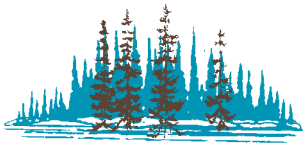
Intersections and Innovations

Change for Canada's Voluntary and Nonprofit Sector

The Muttart Foundation

ISBN: 978-1-897282-30-4



The Muttart Foundation

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.

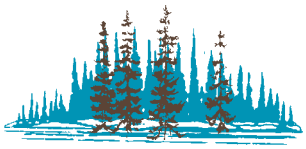
Lesley Fraser did an incredible job in editing the various chapters and ensuring consistency. And Don Myhre of P40 Communications has again brought his talent to the fore in providing an attractive design for a Muttart publication.

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



The Muttart Foundation

This book may be cited as:

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

Individual Chapter Citations

Chapter 1

Phillips, Susan D. and Wyatt, Bob (2021) Intersections and Innovations: Change in Canada's Voluntary and 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 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

The Muttart Foundation

Governance and the Regulatory Environment

Chapter 5

The Evolution of the Legal Meaning of Charity in Canada: Trends and Challenges

Kathryn Chan, University of Victoria
Josh Vander Vies, Versus Law Corporation

Many Canadians have their first encounter with charity law and policy when they attempt to determine whether the nonprofit organization that they are involved in is eligible for registered charity status. While all nonprofit organizations are exempt from paying Part I income tax under the federal Income Tax Act (1985), registered charities are among the shorter list of designated "qualified donees" that are entitled to issue valuable tax receipts to corporate and individual donors (ss. 110.1 and 118.1).[1] This latter benefit, which is "designed to encourage the funding of activities which are generally regarded as being of special benefit to society," is often a "major determinant" of an organization's success (*Vancouver Society of Immigrant and Visible Minority Women v MNR* [*Vancouver Society*], 1999: para. 128).

The legal definition of charity plays a crucial function in determining what subset of Canadian nonprofit organizations will be endowed with the additional benefits and burdens of registered charity status. The Income Tax Act stipulates that to be registered as a charity, an organization must be constituted and operated "exclusively for charitable purposes." An organization that is registered as a "charitable organization" must also devote all its resources to charitable activities that the organization carries out itself.[2] The Income Tax Act does not define the term "charitable," however. In this situation, the longstanding practice of both the Canada Revenue Agency (CRA) and the federal courts has been to draw guidance from the common law (*Vancouver Society*: para. 28).[3]

The purpose of this chapter is to describe and analyze the manner in which the legal concept of charity has evolved in Canada. We structure our discussion around four questions:

1. How have the courts contributed to the evolution of the legal meaning of charity in Canada?
2. Why have so few litigants succeeded in convincing the courts to advance the legal meaning of charity?
3. How has the CRA Charities Directorate contributed to the evolution of the legal meaning of charity in Canada?
4. How does the current Canadian approach to the legal meaning of charity differ from that of other common law jurisdictions?

Given the summary nature of this chapter, we do not attempt to describe all of the charity law decisions rendered by Canada's federal courts since the Minister of National Revenue began registering charities in 1966. Rather, we aim to highlight certain important developments in the evolution of the legal definition of charity, to situate Canada's approach to defining charitable purposes vis-à-vis that of other Anglo-Commonwealth jurisdictions, and to flag certain obstacles to the judicial development of the concept by the Federal Court of Appeal.

How Have the Courts Contributed to the Evolution of the Legal Meaning of Charity in Canada?

