corporation, except any possible public-order provision, are amendable by majority vote or, in some circumstances, by special or extraordinary resolution. This means that the majority constitutes the will of the corporation and, therefore, that the directors of the corporation are, in some sense, agents of that majority. A fourth and final rule, first articulated in _Percival v. Wright_, states that the director owes his or her duty directly and exclusively to the corporation.

These in essence are the elements of the English model. There is an obvious logical tension here between its claims variously that the corporation is a contract, that it is the majority, and that it is a separate
person with a will. In fact the model is radically incoherent. For example, if the corporation is a contract, then why doesn’t the minority shareholder who is harmed by the director’s breach have a right to enforce it? Or, if the corporation is a separate person from the shareholders for the purposes of limited liability, then how can the shareholders ratify — as though they were principals — the wrongs of the directors?

It is not possible, and therefore not advisable, for a legislature enacting an infrastructure law to facilitate for-profit or not-for-profit cooperative activity not to challenge these elements. The reform has to start from the ground up, with reconceptualization of what is happening juridically in the concept “corporation.” I suggest the following model as a start.

The Revised Model

The revised model proposed here (which we might call “legal” because of its emphasis on coherent legal analysis) presents all five principal attributes of the modern business corporation – perpetual existence, limited liability, separation of ownership and management, free transferability of shares, and legal personality – together with all the accompanying rights and duties as the outcome of contracts between real persons. The institution has certain essential elements, the absence of which renders what has been created by the parties or by the governing statute not a “corporation.” Although this “legal model” would shape corporation statutes, like the special-contracts provisions of civil codes, the statutes may also contain a wide variety of other imperative and suppletive provisions.

The basic concept would work out a little differently for non-profit corporations. Although I seek here to apply this basic analysis to the non-profit, I start with the business corporation, which drives all the precedents, fix it at the foundational level, and then adapt it to the non-profit context. So, in the arguments that follow, I refer to “shares” and “shareholders,” not “members” and “membership.”

Of the five attributes of the modern corporation, limited liability is the most central. It legally obliges the corporate patrimony to answer for obligations incurred by others, and renders other apparent candidates for the liability, such as shareholders, directors, and employees, not as such liable. The proposed new definition must therefore provide a coherent and accurate account of limited liability. That concept can be constructed out of simple contracts between real persons as follows.

The first shareholders of the corporation contract with each other in order to establish and dedicate a patrimony in which each has a “share” but no direct right of ownership or extensive power of admin-
istration. The contract dedicates the patrimony to the capitalization of a defined business administered by “directors,” selected in accordance with the contract. The contract establishes that the shareholders are not agents of each other: no shareholder, as shareholder, need answer for the civil obligations incurred by any other shareholder, and no shareholder is a fiduciary of any other shareholder. The shareholders, in short, are not mutual agents, as they would be if the contract were a contract of partnership. Interpreted strongly, the absence of a fiduciary relationship renders the identity of a holder of a share irrelevant to the determination of his or her rights.

The directors are elected by the shareholders and appointed under a (second) contract that obliges and benefits only the corporate patrimony. The directors promise to manage the patrimony with care and loyalty; to distribute the patrimony in accordance with the “share” entitlements established; to abide by all the other terms and conditions of the shareholders’ contract; and, in managing the patrimony, to act to maximize its net present value within a given range of risk. The contract establishes that the directors are not agents of the shareholders or of each other and therefore that no juridical act or fact of the directors legally obliges or benefits the shareholders or other directors. The contract also provides that the directors have full power to incur civil obligations for which the corporate patrimony alone is charged or benefited.

These two contracts contain all the elements required to establish a corporation. They are entered simultaneously at incorporation in a “bootstrap” operation – the certificate of incorporation – that establishes shares and shareholders, the separate patrimony, and the administrators of that patrimony simultaneously. With the two contracts in place, limited liability works as follows.

Contract creditors of the corporation contract with the directors or with others authorized by the directors to enter contracts charging or benefiting the corporate patrimony. The contracts provide that only the corporate patrimony, not the director(s) or the corporate agent, is charged with or benefits from the contractual obligation. Hence limited liability in respect of the corporation’s contractual obligations. If an agent of the corporation commits a tort in the performance of his or her duty, the tort creditor, of course, may sue the agent. The tort creditor may also, pursuant to the legal doctrine respondeat superior, recover from the corporation. This is because the ultimate liability of any principal for the torts of their agent arises out of the principal’s promise to indemnify the agent (in the contract of agency) for losses that he or she suffers in the course of his employment. The claim by the tort creditor against the principal can be derived as follows: if the
agent is liable, the tort creditor is entitled to be compensated out of
the agent’s patrimony; one element of value in that patrimony is the
principal’s promise to indemnify the agent against harm arising from
that precise claim; and the agent can compensate the tort creditor, in
part, by transferring that promise.

It is a small, but conceptually difficult step from this deduction to
conclude that the tort creditor can sue the principal directly. We do
not need to develop the remainder of that argument here, however,
since our present objective is to understand limited liability. Whatever
the further argument may be, a tort creditor cannot recover against
the directors or shareholders, since no agent of the corporation is by
virtue of that fact an agent of the directors or of the shareholders, and
therefore there is no promise by directors and shareholders to indem-
nify the tortfeasor/agent. Hence limited liability in respect of the tort
obligations of the corporation.

In summary, the first two contracts create a separate patrimony with
administrators. The incidents of ownership of the property in the pat-
rimony are distributed between the directors, who have the power to
administer, and the shareholders, who have supervisory rights and a
residual proprietary interest. All four elements of the argument
together show that the separate patrimony may be charged with civil
obligations, as though it were a principal, a real person. Because of the
two effects – separate patrimony and status of principal – the network
of contracts establishes a juridical operation that manifests the main
attributes of civil personality. Consequently, it makes sense to use the
fictional expression “corporate personality” and to speak of “the cor-
poration” as though it were a real person. The expressions substitute
for the more complex legal description just sketched. However,
because they are fictions, they cannot serve as the basis for analysis in
any seriously difficult case.

The other two incidents of incorporation flow from what is established
above. Transferability of shares follows from the not–mutual-agent
provision of the first contract. Partnership statutes typically state, as
suppletive rules, that new partners may not be introduced without the
consent of all and that assignees of partnership interests may not
exercise the full rights of partners. The restrictions on admission to
membership in the partnership are established, suppletively, because
the legislator presumes that people do not enter contracts of mutual
agency with just anyone. However, since shareholders are not mutual
agents, there is no reason why admission to that status should depend
on anything other than the desire to pay the price of admission. The
first contract, I suggest, thus establishes free transferability as being of
the essence of the corporation. This conclusion may be too strong, however, since many corporation statutes permit the articles of incorporation to restrict transferability.\textsuperscript{56} There are two ways to accommodate this reality: do not interpret the not–mutual-agents term so strongly, and thereby relax the status of the free transferability rule to suppletive or partially suppletive; or, as I prefer, establish some other juridical basis for the statutory rules that permits restrictions on transfer. One such formula would be to construe restrictions on transfer of shares as akin to restrictive covenants – restrictions on ownership, created by contract, but binding on third parties with notice.\textsuperscript{57}

Perpetual existence also tends to follow from what is established above. If the shares are freely transferable, and if the administrators are replaceable by simple election, the continued “existence” of the corporation is not contingent on the life of any real person and therefore may, just like a purpose trust, be perpetual.

At the foundation of this conceptualization is the claim that the corporation is a voluntary co-operative endeavour that deploys a patri-mony for defined purposes. Directors or fiduciaries manage the patri-mony under the supervision of shareholders. Limited liability ends up not being the puzzle that economists portray it to be; juridically, it is the basic regime, since no one is responsible for the juridical acts or facts of another, unless there is a legal reason to shift liability. Agency and master–servant contracts contain the legal apparatus that do this in some cases – the promise to indemnify – but few if any other legal relationships do. The corporation certainly does not.

The reorientation that this model provides to legislators is quite fundamental. First, it says that they are not engaged in an act of state benefaction of some special privilege of limited liability or, what is worse, of personhood. Second, it says rather that their task is to discern the elements of this contract – its imperative and suppletive terms – so that what they come up with can serve private purposes on an off-the-shelf, ready-to-use-basis. The imperative terms are those that flow from the essence and/or that the state imposes for purposes of public order. Usually the suppletive terms identify typical intentions of the parties to this type of contract. Occasionally terms are suppletive in that they provide guidance for a court intervention in a usual kind of case. Third, it tells us that the lawyers who engage in the drafting of this foundational contract will have to have great familiarity with how these co-operative endeavours typically work so that they can define the elements at the right level of detail, in the correct normative – imperative or suppletive – voice. In sum, the legislator can do this job properly only if there is no irrelevant historical legal baggage attached,
so that people with vast experience of how things typically work can construct the real contract.

Mix-up of Corporate and Trust Law

The third significant barrier in the way of proper reform is again legal in nature. Some of non-profit corporation law is or has been too much influenced by the law of trusts. Courts have felt compelled to refer to trust law in order to find norms to govern charitable non-profit corporations in the apparent absence of appropriate norms in some situations. In particular, in the absence of an appropriate set of rules governing self-interested transactions (and of a public administration with a coherent mandate), Canadian courts treat directors as trustees, then apply the severe trustee rule, which requires prior court approval for all self-interested transactions.

