Intersections and Innovations

Change for Canada's Voluntary and Nonprofit Sector

The Muttart Foundation

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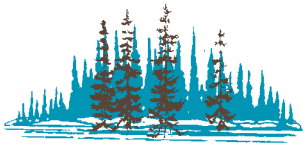

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Acknowledgements

For far too long, Canada has lacked a comprehensive resource examining Canada's charitable sector. That has now ended.

The Muttart Foundation has spent many years focusing on building the capacity of charities in this country. The publication of this collection is another contribution to that effort. By understanding more about itself, the sector can continue to develop and find new ways to serve Canadians and those in need outside our nation.

The authors of these essays bring different perspectives on the role and inner workings of Canada's charities. Collectively, they bring an unprecedented insight into the work of organizations whose diversity is exceeded only by their desire to serve.

It is difficult to express adequate appreciation to Dr. Susan Phillips of Carleton University for her leadership of this project. She has been a source of encouragement, persuasion, cajoling and improving authors from across the country. Her efforts now bear fruit as we make this material available to students, academics, practitioners and others interested in the history and future of Canada's charities.

Amanda Mayer of the Lawson Foundation volunteered at the outset to be the administrative overlord of the project, keeping the editors and authors up to date and keeping track of various versions of articles. We are so grateful for her skills, her patience and her friendship.

None of this would have been possible, of course, without the work of authors, themselves academics and/or practitioners. They took time from their schedules to contribute to a resource we hope many will find valuable.

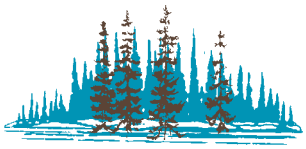
Lesley Fraser did an incredible job in editing the various chapters and ensuring consistency. And Don Myhre of P40 Communications has again brought his talent to the fore in providing an attractive design for a Muttart publication.

The work of all of these individuals has come together in this resource which we dedicate to all of those in, or interested in, Canada's charitable sector.

Malcolm Burrows, President

Bob Wyatt, Executive Director

The Muttart Foundation



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Chapter 1

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Chapter 2

Lasby, David and Barr, Cathy (2021) State of the Sector and Public Opinion about the Sector. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 3

Marshall, Dominique (2021) Four Keys to Make Sense of Traditions in the Nonprofit Sector in Canada: Historical Contexts. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 4

Wyatt, Bob (2021) It Should Have Been So Simple: The Regulation of Charities in Canada. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 5

Chan, Kathryn and Vander Vies, Josh (2021) The Evolution of the Legal Meaning of Charity in Canada: Trends and Challenges. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 6

Manwaring, Susan and Kairys, Katrina (2021) Regulating Business Activity. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 7

Phillips, Susan D., Dougherty, Christopher, and Barr, Cathy (2021) The Fine Balance of Nonprofit Sector Self-Regulation: Assessing Canada's Standards Program. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 8

Charters, Owen (2021) Board Governance in Practice. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 9

Grasse, Nathan and Lam, Marcus (2021) Financing Canadian Charities: The Conditional Benefits of Revenue Diversification. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 10

Hale, Sharilyn (2021) Giving and Fundraising Trends. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 11

Glogovac, Marina (2021) New Technologies and Fundraising. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 12

Fontan, Jean-Marc and Pearson, Hilary (2021) Philanthropy in Canada: The Role and Impact of Private Foundations. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 13

Khovrenkov, Iryna (2021) Canada's United Way Centraide as a Community Impact Funder: A Reinvention or a Failed Endeavour? In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 14

Harji, Karim and Hebb, Tessa (2021) Impact Investing in Canada: Notes from the Field. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 15

Raggo, Paloma (2021) Leadership in the Charitable Sector: A Canadian Approach? In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 16

Fredette, Christopher (2021) Planning for Succession in the Interests of Leadership Diversity: An Avenue for Enhancing Organizational Diversity, Inclusion, and Equity. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 17

Akingbola, Kunle and Toupin, Lynne (2021) Human Resource Management in the Canadian Nonprofit Sector. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 18

Uppal, Pamela and Febria, Monina (2021) Decent Work in the Nonprofit Sector. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 19

Thériault, Luc and Vaillancourt, Yves (2021) Working Conditions in the Nonprofit Sector and Paths to Improvement. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 20

Russell, Allison, Speevak, Paula, and Handy, Femida (2021) Volunteering: Global Trends in a Canadian Context. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 21

Shier, Micheal L. (2021) Social Innovation and the Nonprofit and Voluntary Sector in Canada. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 22

McCort, Kevin and Phillips, Susan D. (2021) Community Foundations in Canada: Survive, or Thrive? (with apologies to lawn bowlers). In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 23

Murphy, Colette (2021) Community Wealth Building: A Canadian Philanthropist's Perspective. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 24

Doberstein, Carey (2021) Collaboration: When to Do It and How to Do It Right. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 25

Munshi, Shereen and Levi, Elisa (2021) Indigenous Peoples, Communities, and the Canadian Charitable Sector. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 26

Stauch, James, Glover, Cathy, and Stevens, Kelli (2021) The Business–Community Interface: From "Giving Back" to "Sharing Value." In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 27

Laforest, Rachel (2021) Transforming Health and Social Services Delivery Systems in Canada: Implications for Government–Nonprofit Relations. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 28

White, Deena (2021) Contentious Collaboration: Third Sector Service Delivery in Quebec. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 29