The Parliament of Canada has never exercised its power to determine the meaning of charity under the registered charity regime. Subsections 248(1) and 149.1(1) of the Income Tax Act establish rough outer boundaries for the sector by identifying and partially defining three categories of charities that the Minister of National Revenue may register.[4] Subsection 149.1(1) defines charitable organizations and public and private foundations by reference to the "charitable purposes" (*fin de bienfaisance*) for which they are constituted and the "charitable activities" (*activités de bienfaisance*) they carry out. However, the Income Tax Act does not specify the meaning of a "charitable purpose," save to state that it includes the disbursement of funds to defined "qualified donees."[5] Similarly, the Income Tax Act does not define "charitable activities," although it does clarify that certain public policy and business activities fall within the term. In the absence of a precise statutory definition of charity, the Revenue Minister has always determined the meaning of the statutory terms "charitable purpose" and "charitable activity" by reference to the common law.[6]

The common law concept of a charitable purpose took its early shape in the English Court of Chancery, which exercised jurisdiction over property held in trust from at least the 15th century (Jones, 1969: 2–9). In determining what objects were charitable, the court took as its guide the list of "good, godly and charitable" purposes set out in the preamble to an Elizabethan statute. In modern English, these purposes are:

> 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, seabanks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

The limited purpose of the Statute of Elizabeth was to delimit the jurisdiction of certain commissioners tasked with addressing misuses of charity property, and the charitable uses set out in the preamble were not originally understood to constitute an exclusive or fixed list (Picarda, 2010: 10). By the start of the 19th century, however, the Court of Chancery had affixed the common law meaning of charity to the preamble and severed it from parallel notions of benevolence and liberality that had been embraced by the civil law (Chan, 2007: 512).

In the 1891 *Income Tax Special Commissioners v Pemsel* [*Pemsel*] decision, the House of Lords sought to clarify the common law meaning of charity by establishing four general categories, or "heads," of charitable purposes: the relief of poverty, the advancement of education, the advancement of religion, and "other purposes beneficial to the community, not falling under any of the preceding heads" (p. 28).

The fourth *Pemsel* head is a residual category, which today includes important purposes such as the provision of public works, the preservation of public order, the promotion of health, the preservation of the environment, and the care of children (Maurice & Parker, 1984: 90–134). People pursuing novel benevolent projects often seek charitable recognition for their projects under the fourth head, inviting the court to recognize new purposes as charitable on the basis that they are a reasonable extension of, or analogous to, existing charitable objects (*Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [*Scottish Burial Reform*], 1968). However, the scope of this residual category is limited by the requirement that a fourth-head purpose be either listed in the preamble to the Statute of Elizabeth or within the "spirit and intendment" of the purposes set out therein (*Scottish Burial Reform*). In order to be charitable, a purpose must also benefit the community or a significant section of the community within the meaning of the public benefit doctrine. Finally, to be charitable in Canada, a purpose must not be "political."

The Income Tax Act establishes the procedure through which the Revenue Minister's views on the legal meaning of charity can be challenged in court. Pursuant to subsection 168(4) of the act, a legal person, usually a nonprofit corporation, who objects to a decision of the minister to refuse to register that organization as a charity or to revoke an organization's registered charity status may file a written "notice of objection" with the minister within 90 days from the date of mailing of the decision. The minister is obliged to consider such objections "with all due dispatch," although in practice the task is delegated to CRA officials who work in the Tax and Charities Appeals Directorate (Income Tax Act, 1985: s. 165(3)). Pursuant to paragraph 172(3)(a.1) of the Income Tax Act, a person may appeal the minister's confirmation of a registration or revocation decision to the Federal Court of Appeal. In theory, this procedure provides an opportunity for a superior court to incrementally develop the concepts of "charitable purposes" and "charitable activities" by reference to the common law. As we will see, however, the Federal

Court of Appeal has very seldom adopted the common law practice of declaring objects to be charitable by reasonable extension or analogy to existing charitable objects.

Since 1980, the Federal Court of Appeal has heard and decided approximately 50 appeals of Charities Directorate decisions to not register or to revoke the registration of a charity. Two of these appeals, *Vancouver Society* and *AYSA v CRA* [*AYSA*], 2007, were ultimately decided by the Supreme Court of Canada. The decision in the *Vancouver Society* case states that in making decisions about charitable status, courts should adapt the common law as necessary and not "perpetuate rules whose social foundation has long since disappeared" (at para. 150).[7] However, it also instructs courts to leave changes with more complicated ramifications to the legislature.[8] The Federal Court of Appeal has taken the latter instruction particularly to heart. In certain charitable registration cases, the Federal Court of Appeal has *advanced* or *expanded* the concept of a charitable purpose, using the common law methodologies of identifying analogies to, or determining reasonable extensions of, existing charitable purposes to keep charity law moving in accordance with new social needs.[9] In most charitable registration cases, however, the court has refused to draw analogies with the existing case law or to advance the concept of a charitable purpose. The cumulative effect of these refusals has been to *stultify* or *narrow* the legal definition of charity in Canada.