In Toronto Humane Society, Justice Anderson said: “Whether one calls them trustees in the pure sense (and it would be a blessing if for a moment one could get away from the problems of terminology), the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes. If such persons pay themselves, it seems only proper that it should be upon terms which alone a trustee can obtain remuneration, either by express provision in the trust documents or by the order of the court. The latter would appear to be the only practical mechanism.” Likewise, a leading American authority on trust law prevaricates: “The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee ... Ordinarily the rules that are applicable to trusts are applicable to charitable corporations ... although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.”

Although the main problem involves self-interested transactions, there are other areas that may require supplementary principles from trust law. For example, an improper expenditure of corporate funds would put the directors in breach of their duty and render them liable to reimburse the corporation for the loss caused by the breach. It is often said that this liability originates in trust law, but it actually derives from corporate law. The reference to trust law is redundant.

A second set of problems arises when the corporation dissolves or undergoes fundamental change. Trust law controls the disposition of property devoted to charitable purposes in these circumstances, but the corporate law statutes often do not, sometimes leaving apparently
no restriction on rededication of the charitable property. Here the observed deficiency is real, and the solution must originate in a better-drafted corporate statute appropriate to the needs of the sector.

Properly formulated corporate law has no need of concepts from trust law. Borrowings only confuse lay users of the statute, who have difficulty enough grasping their responsibilities as directors, without being told that they are also, in some unspecified sense, trustees. This is just sloppy law-making – an example of the facilitating law getting in the way. To be sure, the legislator should heed analogies to other pertinent institutions of private law, but the final expression should use concepts appropriate to the association being designed.

Distracted by Subsidiary Issues

A good deal of contemporary academic writing on the corporation deals with the responsibility of fiduciaries. Questions relating to the design of governing structures of private institutions, both profit and non-profit, focus on the identification of the constituency to which corporate fiduciaries should answer and on the legal and market techniques of their accountability. This strain of analysis seeks to minimize the costs of agency, which consist of the cost of monitoring the agent’s performance, the cost to the agent of making his or her promises to perform credible, and the residual cost to the principal of the agent’s shirking and looting.

Agency cost theory recognizes that design is crucial, since its explicit aim is to reduce the costs of co-operation and co-ordination. But the theory does not give design adequate attention, since it ignores the fact that people come together in associations to pursue purposes. It would seem obvious that the purposes pursued should shape the design of any organizational structure, as constrained by (the limited number of) basic forms of co-operation and co-ordination available. Those designing an associational law should therefore first identify the categories of purposes that are to be served. The old non-profit corporation statutes fail to differentiate intelligently among non-profit purposes, a point to which I return in the second section. The weakness of much economic writing on the corporation is its inability to differentiate at all. This failure is characteristic of consequentialist moral theories, which tend to collapse all value into a single fungible or commensurable unit – here, “non-profit.” This reductionism derives from the logic of economics itself. At its core, economics is a science of waste reduction. Thus the usual form of a good economic argument is: given goal “x,” the cheapest way to pursue it is ... The inherent desirability and therefore the nature of
goal “x” are irrelevant, since “x” is always assumed or given in the analysis.

The economic reduction of all purposes to the placeholder “non-profit” is really rather stunning, if the value of the sector lies in its value judgments, prejudices, and affiliations and if the point of the discussion is to discover the corporate law regime that facilitates pursuit of these values. Investigations must consider the costs of agency, but they have to be far more comprehensive than that. Ultimately, successful design must pursue those values effectively. No discussion can succeed that ignores them completely by reducing them to “non-profit.”

The peculiarly non-economic dimensions of altruistic behaviour (charitable non-profits) and of co-operative behaviour (political and mutual-benefit non-profits) compound this initial error. The economic approach assumes that rational behaviour consists in maximizing some (assumed) good for oneself – that it is self-interested in a selfish, possessive way. Of course people do behave this way much of the time, so that it is often a useful starting point for social analysis. Altruistic behaviour, however, is its antithesis, since it seeks the maximization of some good for someone else. Co-operative behaviour – the mutual pursuit of a common purpose – is also fundamentally different. Instead of adjusting the social analysis to accommodate distinctive types of behaviour or distinctive motivational frameworks, economic analysis of the non-profit frequently simply assumes away their existence. It frequently assumes that all behaviour must be self-interested so that altruism is merely a “consumption preference” and co-operation is merely exchange.

Henry Hansmann provides an illustration of the economic approach: “[T]he charter of a nonprofit corporation serves a rather different purpose than does the charter of a business corporation. In a business corporation, the charter, and the statutory and decisional law in which it is embedded, serves primarily to protect the interests of the corporation’s shareholders from invasion by those immediately in control of the corporation, including management and other shareholders. In a nonprofit corporation, on the other hand, the restrictions imposed on contracting individuals by the charter and the law are primarily for the benefit of the organization’s patrons. As a consequence, business corporation law is often a poor model for nonprofit corporation law.”

Both of the erroneous tendencies are on display here – the assumptions, first, that the objective of corporate law is to reduce agency costs and, second, that the material difference between shareholders and patrons is that the former are providers of capital and the latter are
consumers of the good of their (inscrutable) choice, altruism. My alternative suggestion is, first, that corporate law facilitates the co-operative pursuit of a common purpose, and second, that, despite important differences between the non-profit corporation and its for-profit counterpart, construing patrons as consumers does not identify the relevant point of distinction. To the contrary, patrons give and in so giving provide the capital for the altruistic endeavour. They are thus exactly analogous to shareholders, since they are the primary source of “equity” capital. Hansmann eschews the patron–shareholder analogy in favour of the patron–consumer equivalence, presumably because he rejects the concept “altruism”: his patron is a customer, a purchaser of the commodity altruism, presumably because he cannot conceive of anybody’s financing the well-being of others. Imagine! What they really must be doing is buying some commodity.

The altruism-as-commodity model distorts much of the subsequent analysis. Hansmann argues, for example, that in the case of non-profit entities that provide services for the needy or public goods, “the need for fiduciary organization is so obvious that for-profit firms are virtually unheard of.” Donors need reassurance that their donations are actually purchasing (the commodity) “poor-relief,” and such like. The alternative analysis is that the “profit” is simply “competed” away, since the most successful altruistic organization is the one that gives the most it possibly can. The objective of the donor is to maximize altruism, not profit on a capital investment. Or, to put it another way, the altruism is, in a sense, the profit, and the donor the investor. A companion error in the analysis is the suggestion that there is any choice about the fiduciary obligation of the fiduciary once it is decided to engage in any co-operative pursuit, including the co-operative pursuit of altruism. In every co-operative enterprise, tasks will be distributed or delegated; fiduciaries are obliged to do only what they have undertaken, just like leftwingers, goalies and defencemen in ice hockey. It is the objective or purposes of the co-operative effort that define the tasks, and it is the agreement of the parties that distributes them.

THE ELEMENTS OF AN APPROPRIATE DESIGN

Having identified four significant barriers in the way of reform, I now seek to identify some of the main principles of that reform. My discussion is at the level of principles, or basic elements, not of details and is therefore more of an agenda for reform than a prescription for specific statutory rules. The first subsection sets out four design principles for drafting the statute; the remaining four subsections take up
the specific issues of definition and attributes, of formation, of governance, and of fundamental changes, including dissolution.

**Design Principles**

I suggest four design principles, some of which flow out of the previous discussion and all of which I intend to aid in the implementation of the state’s objective of facilitating non-profit activity by providing an appropriate corporate law.

**Different Types of Statutory Rules** Common lawyers tend to write and read statutes as though the law speaks a kind of monotonic normativity. Rules in statutes drafted in the common law tradition are written and read as though they express norms of the same type and more or less at the same level of generality. Even in statutes in which there is quite evidently a structure provided by chronology, concept, or other ordering principles, the writer or reader may not be aware that this is the case. This normative flatness results from the tradition’s empirical and pragmatic mentality: common law norms are almost always first articulated in a factual, not a conceptual setting (in judicial decisions, as opposed to a professor’s study), and its statutes are drafted as compilations of these rules or responses to or remediations of them, as opposed to attempts to articulate sound juridical concepts. Some of the more successful statutes in recent years, such as the personal property security statutes, work precisely because they ground the legislative product in rigorously defined general concepts, which in turn determine or control the expression of the specific rules. These statutes show a conceptual awareness that is new to the tradition.

Statutes that establish an organic law of a type of association should be grounded in explicit awareness of the essence of the juridical entity that they instantiate. There will thus be rules in the statute that define the association and that state its characteristic attributes. There must also be rules governing the three stages of its “existence”: its creation, its governance, and its reorganization and dissolution. This division of subject matter supplies the basic structure of the statute.

The rules in each of these parts, in turn, will be of four types: imperative as a matter of public policy, imperative as a matter of essence or real definition, suppletive for the members of the institution, and suppletive for adjudicators called on to resolve conflicts that arise during the entity’s “existence.” Some of these rules will be general, and some, very specific. The drafter must be sensitive to this variety of rule types in a way that common law drafting, compared to the drafting of civil codes, typically is not. He or she will also have to be careful to identify
both rules that are regulatory – that is, that seek to constrain the behaviour of the entity or its members for reasons unrelated to organic law – and rules that pertain to the object at hand – that is, that identify and state the imperative and suppletive rules. The former will typically appear in a law applicable to the sector as a whole, not in the associational law.