Levasseur, Karine (2021) Policy Capacity: Building the Bricks and Mortar for Voluntary Sector Involvement in the Public Policy Process. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 30

Houston, Sandy (2021) Evolving Relationships with Government: Building Policy Capacity. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 31

Northcott, Allan (2021) Reflections on Teaching Public Policy Advocacy Skills. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 32

Lauzière, Marcel (2021) A Lever for Change: How Foundations Can Support Public Policy Advocacy. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 33

Ruff, Kate (2021) Social and Environmental Impact Measurement. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 34

Lenczer, Michael, Bourns, Jesse, and Lauriault, Tracey (2021) Big Data Won't Save Us: Fixing the Impact Evaluation Crisis. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 35

Herriman, Margaret (2021) Social Media and Charities in Canada. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Chapter 36

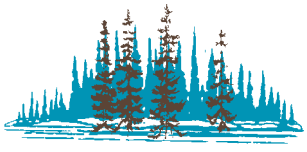
Riseboro, Caroline (2021) The Overhead Myth: The Limitation of Using Overheads as a Measure of Charity Performance. In Susan D. Phillips and Bob Wyatt (Eds.), *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector.* Edmonton, AB, Canada: Muttart Foundation

Part II Navigating a Changing Environment

Governance and the Regulatory Environment

The Funding Environment

The People Environment: Leaders, Employees, and Volunteers



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Governance and the Regulatory Environment

Chapter 4

It Should Have Been So Simple: The Regulation of Charities in Canada

Bob Wyatt
Muttart Foundation

> *92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,*
>
> *7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.*
>
> **Excerpt from the Constitution Act, 1982**

One might have thought that this provision of the Constitution Act – a direct replication of the 1867 British North America Act – would make things pretty simple for public policy and the regulation of charities in Canada. There it is: provinces have the *exclusive* right to make laws relating to the *establishment*, *maintenance*, and *management* of charities.

But if anything is clear about the federation that is Canada, it is this: nothing is simple.

How, then, did we get to the point where the federal government – through the Canada Revenue Agency (CRA) – has become the *de facto* regulator of charities, with provinces playing a perfunctory (if that) role?

Spoiler alert: it boils down to the almost-meaningless distinction between "charities" and "registered charities."

In this chapter, we will examine how Canada got to this place, the complaints and complications that have arisen and continue to arise, and the other models that have been suggested, all to no avail. The conclusion is that if we were starting all over again, we might do things differently. But we are *not* starting all over again, and the chances of any fundamental change in who regulates charities are minimal, possibly non-existent.

That is not to say that there can't, or won't, be changes in how charities are regulated, just that those changes are going to have to be made by the CRA – voluntarily or otherwise. Indeed, an argument will be made that some significant changes need to be made to avoid Canada becoming the laughing-stock of the common-law world as it relates to how charities can operate.

In the Beginning

Our story goes back more than 100 years but incorporates things that predate that by three centuries.

Canada's first income tax act – a temporary measure – was introduced in 1917 and exempted "charitable organizations" from the payment of tax on income. In 1930, government went further and allowed Canadians to deduct from their income any donations they made to charities, thus reducing their taxable income. But the act didn't define (nor does it to this day) what charities were, and, for that matter, there was no way for the government to know what charities existed in the country. There was no system of registration in place – and wouldn't be for another half-century.

The first issue, defining "charity," was resolved simply, if not helpfully: recourse would be had to the common law, dating back to the Statute of Elizabeth in 1601 (see Chapter 5 by Chan & Vander Vies). As interpreted by the English courts, and adopted by the Canadian courts, organizations were charitable if they existed for the relief of poverty, the advancement of education, the advancement of religion, or other purposes beneficial to the public in a way analogous to purposes the courts had ruled were charitable.

The second issue, knowing what charities existed, was less easy to resolve, although it's not clear whether it was because of difficulty or the lack of political will or the fact that there was no political or fiscal benefit from doing anything about it. In 1966, the federal government announced its intention to start a registration system for charities so that, thereafter, only donations to charities that were registered would be tax-deductible.[1]

In the debate that followed, Edgar Benson (1966), then the Minister of National Revenue, justified the change on the basis of

> the abuses which have developed in the matter of exaggerated receipts for which charitable donation deductions were claimed …

He went on to say

> that organizations which once had been given formal approval could subsequently change the nature of their activities so that they no longer qualify. There is also the question of those organizations whose names could lead to the ready acceptance of their receipts, when in fact those bodies might not qualify as proper charitable organizations. The officials of my department have done excellent work to cope with the many problems engendered by the situation. They have, however, been handicapped in their efforts by the lack of provisions for regulatory control in the income tax law.

The minister went on to describe the elements of the new system. Organizations would fill out a form to obtain registration. They would have to issue receipts in a form that the government would prescribe. And there would be "judicious examination" of a certain number of charities each year to ensure they were playing by the new rules.

Benson reassured the House of Commons:

> … it is not the intention of the government or of my department to disallow any legitimate charitable donations to organizations who are approved as charities and who carry out charitable purposes in this country. Rather this is a move toward a system of control whereby people may not abuse the right of being a charitable organization to the detriment of all other taxpayers in Canada, and thus force those taxpayers to pay more tax to make up for the advantage taken of this system by people who should not do so.

The minister gave scant credit to a question from an Opposition member who questioned whether there should be a definition of "charitable organization" included in the Income Tax Act, saying his officials saw no real issue, other than the occasional discussion about how far "education" went in allowing certain things to be charitable.