There are a limited number of Federal Court of Appeal cases where the court can be said to have materially advanced or developed the legal concept of a charitable purpose. This eclectic group of cases includes *Native Communications Society of BC v MNR* [*Native Communications*], 1986, where the Federal Court of Appeal allowed an appeal against CRA's refusal to register a nonprofit corporation whose purposes included:

- organizing and developing radio and television productions;
- providing training as communication workers;
- publishing a nonprofit newsletter; and
- delivering information on subjects relevant to the "native people of British Columbia" (at para. 2).

While there was no case directly on point, the court held that

> it would be a mistake to dispose of this appeal on the basis of how this purpose or that may or may not have been seen by the Courts in the decided cases as being charitable or not. This is especially so of the English decisions relied upon, none of which are concerned with activities directed toward aboriginal people (at para. 18).

Relying in part on the special constitutional status of the Aboriginal Peoples of Canada, the court held that the broadcast of media for the education of Aboriginal people on Aboriginal issues should be added to the common law of charitable purposes (*Native Communications*: para. 11).

Everywoman's Health Centre Society (1988) v MNR [*Everywoman's Health*], 1992, and *Vancouver Regional FreeNet Association v MNR* [*FreeNet*], 1996, round out the small group of positive fourth-head decisions under the registered charity regime. In *Everywoman's Health,* the Federal Court of Appeal held that the provision of abortion services was analogous to the provision of other medical services, and was thus charitable under the fourth head. In *FreeNet,* a decision rendered in the early years of the internet, a majority of the Federal Court of Appeal allowed an appeal of the Revenue Minister's refusal to register an organization that provided a free

electronic communication network. Neither CRA nor the Federal Court of Appeal accepted Freenet's argument that its objects and activities were analogous to those of a physical public library or community centre (both recognized as charitable). Instead, the court reached back to the Statute of Elizabeth's reference to "highways" and "causeways," holding, "I do not want to insist unduly on the analogy to the information highway," but "there is absolutely no doubt in my mind that the provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please is a type of purpose similar to those which have been held to be charitable" (*FreeNet*).

Vancouver Society is also generally counted among the Canadian decisions that advanced or developed the legal concept of charity. The decision involved an application for charitable status by a British Columbia society that sought to assist and educate the community at large but that had a "particular (though non-exclusive) focus upon immigrant and visible minority women" (at para. 5). To that end, it provided career and vocational counselling, along with a variety of workshops and projects involving resumé writing, understanding foreign degree equivalencies, interviewing, and anti-racism initiatives (*Vancouver Society*). CRA refused to register the society as a charity, and a majority of the Supreme Court of Canada ultimately dismissed the society's appeal on the basis that its final corporate object ("to do 'all such things that are incidental or conducive to the attainment of' its other purposes") was too broad and vague to allow for charitable registration (*Vancouver Society*: paras. 193–195). Nevertheless, the decision expanded the advancement of the education head, which had previously been largely confined to "structured, systematic instruction" or traditional academic subjects. *Vancouver Society* introduced a more inclusive approach to education, which encompasses any information or training "provided in a structured manner and for a genuinely educational purpose" (at para. 170). In appropriate circumstances, the court held, "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" (*Vancouver Society*: para. 171).