Several Types of Corporation Private law institutions are related hierarchically. The general idea “contract” is related to the ideas “contract of sale” and “contract of lease” as general to specific. However, although the specific participates in the essence of the general, it also has imperative (essential) elements of its own. The common law tends to collapse these hierarchies and to overlook specificity. The law of contract, for example, has no notion of special contract and thus no explicit doctrinal awareness of the hierarchy, and it is reluctant to recognize that each of the special contracts – sale and lease, for example – has imperative (essential) elements of its own. The latter failing emerges in the poor definitions of the relevant private law institution and is of a piece with general reluctance to state real definitions.

Awareness of hierarchy and specificity is also missing in Canadian corporate law. In the legislation of Canada, Ontario, and Quebec, for example, the current non-profit corporation law appears in short parts of a general statute applicable to all types of corporation. These older statutes express a few non-profit rules in a separate part, relying on a general part to be read, *mutatis mutandi*. They thus assume that individual variations are all contingent, like the difference between the corporation General Motors and the corporation Sears, as opposed to the essential, as in the difference between sale and lease.

The facilitative objective requires clear articulation of the distinctive essential rules of the non-profit form. This difference is located mostly in the difference between the juridical interest of the participant in a for-profit corporation – the “share” – and that of a participant in a non-profit – “membership.” Although the golf course and IBM are both corporations, a person who is both a member of the first and a shareholder of the latter does not regard that sameness to express the whole truth on the juridical logic of his or her participation. Implications flow from the basic distinction between a membership and a share that reverberate through the whole statute. Therefore separate statutes are required.

As an aside, the distinctiveness of these forms of association may also have implications for other areas of private law that apply to them. For example, many non-profits rely on the services provided by volunteers, and volunteering, as a social phenomenon, is largely restricted to non-
profits. People lend a hand in circumstances calling for altruism, and non-profits provide them with the means to do so. These are important social facts, which may imply that the private law which expresses this relationship has to be distinctive. What is the private law relationship between the organization and the volunteer? The private law categories that come to mind are employment, agency and/or the contract for services. Are the rules on respondeat superior in these special contracts applicable to the organization–volunteer relationship? Are the rules of civil responsibility applicable to the actions of volunteers in the way that they apply to employees, agents, and providers of services? Recent developments in the United States suggest that they may not be. The U.S. Congress “immunized” volunteers from tort liability in certain circumstances. Several state legislatures have done the same.

**Various Activities** The law should be designed with the unique non-profit characteristics in mind. As one commentator noted many years ago: “An evaluation of the legal framework for not-for-profit corporations therefore invokes different considerations from those relevant to the business corporation for three reasons. First, there is a fundamental difference in purpose between a corporation formed for a non-pecuniary purpose as compared to one formed for a pecuniary purpose which calls for essentially different statutory provisions. Secondly, the uses to which not-for-profit corporations as a group are being put are considerably more varied than the uses of business corporation. Thirdly, the functional distinctiveness of the non-pecuniary purpose corporation calls for statutory language suitable to its unique non-commercial charities.”

The majority of the rules in the statute will be suppletive, and, of the suppletive rules, the majority will be suppletive for the parties. The juridical logics of “corporation” and “membership” will inform the design of many rules and will feature prominently in some parts of the statute. There are likely to be few public order rules, as most such issues pertain to the sector as a whole and therefore should be the subject of separate regulatory instruments. Therefore the main contribution of the statute will be its suppletive rules, and their quality will be a function mainly of the drafter’s awareness of the patterns of activity in the sector that bear on the creation, governance, and reorganization and dissolution of this type of entity.

**The Ideal “Informed User”** Most statutes address exclusively persons with legal training, because of their complex subject matter (tax law) and sometimes merely because of their (unnecessarily) complex legal
thought (the sale of goods). The non-profit corporation’s statute should address principally the ideal “informed user,” who need not be a lawyer. People conducting associational activity may not have easy access to lawyers with expertise in the area or may have access only to a lawyer-member of the association, who has no specialist knowledge. The typical informed user has no legal education but sufficient sophistication to manage the process of incorporating and launching an organization. As much as possible, the statute should be addressed to that person. To the extent that rules relating to corporate law or non-profit corporate law have to be drafted for the legal specialist, the specialist should be the generalist lawyer and, for some provisions, the generalist corporate lawyer.

Thus the statute should have a clear structure and accessible language. It should not leave the user to design organizational rules on any key or complex question but should provide these clearly in a set or sets of suppletive rules. The older statutes are often silent on matters on which they should say something, if only of a suppletive nature. For example, the current federal statute leaves matters dealing with election of directors to be established in by-laws, since the analogous rules applicable to the other types of corporation covered by the statute – sections 86–92 and 94–7 – do not apply to non-profits. These rules must be set out in a by-law, which then requires ministerial approval both on the initial application for incorporation and upon subsequent amendment. This approach, characteristic of the older statutes, violates the principle that the statute should be “user friendly.”

**Definition and Attributes**

**Purposes and the Non-profit Principle** Economic analysis reduces much of the variety in the sector into a single identifying characteristic, “non-profit.” Although that is a valid and useful principle, it is not the only one. Here we look at the relationship between the non-profit principle and the purposes that non-profit corporations pursue.

Statutes for non-profit corporations typically contain three types of rules that touch on or regulate the purposes for which non-profits may be formed. There is, first, the “non-distribution constraint.” It prohibits uncompensated distribution of value to members or fiduciaries. Its two elements deal with distributions of benefits both from the corporation during its existence and on dissolution. Second, restrictions on purposes include a prohibition on profit-motivated activity as a principal, as opposed to a subsidiary activity. Often they include more. Third, and closely related to the second, is permission to pursue
various purposes, sometimes listed in detail, sometimes left implicit. If a statute lists a set of purposes, then presumably it is forbidding what it omits. All three approaches define or give some content to the term “non-profit.”

In keeping with putting purposes first, I look at permitted purposes, then at prohibited purposes, and finally at the non-distribution constraint. The economic approach mistakenly puts this last concept first because of its narrow focus on agency cost – it is the only set of rules that deals with agency cost. In what follows I suggest that permitted purposes must come first in design of the law and that non-distribution is merely one of many implications that flow from the proper identification and articulation of the permitted purposes.

The lists of permitted purposes found in most non-profits’ statutes serve two functions. First, it identifies the sectors of society entitled to use this form; second, it provides a technique for varying treatment in the statute for non-profits of the different types identified. Some observers think the first function pointless. Although several U.S. statutes use it, there appears to be a “trend ... in favour of liberalization of purposes.” The second function has come into its own only with the third generation of American model acts. It allows for variation in the formulation of rules in four main areas: the fiduciary obligations of directors; the rules governing fundamental changes; the formulation of the non-distribution constraint; and members’ rights.

The Revised Model Act provides a good illustration of the technique. It uses a three-fold classification of non-profit corporations: public benefit, mutual benefit, and religion. Public benefit corporations purport to act for the public good. For the purposes of corporate law, as opposed to tax law, the category “public benefit” under the Revised Model Act includes entities that may not be charitable but which, like a lobbying organization, pursue their version of the public good. The theory of the statute is that all organizations of this type share or should share common structural features. So, for example, membership interest, unlike a share, cannot be sold and cannot be repurchased by the corporation; members’ governance rights are not as robust as those of shareholders in a modern for-profit corporation’s statute; since public benefit–type corporations attract financing and membership largely on the basis of their specific purposes and projects, rules governing fundamental changes and dissolution are more restrictive (compared to other non-profits), so that the donated property remains dedicated to the specific purposes and projects; and, a higher standard governs directors in regard to their transactions with the organization.
Mutual benefits are, in the theory of the statute, substantially different from public benefit organizations. They are organized for the common advantage of their members. Social clubs, fraternal organizations, and trade associations are the most common examples. Its members often have a significant economic interest at stake in their memberships and hence an enhanced interest to monitor activities. Their governance rights are more substantial, and the controls on fundamental changes and dissolution less restrictive. Religion is obviously distinctive and may even, as in California and New York law, merit its own statute.

The list of permitted purposes turns out to be quite important. If done properly, it serves well both functions mentioned above: it both delimits the scope of the statute, by implicitly or explicitly excluding what is off the list, and it provides a framework for rule variations throughout the statute. Older statutes listed items randomly and inclusively, rather than (as the Revised Model Act does) conceptually and exhaustively: public benefit, mutual benefit, and religion, the statute claims, is all there is. And, the statute claims, this division is the most appropriate, all things considered, to serve the rule-variation function.

Although I believe the Revised Model Act’s list is quite good, my suggestion is not necessarily that it should be adopted. Rather, identifying an exhaustive list of purposes should serve the first function and assist the second. If that is done, and done well, the next two rules are subsidiary.

If the categorization of permitted purposes exhausts the field of non-profit purposes, as some claim, then we are at the boundary between non-profit and for-profit. For the sake of clarity the statute could, and probably should, describe the prohibited areas. The most obvious outsider is commercial or for-profit activity. The statute should therefore probably prohibit pursuit of profit as a principal (though not necessarily as a subsidiary) activity. The statute would be stating the second of two obvious implications of the non-profit principle. Its proper and clear expression requires articulation of the first, more general proposition. Those permitted purposes, in other words, have to be primary in the normative framework of the statute.