Not all of the discussion supported the registration system, as evidenced by this interjection by Charles-Arthur Gauthier, a member of the Ralliement Créditiste:

> Let us stop fooling around with charitable donations and forcing every parish priest to file reports and play detective in the field of charity. That is just a farce. I do not know whether it is inspired by anti-Christians or by people who would fain have Christianity lose its sway over Canada, but today, the legislation is being changed: our rectories are to be collection offices; every parish priest will have to be registered to be able to report and deduct charitable donations for the people who will go and get their receipts at the rectory.
>
> Mr. Chairman, the man who conceived such an idea was probably an outstanding man, but he was surely not a Christian. Had he been a sincere Christian, he would not have done such a thing. I feel it is an indirect and disguised way of making light of religion, of Christianity in general. When I think about charity, religion comes to my mind. I noted that under the amendment proposed earlier, deductions were being allowed for charitable donations to the UN, to Japan, to Russia; however, I was surprised at not finding any provision for the deduction of charitable donations to the Communist party. If deductions of 10 or 15 per cent of the income had simply been allowed for charitable donations, all those endless inquiries and investigations in every rectory and within all Christian organizations would have been prevented.

What wasn't discussed, during the debate or subsequently, was where the regulation of charities was placed – in the Department of National Revenue, subsequently to become the Canada Revenue Agency. It is difficult to know whether this was an act of commission or omission. It might have seemed only natural for responsibility for charitable registration to be placed there; the department was responsible for other designations for various types of taxpayers. It was also the department that was responsible for finding and dealing with those people and organizations that were not paying tax when they should have been. To the extent that Benson suggested the need to protect against fraud, National Revenue was the department that did that on an ongoing basis.

The placement of the issue within National Revenue was also consistent with what was happening in most other common-law jurisdictions. In the United States, the Internal Revenue Service had been responsible for registration of exempt organizations, including charities, for decades, although more direct supervision of charities was the responsibility of each state's attorney general. In the mid-1960s, only England had an independent body – the Charity Commission of England and Wales – that exercised jurisdiction over charities.

On the other hand, the move required a certain amount of legislative *legerdemain*. First, it required that charities be considered taxpayers, and then immediately give them an exemption from the payment of any taxes on income. While other types of taxpayers were entitled to certain deductions based on legislated provisions, charities were entirely exempt from the payment of taxes on income. Second, and more critically, the federal government could not, constitutionally, enact legislation that related to the establishment, maintenance, or management of charities – issues that were clearly within the exclusive domain of the provinces. Even though most provinces, with the exception of Ontario, paid little or no attention to charities except in the case of major scandals, the federal government had to tread carefully. It thus established the position that lasts to this day: the federal government does not regulate *charities*, but rather it regulates the *exemption from taxation* of certain organizations and is, thus, entitled to determine the eligibility for the exemption and the requirements for maintenance of that exemption.

Exemption from taxes on income is one benefit of charities, but in terms of forgone revenue from taxation, probably a less important factor than the other major privilege that goes with status as a registered charity: the ability to issue receipts that allow donors to claim tax deductions or tax credits.[2] In its 2020 report on the tax expenditures, Finance Canada does not estimate the amount of taxes that would be paid if registered charities were required to pay income tax, but it projects that the cost of tax credits and donations claimed by donors will be almost $4 billion (Finance Canada, 2020: 32–33).

While arguably logical, the designation of National Revenue (hereinafter "CRA") as the responsible body ignored two issues, both of which were – and remain – critical.

First, no one talked – at least in 1966 – about whether there was an inherent conflict created by making a department responsible for collecting taxes also responsible for dealing with groups that are totally exempt from taxes. It is natural that CRA's performance will be measured, at least in part, by its success in finding taxpayers – individual and otherwise – who should be paying taxes but aren't and rectify that situation with the full power of the federal government. While not discussed during the parliamentary debates, it did not take long, as we will see, before the issue was raised directly.

The second issue is more critical to the development of the charitable sector. CRA is a department that administers the Income Tax Act. Unlike other departments of government, it does not have responsibility for the legislation that governs it; that power belongs to Finance Canada. While CRA can (and does) identify issues related to tax matters, including those related to charities, and while it can make suggestions for reform, it is powerless to move those suggestions forward without the concurrence of Finance. Former employees of the Charities Directorate within CRA are able to give several examples of suggestions that were either ignored or significantly delayed because they were not a priority within Finance.

For good or bad, the 1966 budget proposal was adopted, CRA was given responsibility for registration of charities and ensuring their compliance with the Income Tax Act rules (at least as interpreted by CRA), and, before long, alternative arrangements were being pushed.

For now, the Charities Directorate is responsible for considering every application for charitable registration, reviewing the annual return every charity must file, ensuring compliance with the law through audits and education, and providing "guidance products" (formerly called policy statements) that give its interpretation of what charities must and may do to stay within the law.

The Complaints and the Alternatives

Like most government departments and agencies, the Charities Directorate has had complaints over the years about delays and inconsistent responses. While the publication of its "guidance products" online has been helpful, one still hears concerns about the length of time it takes to process an application for registration of a charity or difficulties in obtaining an interpretation of one or the other of the guidance products in a specific fact situation.