Economists identify the non-distribution constraint as the primary norm. The constraint prohibits the non-profit form of organization from distributing its net earnings to its members or fiduciaries. The second rule prohibits it from operating at a profit or from engaging in commercial activities aimed at earning a profit. The constraint
means only that the beneficiary of any profit may not include the members or fiduciaries. Moreover, it does not prohibit them from earning reasonable remuneration or compensation for services that they provide to the non-profit. Almost all non-profit statutes in Canada express this requirement in one way or another.73 Any organization that wants to make pecuniary distributions to members should be organized as a co-operative (producer or consumer) or business corporation.

Although this too is an important rule and requires clear statements, like the rule on prohibited purposes it is merely an implication of the larger idea that the organization may pursue only a permitted purpose. The rule on prohibited purposes says “no commercial activity”; this rule says “no selfish pecuniary purposes.” These two sets of purposes are outside the permitted purposes.

To articulate the non-distribution constraint properly, one must place the rule on permitted purposes in the normative framework of the statute. Generally speaking, public benefits and religions, to use the scheme of the Revised Model Act, should be subject to a general prohibition against either (temporal) type of distribution; mutual benefits, only during their existence. Permitted purposes come first in the normative scheme given their function of facilitating meaningful variation of rules throughout the statute. Moreover, although the non-distribution constraint just stated is generally true, it requires some nuancing, again according to purposes. Religions, for example, should be able to distribute to less well-off members, and a national, umbrella, public benefit organization, to its local or provincial chapters, each individually incorporated. The Saskatchewan statute, for example, negotiates the difficulties well, explicitly excepting this type of distribution in section 31(2). The key point, however, is that all of this requires clear statement of and normative primacy for permitted purposes.

In sum, drafters of the older statutes had none of these three rule types clearly in view. Much less did they recognize the normative primacy of permitted purposes. Consequently, their formulation of the non-profit principle is often a disaster. The current federal and Ontario laws, for example, prohibit “pecuniary gains” by members. What precisely did the legislators mean by this?

Civil Capacity and Powers It is common for corporations’ statutes to limit the powers of a corporation. The most fundamental limitation is found in the ultra vires doctrine, which restricts a corporation’s exercise of civil capacity to its objects, on pain of nullity. The exact import of this type of rule depends on the theory of the corporation inform-
ing the statute. There are two basic views: the corporation gets its capacity either on a delegation from its original incorporators with the imprimatur of the state (the English contract model) or from a pure benefaction of the state (the letters patent model). In either case, the “originator” or “creator” of capacity may withhold certain elements. The English model looks at the corporation the first way and interprets the *ultra vires* doctrine as a withholding of capacity by the originators. The English model here slips into a principal–agent characterization of the incorporators–corporation relationship and therefore naturally perceives the objects clauses as stating the agent’s mandate (power) in respect of the patrimony. The capacity granted by the state has traditionally been regarded as wider, on the view either that the state is more powerful and/or liberal or that no, or not many powers in respect of the patrimony can have been withheld, because there is no principal or no residual authority to withhold them. However, an *ultra vires* doctrine still occasionally applies to corporations of this type too.

Additional specific restrictions on investment activities and ownership powers also appear in some corporation statutes. Such rules restrict use of a specific power, even for a legitimate object. For example, Ontario used to limit investment activity and land ownership in its corporations law and still does so in its Charitable Gifts Act and its Charities Accounting Act (section 8). Even if it is thought advisable to regulate the investment decisions of non-profit fiduciaries, that regulation should probably not be in the organic law, since it presumably ought to apply to all non-profit fiduciaries, not just those in the corporate context.

The revised theory regards the corporation juridically as a nexus of contracts and not in any sense as a person. The old way, since it regarded the corporation as a person, naturally fell into the view that restrictions on activities should be formulated in terms of civil capacity, as a question of legal power. The only logical sanction for an act in excess of power is nullity. Regarding the corporation instead as essentially an institution of private law, founded in real contracts, facilitates a move away from power–nullity logic to a wider and more reasonable logic of prohibited activity and penalty. If the state, for good or bad, wants to regulate the activity of these people, then let it deploy the latter logic, not the former. There are several practical merits to this approach, in addition to the old theory’s falsity. This move also facilitates a shift of this type of regulation out of the corporation statute and into collateral regulatory statutes. (Of course, members or the corporation could still sue directors for breach of their obligation to comply with the constitution.) Henceforth, only those prohibitions that cor-
relate to or reflect rights of members should continue to be expressed in the organic law.

*The Corporate Constitution* The basic law of the non-profit must have three distinct elements to facilitate activity: the document(s) of its expression (statute, by-laws, articles, and so on); the required and permitted organs (board of directors, officers, members, and so on); and the basic structures of governance and accountability (meetings, elections, and so on). Because the statute is dealing with the structure of a purposive community, it is in essence a constitutional law. How or where should this basic law be expressed? The concern is “constitution” in the sense merely of its mode(s) of expression, not of its substance.

If one refers first to the business context, the constitutional law embodied in the Canadian Business Corporations Act (*cbca*) is expressed in the articles of incorporation, in the imperative provisions of the statute, and in the by-laws. The first element establishes only the name, the share structure, the number of directors, and the location of the head office. The second and third are quite extensive. The second, the statute, sets out the imperative rules and facilitates the remainder with optional suppletive rules. The third, by-laws, deals with internal matters such as the frequency and timing of membership meetings, the notice and quorum requirements for such meetings, the election procedures for the board of directors and for the officers of the company, the constitution and mandate of the committees of the board, and amendment procedures.

How does the distinctiveness of the non-profit form play out in the modes of expression of this constitutional law? If we think in terms of the ideal user described above, the statute should require, as a minimum, establishment of the basic organizational structure in the articles of incorporation. Using the *Revised Model Act*, the incorporators indicate which type of corporation they intend – public benefits, mutual, or religious – thereby opting into the imperative and suppletive structures provided in the statute. For similar reasons, the articles or accompanying documents might also require that everything necessary to make the corporation operational, such as appointment of the initial board, be a condition of incorporation. The statute or the regulations under it might also make available several general by-laws, from which the incorporators might select one or be presumed to select one in the absence of some contrary indication. Constitutional law is not as accessible to lay users of a statute, or even to most lawyers, as is, for example, contract law, so that the state might play a greater facilitative and helping role here.
Formation

Discretionary Grant Some degree of regulation of the sector is imposed at the incorporation stage. In Ontario, for example, the Office of the Public Guardian and Trustee and, in some instances, ministries such as Housing, in the case of non-profit housing corporations, routinely review applications for letters patent. The federal practice is for the receiving ministry (Industry) to forward applications to other relevant ministries for review and comment. This all happens because, under the statute, the grant is discretionary.

Its discretionary nature is a remnant of the theory of the corporation as a subject of law created by the state. If this theory is discarded, does reservation of a discretion continue to serve any useful purpose? On the theory of the corporation proposed here, the state is merely facilitating an organizational form by stipulating the conditions for, and elements of, civil capacity and limited liability, and so there does not seem to be any reason (relating to organic law) to issue corporate charters on a discretionary basis. There may, however, be a regulatory objective — for example, restricting use of the word “charity” or ensuring that charitable corporations are subject to some regulatory authority. If so, would this objective find better expression in the corporate law or in a general statute applicable to charities? Should withholding corporate capacity be the consequence of failing to satisfy any relevant condition?

The current administrative regime in Ontario aims at more than protecting the name of charity. Its rationale relates to the protective role of the state. Presumably, no non-profit that purports to be charitable can become incorporated unless it satisfies certain minimum conditions, such as directors’ serving without remuneration, and certain minimum standards on dissolution. This type of regulation ought to apply to the sector in general, not just to corporations, and therefore should not usually appear in the corporation statute. That general statute could begin by restricting the use of the word “charity.”

The Name Statutes on corporations address the issue of the legal element of the corporate name by prohibiting the use of certain words (“limited” in Manitoba [section 10(1)] and by requiring others (“incorporated” or “corporation” in Saskatchewan [section 10(1)] and Newfoundland [section 421(1)] and “society,” “association,” or “club” in British Columbia [section 6]). Probably the name should contain an element that identifies the corporation either as a non-profit or as a non-profit of the relevant type, since the name should
give the public a sense of its purpose and of its structure of governance. A distinctive element in the name informs persons who see or hear it that the entity is subject to the provisions of the relevant statute of non-profit corporations. That would be a useful rule of public order.

The Number of Incorporators Sometimes one (Saskatchewan section 5[1]), sometimes five (British Columbia section 3[1], Alberta section 3[1], and Nova Scotia section 1), and sometimes three persons are required as initial incorporators. There may be some difficulty in theory with one-person corporations, but the juridical operation described above can easily be adjusted to accommodate unilateral acts. If there is to be any requirement as to the number of incorporators, it probably has to be based on regulatory considerations. It may be that the requirement of several incorporators, several continuing members, and/or several continuing directors will reduce the possibility of fiduciary breach and fraudulent use of the form. More probably, like much of the older corporate law, it is an empty formality.

Governance

The older statutes are deficient in numerous ways, resulting from failure to adjust to modern conditions or to modern corporate practices and from failure to adapt the corporate form to the specific needs of this type of organization. I investigate some of the main deficiencies here.

Membership and Affiliate Structures Non-profit corporations develop unique and peculiar relationships with other organizations, both profit and non-profit. Consider three examples, and contrast them with typical affiliate structures in the profit sector. First, an operating non-profit, no longer content to rely on donors’ annual giving, might set up a fund-raising foundation. In this structure, the "parent–subsidiary" control is from operating to financing, not, as is typical in the for-profit sector, vice versa. The foundation is more like a bank account than a bank or a venture capitalist. This type of structure is not uncommon. An operating charity might establish a foundation to receive and administer a ten-year gift. Or a foundation might be established to engage in planned giving, such as charitable remainder trusts, charitable gift annuities, and gifts of life insurance. In these cases, the operating charity may want some veto control over basic changes or may want some automatic representation – perhaps even
by appointing the chair – of the foundation. Alternatively, arrange-
ments may be required to provide for an element of protection
against too large a call on the foundation’s resources by the operating
organization, in which case the direction of control may be more
ambiguous. For example, the board of an operating charity might,
after a successful fund-raising campaign, shift the funds into a related
foundation, beyond the direct reach of future boards. Foundations
are also useful for segregating funds to acknowledge separate donors
or to insulate the operating charity in the grant application process to
government, vis-à-vis other charities, or in future appeals for funds to
the public.

Second, a charity decides to put profit-making commercial activities
into a related entity – a for-profit corporation or a business trust – in
order to maintain its charitable status under the Income Tax Act.
Third, large multi-member organizations may require a variety of
membership structures. These can be of two main kinds: a federated
structure to accommodate different structures of membership
(perhaps on a regional) basis, delegate voting, and so on; and an affil-
iate structure both to insulate participating entities from each other’s
liability risks and to allow for some degree of control of one by the
other.

These examples indicate that membership structures in this sector
are quite different from those in the profit sector. The legislator must
take this into account in the design of the law. A good facilitative law
should provide the concepts and the framework to permit these struc-
tures. The cbca’s concepts of affiliate, subsidiary, and control are
probably not adequate to the task.

Membership Rights The theme of most reforms of the business corpo-
ration statutes was the enhancement of shareholders’ governance
rights and increased protection for their pecuniary entitlements.
Reform of these areas of the law in non-profit corporations is signifi-
cantly different for a variety of reasons. Certainly, those reforms, such
as the derivative action, that are grounded in a more accurate appre-
ciation of the juridical nature of the corporation would apply with few
changes to the non-profit. In two areas, however, the shape of the law
should be considerably different: governance is substantially different,
as is members’ inclusion and expulsion.

Governance rights in the non-profit sector do not aim to protect a
pecuniary interest. The point of members’ involvement may be vari-
ously to allow pursuit of the common purpose and to hold the organi-
zations’s executive accountable for its performance in that regard
(for example, a humane society); to permit deliberation on tactics and
strategy in the pursuit of common purposes (as in a political advocacy group); to express the common purpose (for instance, a congregational religion); or to oversee or decide on the quality of the service provided by the non-profit to its members (such as a golf course or daycare). Many organizations, especially religious ones, already have a good deal of structure provided by their internal law. Thus the drafting of the law will have to accommodate a wide range of organizational types. The Revised Model Act provides a useful starting point, as it makes a significant distinction between religious and other non-profit organizations in this regard and alternates the legislative voice between imperative and suppletive.

The personal identity and behaviour of individual and group members are of concern in the non-profit in a way that they typically are not even in the case of the closely held for-profit corporation. Members of a religion have to at least profess the religion. Boors are unwelcome in the curling club’s dining-room, as are infiltrators and usurpers in the political advocacy group. Given a legitimate common purpose, however, it cannot hurt most non-profits to decide issues of expulsion, if not inclusion, in a manner that is fair. Provisions in the statute should require some sort of valid fact-finding process and some manner of unbiased decision-making applicable to most non-profits. Religious groups might again be exempted on the basis that enforcing a member’s right to natural justice in expulsion would involve a court in argument about truth in doctrinal matters.

**Directors’ Duties** Boards of directors in all corporate sectors have at least five key functions: to select and supervise the performance of the chief executive officer; to establish and supervise implementation of long-term or strategic objectives; to facilitate obtaining of resources sufficient to implement these objectives; to supervise management’s performance; and to reproduce themselves. But there are important differences between profit and non-profit boards. Fishman and Schwarz outline some of the differences: “For-profit boards concentrate on developing and carrying out board strategies for enhancing shareholder value while non-profit boards are more committed to the organization’s mission. While a business board may have an obligation to divest itself of unprofitable activities, a non-profit board has a greater duty to stay the course if it is to be true to its mission. Corporate boards devote much more time to review of performance than the typical non-profit. The bottom-line, the talisman of profit-seeking activity is easier to measure than non-profit effectiveness.” Another commentator says: “it is especially hard to be an effective director of a non-profit organization. The very
mission of the enterprise can be difficult to define with precision and subject to intensive debate. It is often seen differently by various influential participants and supporters. Relevant data and analyses are frequently either unavailable or, if available, tricky to interpret. Performance often defies easy assessment and lack-luster leadership can go unnoticed, or at least uncorrected, for considerable periods of time. Resources are almost always scarce and problems often appear intractable. Creative solutions can be elusive and, if identified, hard to put into effect – in part because of the lack of ready access to the kind of “buy–sell” mechanisms provided by markets.80 Another has observed that the non-profit boards tend to be larger (relative to assets), to be dominated by outsiders (as opposed to insiders), and to function more through a committee structure than their for-profit counterparts.81

The situation regarding modes of accountability is also distinctive, if somewhat paradoxical. The non-profit sector receives its funding almost entirely from the public or the government, and the task of a director is more complex than that of his or her for-profit counterpart. Yet its formal and informal modalities of accountability are far more lax than anything encountered in the profit sector, and there is nothing in it equivalent to the “market” modes of accountability – takeover, product, and manager markets. Its distinctiveness, which flows from its peculiar purposes, requires the legislator’s special attention in the design of the general and specific rules governing the duties of directors. The place to begin thinking about this is in the formulation of directors’ duties. I examine first the logic of the rule and then its content.

The codification of directors’ duties in Canadian law is a recent project. Unfortunately, the current statements are exceptionally weak conceptually. In theory, the duty of a director has three components: a duty to act prudently (with care) and a duty to act loyally, both in pursuit of a specified purpose, with prudence (or care) further divided into competence or skill and attention or diligence. This whole package expresses the logical components of all fiduciary duties and is sometimes called (correctly, in my view) “fiduciary duty,” which term sometimes refers to only loyalty.

The CBCA’s codified formulation states: “Every director and officer of a corporation in exercising his or her powers and discharging her or his duties shall, (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” Note at least four significant conceptual deficiencies. The specified purpose is “the best interests of the cor-
The duties of loyalty and prudence are formulated as "honestly and in good faith" and "care, diligence and skill," respectively. And the level of skill required is that of a "reasonably prudent person."

As far as the first goes, the formulation "best interests of the corporation" is imponderable, since only entities with a will or desires can have interests. Here, the corporation-as-person metaphor surfaces again. One is forced either to identify some human constituency that is "the" corporation or "unpack" the metaphor to discover the true legal reality. Most observers would probably agree that what the drafters really meant was that the directors must prudently and loyally pursue "the maximization of the net present value of the corporate assets, within a given range of risk," as suggested above in section 1. For non-profits, the analogous objective can be only the "mission" or common purpose of the organization. In the jurisprudence of the for-profit sector, as I noted above, the meaning of this objective is a source of considerable controversy. It probably does not make sense to import that controversy to the non-profit context by using the same phrase. In any event, it is probably better to state much more clearly what the objective is and not to resort to a metaphor for such an important rule. Even though this rule is probably imperative (essential), its proper expression is facilitative, because it tells our ideal reader as plainly as possible what his or her duties are as a director.

As for the second aspect of the formulation, one can ask whether "honestly and in good faith with a view to" clearly and adequately expresses the idea of loyalty? What, in particular, does "good faith" mean – that the actor really intends what the actor purports to intend? Thus the director must "really intend" the best interests of the corporation. What does "honestly" add to that? At most the requirement that the director must not, in "really intending," be fooling himself or herself. If the director is loyal, then he or she must intend loyalty, since loyalty is a virtue, a subjective state. This is what the concepts "honestly" and "in good faith" are aiming at. If so, which is more readily intelligible to the ideal reader – the current formulation or to "be loyal" or "act loyally" in the pursuit of the common purpose? "Good faith" and "honestly" are just fragments of the larger concept of "loyalty."

On the third aspect, there is less of a problem with prudence. One might quibble that "care" and "diligence" say the same thing. But, with regard to the fourth, what does it mean to exercise the skill of a "reasonably prudent person"? Do all reasonably prudent people have the same level of skill? This formulation attempts to state the duty of pru-
dence in too short a compass. A better approach might be to identify the components and then, for each one, the relevant standard. If the components are diligence and skill, as suggested in the statute and in the definition, then we can and probably should require a uniform standard of diligence (go to meetings, pay attention, do the reading, and so on) and a varying standard of skill (the skill of a lawyer for lawyers, the skill of a housewife for housewives, and so on). After all, the point of having a board of directors, as opposed to a single person, is to allow for deliberative decision-making. It must be assumed that the directors will not and should not share the same social, economic, or professional make-up. It must be assumed that their skills will be complementary. Alternatively, the standard of skill might be uniform, but, if so, it cannot be the skill of a reasonably prudent person, since the concept “skill” implies a craft, calling, or profession, and persons as such have none of these. Maybe what was meant was “reasonably prudent director.”