The more substantive complaints tend to fall in one of two categories. There are those who believe that it is inherently wrong for CRA to be the regulator of charities because of a conflict of interest. And there are those who have complaints about a particular action or series of actions that CRA has undertaken. The second type of complaint often morphs into the first, but both have the same goal: moving the regulation of charities to some body that is independent of government.

Drache and Hunter (2000) argue that there was no alternative but to establish an independent commission:

> We also take the position that organizational changes are extremely difficult, if not impossible. We do not believe that it is prudent to try to counteract the problems inherent in having a department dedicated to maximizing tax revenues make social policy decisions, particularly where a decision to recognize an organization as charitable de facto implies a loss of tax revenue.

They considered three options that had been described by the initial regulatory table of the Voluntary Sector Initiative[3] and found all of them lacking. Instead, they proposed a Charity Tribunal, which would, initially, serve as the body that decided on the registration of charities and the revocation of such registration. They looked to the Charity Commission for England and Wales for practices but suggested that simply replicating the model was not a viable option for a variety of reasons, including matters of constitutional law. Their fundamental premise, though,

was that the conflict between the role of tax collector and decision-maker about charities could never be resolved.

The other source of calls to remove charity regulation from CRA came about as a result of actions, rather than principles. Most prominent amongst this category was the political-activities audit project that was undertaken starting in 2012.

After a federal Cabinet minister suggested that some Canadian charities were acting contrary to the public interest by opposing expansion of some energy facilities, and were accepting money from outside Canada to do so, there followed a budget that gave the Charities Directorate additional resources to audit a selection of charities thought to be breaking the rules then in effect that limited their ability to engage in what were considered "political activities."

The move ended a period of relative calm over the issue of advocacy by charities. The issue had arisen before, in the mid-1980s and again near the end of the 20th century. But a new policy had been adopted by CRA – with significant input from the sector – in 2003, and there had been little concern about the topic until 2012.

Sixty charities were targeted for audit. Some charities, newspapers, commentators, and members of the public argued this was political interference in what was supposed to be a strictly regulatory function by CRA and did not accept denials from the then director-general of the Charities Directorate and her superiors that no politicians were involved in selecting the charities to be audited or in the conclusions that were reached. In the final result, of the 49 charities audited for political activities by 2017, nine had their registrations revoked (or intentions to revoke were issued), two had registrations annulled, and one voluntarily revoked its registration.[4] However, the Charities Directorate said none were revoked primarily because of political activities.

A change in government ended the political-activities audit project and brought assurances that the new government saw the value of involving charities in the development and review of public policy.

Following a decision by the Ontario Superior Court of Justice that the rules governing political activities breached the provisions of the Charter of Rights and Freedoms, legislative changes were hastily introduced to do away with the concept of political activities and instead provide positive reinforcement for charity involvement in "public policy dialogue and development activities."

The 2012 to 2015 debacle again led to calls for the creation of an independent regulator of charities. The calls dissipated, however, in part because absolutely nothing had changed since the last reviews a decade and a half earlier.

As noted by Drache and Hunter, three models were considered by the Working Group on Regulation that met during the first phase of the Voluntary Sector Initiative. Those models were subsequently considered by the Joint Regulatory Table (JRT) that was formed in the second phase of the Voluntary Sector Initiative. The mandate of the JRT required it to examine and report upon the models but specifically restricted it from making a recommendation. The JRT considered the three models and added a fourth, which shared many of the attributes suggested by Drache and Hunter. The JRT's final report (2003) described the models and assessed them against the factors that, in the JRT's opinion, were critical, no matter where the regulatory

responsibility rested. Of particular note was the JRT's statement that it found no evidence to suggest that the conflict between the Charities Directorate's role and the CRA's mandate existed in fact.

The JRT's report included an appendix setting out the situation in other common-law jurisdictions. While it spoke positively about the Charity Commission for England and Wales, the JRT, like the Drache and Hunter proposal, noted that it could not simply be replicated in Canada. Among other problems, the Charity Commission exists in a unitary state and administers an act that exclusively relates to the establishment, maintenance, and management of charities – a role that is within the constitutional authority of Canada's provinces. Moreover, the Charity Commission's decision-making authority intrudes on areas that are the exclusive jurisdiction of Canadian courts.

Aptowitzer (2009) sought to overcome the constitutional hurdles by proposing a federal-provincial council that would exercise the powers of both the federal government under the Income Tax Act and the provincial governments under their constitutional authority.

The idea attracted little attention, likely for two reasons. First, shortly after the publication of his paper, the sector found itself in the middle of another crisis: a private member's bill introduced in the House of Commons that would have imposed a cap on the maximum salary that any charity could pay an employee. The second likely reason is more quintessentially Canadian: no one could conceive of a situation in which the federal and provincial governments could come to a unanimous agreement on the type of power-sharing arrangement the concept proposed.

It is easy to see why the Charity Commission for England and Wales was such an attractive alternative for many people. In its heyday in the late 1980s and 1990s, and even into the early part of the 21st century, the Charity Commission was seen as effectively balancing its regulatory function with its responsibilities to support charities and enhance public trust in them. Its guidance to charities was well presented and explained complex principles in ways that were easily understood. But as government restraint measures started being imposed, the Charity Commission became a shadow of its former self, shedding a significant part of its workforce, cutting back its services, and becoming increasingly focused on its role as a regulator. More recently, the commission has lost credibility with some in the sector as the result of the appointment of a commission chair, despite a negative recommendation from a parliamentary committee on the basis of her lack of experience with charities and her perceived partisanship.