In sum, to clarify these conceptual difficulties, the essential elements of the director’s duty may be stated as follows: the director of a non-profit corporation must pursue the common purpose loyally and with prudence (diligence and skill). Now the question is: to what standard must he or she fulfil this duty?

First, much ink has been spilt over whether the standard of diligence and the standard of skill are higher or lower than those that apply to trustees or those that apply to directors of for-profits. This discussion is sometimes confused with a parallel debate on the duty of loyalty. The expression “fiduciary duty” is ambiguous – used to refer to the duty of loyalty and to both the duty of loyalty and the duty of prudence. The first step in clarification is to separate diligence and skill for independent analysis.

The duty of diligence turns out to be the more important. In fact, I do not know of a case where a court said that the directors lacked the requisite level of skill. Even in cases where there was an implicit finding of fact that they did lack the skill, the easier and more obvious conclusion was that they lacked the diligence, under the circumstances, to acquire the skill, to delegate appropriately, or to resign. In most cases, however, the problem was simple inattentiveness. And in a large number of these, the lack of attentiveness is related to a breach of the duty of loyalty.\textsuperscript{82}

One could argue that the duty of diligence should be high, on the basis that the director of a charitable non-profit is analogous to the trustee of a charitable purpose trust. His or her position carries a very large social responsibility. Conversely, perhaps a standard set too high will simply scare people away.\textsuperscript{83} Or perhaps the formulations available
say pretty much the same thing, and anyway this question is seldom litigated. I take this last view. My preference would be “diligence of a reasonably prudent person in the same circumstance.” Everybody understands that.

Second, because it makes no sense to talk about a level of skill without identifying a craft, the standard applicable to the duty of skill must be stated either in the context of a craft or not at all. Therefore, it appears that the choice is the “reasonable director” or no standard and therefore no duty of skill. Another option in the for-profit context is the business judgment rule. For non-profits, it has been referred to as the “best judgment rule.” The U.S. business judgment rule is a standard that courts use to police their own involvement in enforcing the accountability of directors. It is a standard, in effect, of judicial review. It has been stated in numerous cases and was most recently and usefully codified in the American Law Institute’s Principles formulation. Some U.S. jurisdictions have applied it in the non-profit context. In general terms, the rule provides that, if directors take a decision in a good faith and in a disinterested manner, and if they have taken the proper steps to inform themselves of the matter to be decided, no court will subsequently review the decision for breach of the duty of care. In essence, the skill with which the decision has been made or its wisdom will not be questioned if the directors have made it with proper diligence.

Second, besides stating the general rule governing the behaviour of directors, a statute might also identify norms that apply in particular areas of activity. Corporate statutes address this issue in a number of ways besides simply imposing a particular duty in a specific context. For example, many contain rules that restrict the power of directors or of a corporation to borrow, to invest, or to own land. I argue above against rules that use a capacity–nullity logic. Are such restrictions, stated directly as specific duties in particular contexts, desirable at all?

These types of rules make sense only if the prohibited activity would probably or too frequently be carried on in some undesired way if it were permitted. In theory, there are only two justifications for any rule imposing specific duties on a fiduciary or prohibiting certain intrinsically unobjectionable behaviour. Either the specific duty is an application of the general duty in a defined circumstance, or it is too difficult for interested persons, including adjudicators, to apply the general rule accurately. If that is true, the rule would rarely if ever say: “You have a duty to invest in X, Y, Z, but not anything else,” because this rule may not always instantiate what is prudent. Rather it would say either: “Be prudent, and, if you want to be safe from a judge’s second guess-
ing, then invest in xyz”; or “Judge: In this type of case the usual solution is xyz.”

There cannot be too many instances in which such rules are appropriate. Since prudence depends very much on circumstances, it is hard to see how this type of legislative strategy would get the rule right often enough. All such rules are susceptible to the following criticism: “But what the prudent man [or woman] should do at any time depends on the economic and financial conditions of that time – not on what judges of the past, however eminent, have held to be the prudent course in the conditions of 50 or 100 years before.”

Finally, let us consider the content of the duty of loyalty. Its positive content is clear – the director must use his or her powers in the pursuit of the common purpose. The negative content is also clear – no stealing. Difficulties arise in two related areas: conflicts of interest and self-dealing transactions. Trustees may not deal with the trust at common law; they may not place themselves in a situation where their interest conflicts with their duty. This rule works reasonably well where the fiduciary really has no need and no occasion to deal with the trust. The activity of a fiduciary is to manage passive investments. In an operational setting, such as the typical for-profit or non-profit corporation, there is a need for fiduciaries to deal with the corporation: they may require remuneration; they will want or require indemnification; and they may have skills or assets needed by the corporation that the corporation should purchase. Therefore the absolute prohibition against conflicts of interest is not generally appropriate in the corporate context, and the legislator should design rules regulating self-dealing transactions so that they meet the loyalty requirement. These rules, moreover, like the specific context rules in the duty of prudence, will take the form of “safe harbour” rules or suppletive rules for judges.

_Fundamental Change and Dissolution_

American studies show that non-profits, compared to their for-profit counterparts, tend to resist fundamental changes. For-profits in financial difficulty may seek to take advantage of tax and economic benefits available on amalgamations and dissolution, whereas financially stressed non-profits with a large asset base, including a strong reputation, often seek to maintain their existence at the expense of not seeking new opportunities. In the absence of economic incentives, the negative factors inhibiting merger – such as cultural barriers, management’s hubris, and inertia – are just overwhelming.
Non-profits are also distinctive in the types of considerations that they face on dissolution. The reasons for dissolution may vary – assets or funds may be insufficient for stated purposes, or stated purpose may have become redundant, or the board or the members may be deadlocked ideologically.

Although these differences are important and may shape the rules governing decision-making on fundamental changes and dissolution, the most critical consideration is disposition of the assets of corporations that have raised money for some public purpose. What is required therefore is some corporate law version of the cy-pres doctrine.

CONCLUSION

My main argument has been that designing a good law for non-profit corporations requires a great deal of thinking on the purposes for which the statute will be used. This turns out to be a difficult task because of the incredible variety of non-profit purposes. Still, that is the work that has to be done, because those purposes play out all the way through the statute. I suggest that this is a task that (probably) only lawyers with great experience in the sector can do well, but that even they are handicapped by the old, familiar models of corporate law. I believe that the Revised Model Act is a very good start and speculated above that its virtues derive from the fact that it is the third or fourth such attempt, and involved a lengthy, collegial process. I sought to contribute to reform by looking at design principles, while downplaying my favoured solutions. This is a useful level for the lawyers to begin thinking about the issues. I aimed at stating more an agenda of issues than a list of answers. But I do suggest one answer: the objective is a law appropriate to the purposes.

NOTES

1 The basic law of the unincorporated association has been reformed in several American states, based on National Conference of Commissioners on Uniform State Laws, Unincorporated Associations Act, 1992, (draft act). The Uniform Act has been adopted in Colorado (Colo. Rev. Stat., 17-30-101–9), Idaho (Idaho Code, 53701–7), Wisconsin (1997 Wis. Stat. 140) and Wyoming (Wyo. Stat. 1977. 17-22-101–15). The Uniform Act provides that members, officers, and directors of unincorporated associations are not, as such, liable for the torts or contracts of the association; it defines and states the legal implications of membership; and it gives the association the capacity to own property.

Most commentators agree that the current statutory framework is sorely inadequate. “Much of the confusion in this area evidently originates from the lack of any coherent conception of the basic purposes served by the non-profit form of organization ... [E]xisting non-profit corporation law, including the various recent efforts of statutory reform, is, in fundamental respects, misconceived and badly flawed”: Hansmann, “Reforming,” 500. “[T]he present [federal] Act is ... awkward, confusing and functionally unsuitable”: Cumming “Corporate Law Reform,” 13. See also H. Henn and J. Boyd, “Statutory Trends in the Law of Non-profit Organizations: California, Here We Come!” Cornell Law Review 66 (1981), 1103; they note that non-profit corporate law is the “neglected stepchild” of corporate law receiving the latter’s “hand-me-downs,” as opposed to the distinctive treatment that it deserves.


There have been reform efforts federally, in Alberta, and in Saskatchewan. For the federal effort, see Canada, Proposals for a New Not-for-Profit Corporations Law for Canada (Ottawa: Department of Consumer and Corporate Affairs, 1974). The last version of the federal proposal was Bill C-10; it died on the order paper in 1980. For Alberta, see Alberta Institute of Law Research and Reform, Proposals for a New Alberta Incorporated Associations Act, Report No. 39 (Edmonton: March 1987), Alberta, Task Force on the Volunteer Incorporations Act, Toward New Non-profit Legislation: Report of the Task Force on the Volunteer Incorporations Act (Edmonton: Minister of Consumer and Corporate Affairs, January 1990); and Volunteer Incorporations Act, Bill 54, Alta. 1987 (21st Leg., 2nd Sess.). For Saskatchewan, see The Non-Profit Corporations Act, ss 1979, c. N-4.1. Now, see Non-Profit Corporations Act, 1995, ss 1995, c. N-4.2.
6 A newly revised statute, the Society Act rsbc 1979, c. 390, was enacted in 1977 in British Columbia. Saskatchewan reformed its law in 1979.

7 The Interim Report of the Select Committee on Company Law (Chair: A.F. Lawrence, qc) (Toronto: Ontario Legislative Assembly, 1967) had recommended a study and revision of Ontario’s non-profit corporation law, but nothing came of the recommendation. The Alberta and federal efforts described in note 4 also did not result in legislation.


10 There has not been much writing on the non-profit corporation. See note 1 above. One author noted in 1973: “Not-for-profit corporations have received considerably less attention than the business corporation. This is readily evidenced by a significantly less developed statutory framework, very few judicial interpretations through the case law, little attention from the academic world and general disinterestedness on the part of the legal profession as a whole”: Cumming, “Corporate Law Reform,” 14.


13 In the United States, a majority of states still use the *Model Act* of 1952, as revised in 1957 and 1964. Some apply, with adaptations, a general corporations statute. See, for example, Delaware, Code, Title 8; Kansas, Statutes; Maryland Code 5-202–8; and Oklahoma, General Corporation Act. New York implemented a major reform in 1969, and California, in 1980. Their non-profit corporation laws were original and innovative. Their interpretation and administration over the past 15 to 20 years provide a wealth of experience for Canadian legislators. Numerous U.S. states have adopted the Revised Model Act, which appears to be growing in popularity. The following jurisdictions have adopted it to date: Idaho, Code 30-3-1–145; Arkansas, Code Ann. 54-28-201–6 and 4-28-209-223; Colorado, Code 7-121-101–301; Mississippi, Code 79-11-101–399; Montana, Code 35-2-112–1402; Oregon, Revised Statutes 65.001–990; Tennessee, Code 48-51-101–105; and Wyoming, Statutes 17-19-101–18070. Some jurisdictions have implemented portions of the statutes. For example, Texas uses the Revised Model Act’s rule for a director’s fiduciary duty. See, Texas Revised Civil Statutes s. 1396-3.02.

14 See: *Re Centenary Hospital Association and Public Trustee* (1989), 69 OR (2d) 1 (HCJ); supplementary reasons 69 OR (2d) 447 (HCJ); *Re Faith Haven Bible Training Centre* (1988), 29 ETR 198 (Ont. Surr. Ct); *Re David Feldman Charitable Foundation* (1987), 58 OR (2d) 626 (Surr. Ct); *Re Harold G. Fox Education Fund and Public Trustee* (1989), 69 OR (2d) 742 and 748 (HCJ); and *Re Public Trustee and Toronto Humane Society* (1987), 60 OR (2d) 236, (HCJ) *Re Laidlaw Foundation* (1984), 48 OR (2d) 549 (Div. Ct); *Re Incorporated Synod of the Diocese of Toronto and HEC Hotels Ltd.* (1987), 61 OR (2d) 737 (CA).

15 See *Society Act* and *The Non-Profit Corporations Act*.


17 See ibid., 277–84.

18 Ibid., chap. 17.

19 See Sharpe, chapter 2 in this volume.

20 I do not intend to address that question, which many contributions to this volume consider. A recent statement by an American author suggests the elements of an answer in the U.S. context: “[T]he non-profit sector makes a significant, probably pivotal, contribution to the American form of representative democracy in at least three respects. First, the non-profit sector teaches the skills of self-government. Second, it inculcates the habits of tolerance and civility. Finally, it mediates the space between the individual and the other two sectors of society, that is, the ‘public’ or governmental sector and the ‘private’ or ‘entrepreneurial’ or ‘propri-


22 Some lobbying efforts of the sector in recent years have been successful, but relatively minor. For example, the standard $100 deduction for charitable donations was repealed in 1987, and the deduction was converted to a credit in 1988.

23 The OLRC was abolished in 1996. Few of its private law projects have been acted on in the last 20 years.

24 This may explain why so little of the OLRC’s private law work has been implemented.

25 Revised Model Act, xxix–xxx. This list of deficiencies mentions fiduciary responsibility implicitly only once (when it lists derivative suits), and all the others relate to whether the statute addresses organizational needs.


27 England no longer exports its corporate law. More and more, common law jurisdictions seeking to reform their corporate law go to other jurisdictions for inspiration. See L. Gower et al., *Principles of Modern Company Law*, 5th ed. (London: Sweet & Maxwell, 1992), 70, which laments this “sad conclusion.”


30 The leading cases are recent, contradictory, and not exhaustive: *Sparling v. Caisse de dépôt et placement* [1988] 2 SCR 1015; *Bowater Canadian Ltd. v. RL Crain Inc.* (1987), 62 OR (2d) 752 (OCA); *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 11 BLR 313 (Alta. Q.B.); and *Jacobsen & United Canso Oil & Gas Ltd.* (1980), 12 BLR 113 (NS SCtD).

31 Are directors obliged to maximize shareholders’ value or the value of the corporate patrimony?

32 Do they owe their duty to the corporation, to society at large, or to the shareholders?

33 Hence the “stakeholders” debate. See generally the essays collected in *University of Toronto Law Journal* 43 (1993), Special Issue on the Corporate Stakeholder Debate: The Classical Theory and Its Critics.


36 The thing created by the contract – the company – is also a party to it in many versions of this provision.

37 This suggests that statutory rules allocating the power to manage are suppletive. Query whether the obligation of whoever manages to maximize the net present value is also suppletive. I would suggest not; I would suggest that it is either essential or at least of public order.

38 See Gower, *Modern Company Law.*

39 (1843), 2 Hare 461, 67 ER 189.

40 There are four exceptions to this rule. Shareholders may sue: when it is complained that the company is acting ultra vires: *Yorkshire Miners’ Asscn. v. Howden*, [1905] AC 256 (HL); when the act complained of is one that could be done validly or sanctioned not by a simple majority vote but only by some special majority vote: *Baillie v. Oriental Telephone Co.*, [1915] 1 Ch. 503 (CA); *Edwards v. Halliwell*, [1950] 2 All ER 1064 (CA); when the personal rights of the plaintiff shareholder have been infringed: *Johnson v. Lyttle’s Iron Agency* (1877), 5 Ch. D. 687 (CA); and
when those who control the company are perpetrating a fraud on the minority: *Menier v. Hooper’s Telegraph Works* (1874), 9 Ch. 350 (CA); *Mason v. Harris* (1879), 11 Ch. D. 97 (CA).

41 *Mosley v. Alston* (1847), 1 Ph. 790, 41 ER 833; *MacDougall v. Gardiner* (1875), 1 Ch. D. 13.

42 (1887), 12 App. Cas. 589 (JCPC).

43 [1902] AC 83 (PC).

44 (1877), 6 Ch. D. 70 (CA).

45 [1967] Ch. 254.


47 There is no precedent for this idea in partnership law. Major elements of the partnership contract, such as admitting new partners, changing the business, and modifying the mutual rights and duties of the partners, require unanimous approval.

48 [1902] 2 Ch. 421.

49 An Ontario case, *Craik v. Aetna Life Insurance company of Canada* [1995] OJ No. 3286 (Gen. Div.), at para. 5, captures the conventional picture: “A corporation is an artificial entity. That is, it is a juristic person whose reality arises because the law recognizes it as a separate person. It can only function and act through human beings acting on its behalf ... That is, the corporation acts through individuals who form its directing mind and management. A director or officer who carries on discussions and makes decisions relating to the business carried on by the corporation, if acting within the scope of his/her authority as a human agent for the corporation, is simply causing the corporation to act and form legal relationship.”

50 There is English authority for the proposition that the corporation is variously the shareholders, as in *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656 (CA); *Brown v. British Abrasive Wheel*, [1919] 1 Ch. 219; and *Greenhalgh v. Arderne Cinemas Ltd.* [1951] Ch. 286, [1950] 2 All ER 1120 (Eng. CA); the majority of shareholders, as in the ratification cases; and a separate person, as in *(Salomon v Salomon* [1897] AC 22 (HL); and *Macaura v. Northern Assurance Co.*, [1925] AC 619 (HL).

51 It is critical that their promise is to maximize corporate wealth, not shareholders’ wealth. It is well-known that the two criteria diverge at insolvency: the residual claimants at that point have every incentive to choose higher variance and lower net-present-value investment opportunities – or, in other words, to “bet the farm.” See S. Myers, “Determinants of Corporate Borrowing,” *Journal of Finance and Economics* 5 (1977), 147; J. Ziegel, “Creditors as Corporate Stakeholders: The Quiet Revolution – an Anglo-Canadian Perspective,” *University of Toronto Law Journal* 43 (1993), 511. See also *Kinsela v. Russell Kinsela Pty.* (1986), 4 NSWLR 722 (court).
In many corporation statutes, the articles appoint the first directors.

“Corporate agent” is a fiction. The “agent” cannot really be that because the corporation cannot be a principal; only real persons can be principals. However, the fiction is a perfectly accurate description of the effects of the contracts described in the text, and the juridical mechanics are easily “unpacked.” See Lord Diplock’s discussion of corporate agents in *Freeman & Lockyer v. Buckhurst Park Properties*, [1964] 2 QB 480 (CA).

See Ontario, Partnerships Act, rso 1990, c. P.5 at s. 24 (7).

Delaware General Corporation Law, s. 202; CBCA, ss. 6(1)(d) and 49(8); Business Corporations Act, rso 1990, c. ss. 5(1)(d) and 56(3).