The United States has been the most consistent of the common-law countries. The Internal Revenue Service – the equivalent of CRA – is responsible for the registration of charities, although the supervision of charities is clearly done by the individual states. Such supervision is active, as opposed to the passive role taken by most of Canada's provinces.

At the time of the JRT report, Australia and New Zealand did not have charity commissions, but that was to change. Both countries established charity commissions, although New Zealand's was short-lived, "disestablished" after a change in governments and only by a one-vote majority in the upper house of that country's parliament. A less independent regulatory function was then rehomed in a line department. Australia's commission had an illustrious start and was soon widely accepted by that country's charities, only to find its support waning after the appointment of a new commissioner whose past statements clearly indicated he was not a fan of most charities.

Subsequently, charity commissions have been established in Scotland, Ireland, and Northern Ireland.

All these historical developments lead inevitably to a question: is institutional reform of the charity regulator in Canada desirable, or even possible? At the time of writing – nearing a year into the COVID-19 pandemic – it is not on the top of anyone's list of issues. Indeed, since the end of the political-activities audit project and the legislative changes that followed, there has been little commentary on the topic. That is probably for the best, because it would seem unlikely that it would be a priority – or even a possibility – for the federal government. Even without the distraction of a pandemic that has shut down much of the economy and led to unplanned expenditures in the tens of billions of dollars, one would be hard-pressed to articulate a political imperative for such a significant change to the machinery of government.

If, at the time the registration system was established in 1966, government had decided to establish an independent body to regulate charities – and could get its head around the constitutional issues involved – that would probably have been acceptable. Instead, it gave the responsibility of conferring (or not conferring) a certain tax status on the same department that confers (or doesn't) other status on other people and organizations. To take away responsibility over 86,000 organizations that will generate no revenue of any kind for government and give it to a body over which it has little authority would not seem to be a move that would have appeal for any government. Given the recent history in England, Australia, and New Zealand, one would have to question whether the charitable sector has – or should have – any appetite for such an independent body.

Is there a conflict between CRA's overall mandate and the responsibilities of the Charities Directorate that is housed within CRA? The JRT said it found no evidence of it. While there are still disagreements about registration decisions, there has not been evidence produced to suggest that those people making registration decisions are considering the loss to the treasury that might flow from approving an application for charitable registration.

Thus, if we were starting all over again to address the regulation of charities, Canada might do something different. But now, more than a half-century into the process, it is difficult to imagine the situation that would lead government to take on the cost and administrative burden of creating a new agency. It is equally unlikely that the charitable sector could make a case that such a move would have significant tangible benefits for Canadians. Thus, it perhaps makes more sense to consider the form of regulation that exists, rather than who is exercising the authority.

The Role of the Provinces

That provinces are responsible for exercising jurisdiction over charities is beyond doubt: it's right there in the Constitution Act, and in the same terms as the British North America Act that governed the country since Confederation.

Drache and Hunter suggested that the provincial powers were "sparsely exercised." That might well give the provinces too much credit. Ontario does have a formal system to oversee charities

through the Office of the Public Guardian and Trustee (OPGT). Organizations that wish to incorporate a charity in that province must either use pre-approved objects to describe their purposes or make their application for incorporation through the OPGT. The office also accepts complaints suggesting that a charity is not using its property for its charitable purposes or that the officers or managers of a charity are not using that property appropriately. The OPGT, a branch of the Ministry of the Attorney General, can – and does – bring applications before the court to bring charities into compliance with laws and to protect charitable property.

Drache and Hunter (and others) refer to Alberta exercising jurisdiction through its Charitable Fund-Raising Act. The degree to which that is an accurate assessment is open for debate. Certainly, there is such an act, which sets out certain rules regarding fundraising by charities, but there is disagreement as to how seriously it is regarded or enforced. There are no readily available data on the number of organizations that have registered under the Charitable Fund-Raising Act or the number of businesses that have registered either as fundraisers or because they are promising to donate amounts to charity. In meetings, officials have said that only a small percentage of the nonprofit organizations in the province have registered under the act, but it is not clear whether that is a form of noncompliance or whether they fall under one of the exemptions contained in the act.

Whether they use it (or know it) or not, provincial attorneys general have jurisdiction over charities; indeed, they are often the only ones who can seek court orders to deal with issues affecting charities. Outside of Ontario (where the OPGT acts on behalf of the attorney general), there is little in the way of reported cases where a provincial attorney general has used this power.

One might well ask why provinces would not utilize a constitutional authority that is reserved only to them. Again, we have no detailed information. It may be that they are content to rely on the supervision exercised by CRA, or it may be that they see no "up" side. Establishing a mechanism to exercise their constitutional authority would cost money, and because it would be money used for enforcement, there would be little "good news." At best, government might sometimes get credit for catching up with those who seek to defraud donors, but it is also likely to attract criticism for not catching more.

Provinces have asserted one form of authority, but it is one that causes confusion. Under federal law, there is a general prohibition on gambling, but with a number of exceptions. One of those exceptions allows the provinces to authorize lotteries and other forms of gaming for charitable or religious purposes. However, provinces have adopted varying definitions of what constitutes a charity for the purposes of gambling activities within its province. This can, as in the case of Alberta, result in some organizations, registered as charities by the federal government, falling outside a province's definition. Similarly, there are organizations licensed to conduct gambling activities that would not qualify for registration as charities for the purposes of the Income Tax Act.

The Role of the Courts

An underlying premise of charity law is that it is supposed to evolve with the times. This can occur in one of two ways. First, the regulator can consider societal developments when it is reviewing an application for charitable status. It can draw analogies between something that is happening in the "here and now" to something that it, or the courts, has previously ruled charitable. The other way is through the courts themselves, using cases brought before them to advance the "common law" – the judge-made law that keeps our legal system relevant to changes in society.

In the area of developing the law of charities, Canada's courts have failed miserably – partially as a result of bad cases that have been brought before them and partially because of their willingness to defer to government. But the overwhelming reason for Canada lagging behind virtually every other common-law country is because we have, in the area of charity law, an appeal process that is (at its highest) illusory.

If an individual or corporate taxpayer disagrees with a decision made by CRA, it can ask for a review within CRA. If still not satisfied with the result, the individual or corporation can file an appeal with the Tax Court of Canada. Depending on the circumstances and the amounts involved, the issue could go through the informal procedure (where there are no fees to start an action) or the general procedure (where there is a fee). In either case, the individual or corporation calls its evidence, CRA presents its evidence, and then both sides make their arguments. A judge will then decide if CRA was right – whether its decision was correct in law.

By way of contrast, let's take the case of an organization that wants to register as a charity but has been turned down for some reason. In most cases, the organization has just been set up, and has had little revenue, in part because it cannot give tax credit receipts to donors without the charitable registration. Once it is finally refused registration, it can ask for a review within CRA. If the refusal is upheld, and the organization wants to keep fighting, it faces what often seem to be (and are) insurmountable barriers. The organization cannot go to the Tax Court, but rather has to make its case to the Federal Court of Appeal (FCA). In the hierarchy of Canadian courts, the FCA is on the level just below the Supreme Court of Canada. While an organization can ask for permission to be represented by a member, that is not easily obtained. Lawyers have estimated that the cost of pursuing an appeal before the FCA is likely to be in the range of $100,000 to $250,000.

Even if, somehow, the fledgling organization is able to find the resources to launch an appeal, the process seems stacked against it. They are not allowed to call evidence. The only material before the court is the documentary material exchanged between the organization and the Charities Directorate. This is problematic enough in a registration case, but where the appeal is from a decision to revoke the registration of a charity, the organization has no right to cross-examine any of the auditors or officials responsible for the decision. The only explanations for the Charities Directorate's actions, and only the objections made in writing by the organization, will be before the three judges who hear the case.

Unlike the situation in the Tax Court, the FCA will not decide whether CRA's decision was correct. Instead, to uphold the decision, the FCA must find only that CRA's decision was

"reasonable." This may explain why every charity-law case in more than 20 years has been decided in favour of CRA (Special Senate Committee, 2019).

For at least that long, virtually everyone who has written on the topic has advocated that appeals from Charities Directorate decisions should go to Tax Court for a full hearing, including evidence of witnesses. Those calls have been studiously ignored.[5] The most frequent rationale offered by the Department of Finance (which would have to put forward the legislative amendments to make the change) is that the Tax Court is established to deal with interpretation of statutes and is not expert at common-law issues like the law of charities. That rationale does not withstand scrutiny. The Tax Court is frequently called upon to apply common-law principles to the cases before it. Moreover, all the judges of the Tax Court were formerly practising lawyers, who had to deal with common-law issues on an almost daily basis.

Whatever the true concern of Finance officials, the result has been that few cases have made it to even the first level of judicial appeal. The Special Senate Committee's (2019: 70) report on the charitable sector quoted law professor Kathryn Chan, who testified that the result has been the "near eradication in Canada of the common law method of developing the legal definition of charity by judicial analogy."

Even fewer cases have made their way to the Supreme Court of Canada. When that court heard the case of the Vancouver Society of Immigrant and Visible Minority Women[6] in 1998, it was the first time in more than three decades that a charity law case had been before the bench. Since that time, only one other charity law case – that of the Amateur Youth Soccer Association[7] (AYSA) – has been argued before the country's highest court.[8]

In both cases, the Supreme Court passed on the chance to expand the concept of what is charitable to meet the needs of modern-day Canada, saying that was the role of Parliament, not the courts. This is in stark contrast to the court's counterparts in Australia and New Zealand, where the courts have struck down restrictions on advocacy by charities and, in the case of Australia, has endorsed the "destination of funds" test, ruling that charities may engage in any form of business activity, so long as profits from those businesses are used to fulfil the charitable purposes of the charity (see Chapter 6 by Manwaring & Kairys).

This is not to say that the two cases heard by the Supreme Court of Canada were entirely bereft of good news. In the Vancouver Society case, the court did expand the boundaries of what was considered to be educational for the purposes of charity law. In the AYSA case, while the court upheld the FCA's dismissal of the appeal, it did so on different grounds. The distinction removed a significant potential problem that could have led to questions about whether arts organizations and those providing housing to seniors would remain as charities.

But the court made clear in both cases that the voluntary sector should look to the judicial system only for "incremental" change. The court in AYSA felt that giving charitable status to amateur sports would be a "wholesale" change and that was "a task better suited to Parliament than the courts."

The Role of Parliament

Canadian charities and their lawyers would likely have widely divergent views on what regulatory issue they would most like to see addressed by Parliament. Often, preferences will depend on the nature of an organization's work, and particular obstacles it faces. Trying to decide what would benefit the sector as a whole is a more difficult exercise.