The restrictive covenant interpretation might explain why some statutes tie permitted restriction to some concrete benefit in the corporation and why UCC Article 8–style statutes do not bind restrictions on purchasers without notice if the share certificate does not mention it. This construal might also suggest that the restrictions should not be capable of amendment without the consent of the person(s) who benefit from it. So, for example, where the restriction creates a right of first refusal in other shareholders, an amendment should require the consent of the class. *Contra: Greenhalgh v. Arderne Cinemas Ltd.*, [1951] Ch. 286.

E. Mockler, *Charitable Corporation: A Bastard Legal Form* (1966):

“As the common law has developed, numerous situations have arisen in which legal forms have been interbred; purity has been lost to expediency and the needs of the day have spawned some curious results. Forms, once strangers to each other, have been joined out of wedlock and the result has been the birth of a ‘nullius filius.’ Of all the bastard legal forms it is my contention that the charitable corporation ranks close to the top of the list. It has strains of both corporation law and trusts and on the paternal side one sees shades of the Chancellor’s foot!”

The main cases are *Faith Haven Bible Training Centre; Re David Feldman Charitable Foundation, Re Harold G. Fox Education Fund; Toronto Humane Society; and Re Incorporated Synod of Toronto*, as well as *Roman Catholic Archdiocesan Corp. of Winnipeg v. Ryan* (1957), 12 DLR (2d) 23 (sub nom. Canada Trust Co. v. Roman Catholic Archdiocesan Corp. of Winnipeg) 26 WWR 69 (BCCA); *Re French Protestant Hospital and Attorney General*, [1951] Ch. 567; and *Liverpool & District Hospital for Diseases of the Heart v. Attorney General*, [1981] 1 Ch. 193.

The American situation is much the same. See *Somerland of Santa Barbara, Inc. v. County of South Barbara*, 31 Cal. Rptr 131 (Cal. Dist. Ct App., 1963) (“[A]ll property held by a benevolent corporation is impressed with the charitable trust”), cited in “Developments in the Law:

The *Model Act*, however, states unequivocally that directors are not trustees: 8.30(e). See also L. Sealy, “The Director as Trustee,” *Cambridge Law Journal* [1967], 83.


61 On non-profits, see Hansmann “Reforming.” On for-profits, see Easterbrook, *Economic Structure*.

62 Albert O. Hirschman has complained about the parsimony of the postulates of economics as follows: “Economics as a science of human behaviour has been grounded in a remarkably parsimonious postulate, that of the self-interested, isolated individual who chooses freely and rationally between alternative courses of action after computing their prospective costs and benefits.” And Thomas Schelling has noted likewise: “The human mind is something of an embarrassment to certain disciplines, notably economics .... that have found the model of the rational consumer to be powerfully productive.” See A. Hirschman, “Against Parsimony: Three Ways of Complicating Some Categories of Economic Discourse,” *Economics and Philosophy* 1 (1987), 7. Hirschman provides the quote from Schelling, *Choice and Consequence* (Cambridge, Mass.: Harvard University Press, 1984) 342. Among the many modes of behaviour that this model excludes is love. Hirschman points out that things such as love and skill and civic spirit should be modelled not as scarce resources but as abilities or dispositions that grow or increase in value as they are used or practised. So any economics – any science of efficient resource use – in the charity sector or civil society in general would have to accommodate the different logics of these types of resources into its basic model.

63 Hansmann, “Reforming,” 507.

64 Ibid., 508.

65 See sections 133 of the Ontario act and 157(1) of the federal act, which now make the general part applicable to the non-profit, subject to necessary modifications. This was not always the case. See Cumming, “Corporate Law Reform,” 11.

66 See the Volunteer Protection Act, pl 104-19, 42 U.S.C. 14051. The act was signed by President Clinton on 18 June 1997.

67 Similarly, it has been argued that non-profits should not be subject to punitive damage awards: D. Barfield, “Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?” *Valparaiso University Law Review* 29 (1995), 1193.


69 See ibid., 12: “[T]he absence of statutory standards results in a lesser knowledge and appreciation of duties, responsibilities, powers, etc. on the part of directors than would be so if there were statutory provisions
present as enabling provisions and standards. It further results in an
unnecessary expenditure of time and energy through the supervisory
administrative role of the Department.”

70 Alaska, Statutes 10.20 005; Florida, Statute 617.03101; and Illinois,
Comprehensive Statute 805 101/103.5.

71 Fishman and Schwarz. Indiana’s statute provides: “Corporations may be
organized or re-organized for not-for-profit under this chapter for any
lawful purposes consistent with the provisions of this chapter and regard-
less whether any other law is available which specifically provides for the
incorporation of a corporation for the purposes sought to be accom-
plished by the incorporations.” Indiana, Code 23-7.1-3.

72 Some states have used the Revised Model Act’s tripartite classification;
others have not. Even some that do have reduced the significant differ-
ences in treatment. For example, the Revised Model Act imposes a stricter
conflict-of-interest approval process on public benefit and religious cor-
porations, but the additional requirement – that the directors bona fide
believe that the transaction is fair to the corporation – is not imposed
under the Arkansas law.

73 There is no statement of the non-distribution constraint in New
Brunswick’s statute. Some provinces’ laws prohibit “pecuniary gain,”
others “monetary gain” (Newfoundland, s. 421). Saskatchewan’s law con-
tains perhaps the clearest expression of the constraint: “30(1) Subject to
subsection (2), any profits or accretions to the value of the property of a
corporation shall be used to further its activities, and no part of the
property or profits of the corporation may be distributed, directly or
indirectly, to a member director or officer of the corporation except as
permitted pursuant to sections 111, 112, 169, 177, 209, 225 and 227.
Where a member of corporation is a body corporate or association that
is authorized to carry on activities on behalf of the corporation, the
corporation may distribute any of its money or property to carry out those
activities.”

74 Canada, Ontario, Quebec, Prince Edward Island, and New Brunswick are
letters-patent jurisdictions. Saskatchewan, Manitoba, and Newfoundland
use articles of incorporation. British Columbia, Alberta, and Nova Scotia
incorporate “societies” by “certificate of incorporation.” Some of these
jurisdictions require the filing of a “memorandum of association”: Quebec
section 6, Nova Scotia section 4, and New Brunswick section 7(1).

75 Letters patent statutes contain lists of powers usually complemented by
the power to things incidental to or conducting to achieving their
objects. These in turn are supplemented by provisions in the relevant
interpretation acts. See section 27, Interpretation Act, rso 1990 c. I 111.

76 Canada section 155(2), British Columbia section 3(1)(a), Alberta section
5(1), Prince Edward Island section 90(2), and Nova Scotia section 4
require filing of by-laws with the application for incorporation. The federal (section 155) and Alberta (section 5[1]) statutes require that by-laws be submitted with the application for letters patents, and these are occasionally returned by the relevant minister for deficiencies. Organizations can avoid this delay by using the by-law (annotated) provided by the ministry in its information kit. The Ontario statute (section 29) contains a list of items that may be included in the by-laws; Saskatchewan’s contains neither a list nor a requirement to file by-laws.

77 See Housing Development Act, rso 1990, c. H-18. Applications are also sent to the legal services branch of the Ministry of Consumer and Commercial Relations in the case of corporations pursuing objects relating to education, social welfare, health, and fitness.

78 See W. Bowen, Inside the Boardroom: Governance by Directors and Trustees (New York: J. Wiley, 1994), 18–20. American Law Institute (ali), Principles of Corporate Governance, establishes the following specific responsibilities for directors of public corporations: “5.02. The Board of directors of a publicly held corporation should perform the following functions: (1) Select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives; (2) Oversee the conduct of the corporation’s business to evaluate whether the business is being properly managed; (3) Review and, when appropriate, approve the corporation’s financial objectives and major corporate plans and actions; (4) Review and, where appropriate, approve major changes in, and determinations of other major questions of choice respecting the appropriate auditing and accounting principles and practices to be used in the preparation of the corporation’s financial statements; (5) Perform such other functions as are prescribed by law, or assigned to the board under a standard of the corporation.”


82 The U.S. jurisprudence provides an instructive illustration. In the Sibley Hospital case, a finance committee had directed that large sums of money be held on deposit with defendant banks with no or inadequate interest being paid in return. Each director on the committee held a position on the board of a defendant bank. In respect of the duty of diligence, the allegation was that the directors failed to exercise any of their responsibilities as members of any of the board committees (ooo): “[T]he Court
finds that each of the defendant trustees has breached this fiduciary duty to supervise the management of Sibley’s investments. All except Mr. Jones were duly and repeatedly elected to the Investment Committee without ever bothering to object when no meetings were called for more than ten years. Mr. Jones was a member of the equally inactive Finance Committee, the failure of which to report on the existence of investable funds was cited by several other defendants as a reason for not convening the Investment Committee. In addition, Reed, Jones and Smith were, for varying periods of time also members of the Executive committee, which was charged with acquiring at least enough information to vote intelligently on the opening of new bank accounts. By their own testimony, it is clear that they failed to do so ... [T]hese men have ... failed to exercise even the most cursory supervision over the handling of Hospital funds and failed to establish or carry out a defined policy.”

83 The standard might also vary with the size of the non-profit. See

84 See Beard v. Achenbach Memorial Hospital, 170 F. 2d 859 (10th Cir. 1948).