The list that follows provides a brief review of three of the more significant sector-wide issues that exist, other than issues that have already been discussed, most notably the appeal process. Some of the following issues could be resolved, at least in part, through administrative action; others would clearly require a legislative change. The list is by no means exhaustive, and the order is arbitrary.

Statutory Definition of "Charity"

As already discussed, there has not been much development in the law of charities in Canada over the last two decades – even longer according to some. CRA has broken little new ground through the registration system, and the record of court decisions on the issue is pretty one-sided.

The argument in favour of a statutory definition is that it will provide certainty and reduce the reliance on the discretion of both CRA and the courts. Things that "everyone agrees" should be charitable would no longer have to go through a process that might or might not lead to them being accepted by CRA and the courts. It would also, proponents say, allow for regular updating as society changes.

The argument against a statutory definition is that such a move would introduce politics into charity law and could make our understanding of what is charitable subject to differing political views over the years. The fact that the definition could be changed by legislative amendment is, opponents argue, dangerous because it could introduce political ideology into the mix.

England and Australia have used a "charity-plus" model in their legislation governing charities. They have incorporated the traditional common-law definition and then added other things that are also then made into charities. Canada has done this to some extent, by creating a category of organizations known as qualified donees. This includes all registered charities but goes on to give certain other types of organizations privileges akin to those of charities, mainly the ability to issue receipts that allow donors to claim a tax credit or deduction. This list includes registered Canadian amateur athletic associations, national arts service organizations, municipalities, the United Nations and its agencies, and both federal and provincial governments.[9] But the list does not, unlike provisions in England and Australia, include types of organizations that have been turned down for charitable status.

Drache (1999) proposed a much fuller "charity-plus" model and included annotated draft legislation to help explain his choices for the list. Some types of organizations suggested by Drache have, since his paper, been determined to be charitable, but there are still many types of organizations on his list that cannot obtain charitable registration. The fact that the proposal has not been acted upon is probably the best indication of a lack of interest by government

in expanding the number of organizations that can issue receipts resulting in tax credits or deductions.

If neither Parliament nor the courts are willing to ensure the continued evolution of the common law as it relates to charities, Canada will be in a very sorry state indeed.

Purposes Versus Activities

Perhaps one of the most confounding aspects of the Canadian law related to charities is the confusion between "charitable purposes" and "charitable activities." Even the Supreme Court of Canada has lamented over this.[10]

It is well settled that to be a charity, an organization must have purposes that are exclusively charitable. Once those purposes have been established as charitable, the organization is supposed to engage in activities that further the charitable purpose. An ongoing complaint is that CRA focuses too much attention on the activities themselves – even from newly formed organizations that can only guess what their activities might be.

In the Vancouver Society case, Justice Iacobucci outlined the dilemma:

> The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature.[11]

CRA has argued that its focus on activities is necessary to ensure that a charity does not have a "collateral non-charitable purpose." If, for example, an inordinate amount of the charity's resources (including time) are focused on something, it could be that its purposes were (deliberately or innocently) misstated. Those on the other side of the argument believe that CRA is applying the "exclusively" charitable test to activities, rather than purposes, and say that is not what the law demands.

Justice Iacobucci, citing a 1960s case that adopted a 1949 English decision, came to this conclusion:[12]

> The chief proposition to be drawn from this holding is that even 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 fulfilment of another, charitable, purpose and not as an end in itself. That is, where the purpose is better construed as an activity in direct furtherance of a charitable purpose, the organization will not fail to qualify as charitable because it described the activity as a purpose.

Some have suggested that the best way to end the confusion is to eliminate references to "activities" in the Income Tax Act provisions related to charities. Again, the call seems to have fallen on deaf ears.

Business Activities

Charities must, as a matter of survival, constantly be searching for sources of revenue. Statistics Canada has reported over a number of years a decrease in the percentage of tax filers who claim a tax credit for charitable donations (see Lasby & Barr, 2018), although CanadaHelps (2020), the online donations portal, reported record donations through its system for 2020. Government grants and contracts can, at the best of times, be unpredictable, and it is likely that unpredictability will only increase as governments begin to struggle with deficits incurred as a result of the COVID-19 pandemic.

Some charities have indicated a desire to engage in businesslike activities to help generate revenue. Their ideas run the gamut from operating an actual business to the use of commercial-like financing instruments.

These organizations run into a number of regulatory and operational hurdles. From a regulatory perspective, the Income Tax Act says that a charity can operate a business under only two circumstances: it must be a business that is related to the charity's purposes, or it must be operated entirely by volunteers.[13] From an operational perspective, there are issues related to obtaining start-up capital, meeting ongoing funding needs, and balancing the time and efforts of senior staff and volunteers between the charity and the business.

From a policy perspective, there are additional difficulties. There have been some business groups, particularly in Canada and the US, that have been vocal in opposing the entry of charities into the world of business, suggesting that charities would enjoy an unfair advantage because of their tax-exempt status. In the US, some were successful in challenging the charitable status of YMCAs because they operate fitness facilities – an issue not existent in Canada because CRA has held similar facilities to be charitable.

Among the other concerns are ones that relate to the fiduciary responsibility of directors of charities, as well as the potential for reputational risk. If charities operate businesses within the corporate structure of the charity, then it is the charity itself that may end up assuming all liability for anything that goes wrong with the business. This could mean that donor dollars (which can be considered "tax-assisted" because of the credit or deduction that the donor receives) could end up being used to deal with a problem of the business. There is also the reality that businesses do not always succeed; a failure of the business could also eat up tax-assisted dollars the charity has received.

There are options to operating a business within the charity's corporate structure. The charity could create a wholly owned subsidiary as a tax-paying entity. It could then make a donation of up to 75% of its net income to the charity and pay any leftover money (after being sure it retained enough to continue operations) by way of dividend. This would minimize the tax paid by the company while keeping all of the liability within the business, and not attaching it to the charity. It could also counter arguments by business organizations; the charity-owned business would live by the same rules as any other business but would still pay less tax because it would be donating most of its proceeds to the charity that owned it.

The other option being proposed is adoption of what is called the "destination of funds" test. In this model, a charity would be allowed to undertake any business activities it wishes, so long as the proceeds of those activities were used to further the charity's charitable purposes (see

Chapter 6 by Manwaring & Kairys). This is the model approved by Australia's High Court in 2008.[14]

The Special Senate Committee on the Charitable Sector (2019: 92) recommended a pilot project to test the destination-of-funds model. The proposal followed evidence by some witnesses proposing a "regulatory sandbox" so that a variety of suggestions could be tested before they were implemented through legislative change. The biggest problem with the committee's recommendation – well-intentioned though it might be – is that there appears to be no way for a "regulatory sandbox" to be used to exempt some group of charities from provisions of the Income Tax Act, without amending the act itself. Some regulatory bodies – including the Canadian Security Administrators and Transport Canada – have, in recent years, tried some things, but it was done through providing alternative regulations, and regulations do not require parliamentary approval. An exemption from the Income Tax Act is something different. Contrary to what some people apparently believe, the temporary allowance of the capital gains exemption of appreciated capital property (later made permanent) and the introduction of a temporary additional tax credit for first-time donors (allowed to expire) were not the equivalent of a regulatory sandbox. In both cases, government introduced an amendment to the Income Tax Act that had a time limit included in it. It is difficult to imagine how government could allow some, but not all, charities to test a destination-of-funds concept without being accused of discrimination against those charities that were not included.

Conclusion

There are a number of serious shortcomings in the laws that govern charities in Canada, yet neither the courts nor governments of any political stripe seem to be particularly motivated to make changes. While the issue of political activities by charities has been resolved, at least for now, there are a number of other issues that remain.

The suggestion for a change in regulators is, most likely, a non-starter. There would appear – at least from the government perspective – little reason to create a new regulator and several reasons not to do so. Thus, changes in how charities are regulated must be derived either from changes in how CRA applies the law of charities or through governmental or judicial decisions that clarify or change the law of charities.

Canada lags far behind other common-law jurisdictions in a number of aspects, especially in what is regarded as charitable. Absent a real (as opposed to illusory) appeal mechanism that allows for the boundaries to be tested, that situation is unlikely to change, absent parliamentary involvement, and the sector has been anything but united in formulating what changes it would like in that regard.

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Notes

[1] Taxpayers were still allowed a standard $100 deduction (for combined charitable donations and medical expenses) that could be claimed without submitting any receipts. By way of reference, $100 in 1966 dollars equates to slightly more than $675 in 2020 dollars.

[2] At the time of the initial legislation, taxpayers were entitled to deductions for charitable donations. Subsequently, the benefit for individual donors was changed to a refundable tax credit. Corporations continue to receive deductions for donations to registered charities.

[3] The Voluntary Sector Initiative was initiated by the government of Jean Chrétien to establish a new relationship between the federal government and the voluntary sector. In the first phase, three "working groups" were established, with equal numbers of public servants and people from the voluntary sector, and given the task of preparing reports outlining the scope of certain issues. In the second phase, there were six working groups plus a coordinating group, again each composed of equal numbers of public servants and people from the voluntary sector. Their task was to get further into the issues that had been identified and make recommendations to government. The joint tables had between two and four years to complete their reports.

[4] Because of the confidentiality provisions within the Income Tax Act, it is impossible to determine what happened to these cases. Some may still be in the appeal mechanism; CRA may have abandoned its efforts to revoke the registration in some cases. Information about audits of charities is available only when a revocation actually occurs, or an intermediate sanction is imposed.

[5] Somewhat ironically, when the Income Tax Act was amended to provide for intermediate sanctions – penalties short of revocation for charities that have blatantly contravened the rules related to charities – the amendments provided that appeals from those sanctions would go to the Tax Court of Canada.

[6] *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.* (1999) 1 SCR 10, 1999 CanLII 704 (SCC).

[7] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency).* (2007) SCC 42, 3 SCR 217.

[8] One other case implicated a charity but focused primarily on the right of the CRA to demand information about donations to the charity, rather than the question of whether the organization was a charity: see *Redeemer Foundation v Canada (National Revenue)*. (2008) 2 S.C.R. 643, 2008 SCC 46.

[9] While these other types of qualified donees have receipting privileges similar to those of charities, they do not all have the same reporting requirements.

[10] See *Vancouver Society*, infra, at paragraph 52 per Gonthier (dissenting, but not on this point) and paragraphs 152–153 per Iacobucci for the majority.

[11] *Vancouver Society*, op cit., at paragraph 152.

[12] *Vancouver Society*, op cit., at paragraph 158.

[13] Charities that are categorized as private foundations cannot engage in any business activities.

[14] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*. (2008) HCA 55.

Biography

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