While Canadian courts have occasionally adopted an expansive and creative approach to the definition of charity in the income tax context, they have more often refused to expand the bounds of the registered charity regime. Two cases illustrate this trend.[10] The first, *AYSA*, addressed the Minister of National Revenue's refusal to register an amateur youth soccer association on the basis that the promotion of amateur sport was not charitable. A 19th-century English case involving a yachting race stated that "a mere sport or game" should not be charitable (*Re Nottage,* 1895). *AYSA* acknowledged this common law authority but argued before the Supreme Court of Canada that "the time [was] ripe" for Canadian courts to recognize the public benefit and the charitable nature of promoting amateur sport (at para. 33). The court described the reasoning in the 1895 yachting case as "perfunctory" but relied on it nonetheless in declining to expand the common law definition of charity. The court dismissed the entity's appeal for charitable registration and held that recognizing youth soccer as charitable "would be a change better effected by Parliament than by the courts" (*AYSA*: para. 200). The Supreme Court of Canada also noted that the "registered Canadian amateur athletics association" (RCAAA) designation in the Income Tax Act accorded charity-like privileges to a narrower group of sports organizations that had "the promotion of amateur athletics in Canada *on a nationwide basis* as [their] exclusive purpose and exclusive function" (*AYSA*: paras. 34–40).

News to You Canada v MNR [*News to You*], 2011, is a second case that illustrates the Canadian courts' reluctance to expand the common law concept of charity through analogy or reasonable

extension of the existing case law. We have seen that, in 1986, the Federal Court of Appeal expanded the definition of charitable purposes to include the broadcast of Aboriginal media. In 2010, a nonprofit communications company attempted to build upon this development, seeking registered charity status to "produce in-depth news and public affairs programs designed to provide unbiased and objective information concerning significant issues and current events that are relevant to a large sector of the general public" (*News to You*: para. 2). On appeal from the negative registration decision of the Revenue Minister, News to You argued that the decision in *Native Communications* could reasonably be extended to the production of media programs on non-Aboriginal issues and that its in-depth news programs would benefit the public within the meaning of the common law. However, the Federal Court of Appeal rejected the appellant's argument, holding that unlike the society in *Native Communications*, News to You was "a mere vehicle for conveying news" (*News to You*: para. 18). The court also limited the ruling in *Native Communications* by emphasizing the "special position occupied in Canada by Aboriginal peoples" and suggested that a charitable purpose would more readily be found to exist where the charitable beneficiaries comprised "individuals from groups or communities commonly recognized as in need of charitable assistance" (*News to You*: para. 31). *News to You* did not generate an immediate legislative response. However, in 2019, almost a decade after the negative ruling, the Government of Canada announced its intention to extend charity-like privileges to nonprofit journalism (Morneau, 2019: 173). It remains to be seen how the amendments will interact with the registered charity provisions.

Why Have So Few Litigants Succeeded in Convincing the Courts to Advance the Legal Meaning of Charity?

Given the overwhelming number of failed appeals of the Minister of National Revenue's charitable registration and revocation decisions, it is worth asking why so few litigants have succeeded in convincing the federal courts to advance the meaning of charity to keep pace with new social needs. In this section, we briefly identify some of the obstacles to the judicial development of the concept of charity under the registered charity regime, before discussing the ways in which CRA policy functions to fill the gaps in the case law.

A first explanation for the very low number of successful appeals addressing the legal definition of charity is simply that very few parties choose to appeal charitable registration and revocation decisions under the Income Tax Act's statutory appeal procedure. The reticence to appeal is at least partly attributable to the high cost of litigation and the limited funds available to most nonprofit organizations. However, it is also attributable to principles of Canadian administrative law, which require the Federal Court of Appeal to accord a significant amount of deference to the registration and revocation decisions of the Minister of National Revenue.

For many years, statutory appeals from charitable registration and revocation decisions were governed by administrative law review principles (*Mouvement laïque québécois v Saguenay,* 2015; *Edmonton v Edmonton East (Capilano),* 2016).[11] An organization that was denied registered charity status could appeal the decision on the basis that the minister had incorrectly

decided an "extricable question of law," including a question about the interpretation of the Income Tax Act. However, decisions on questions of fact or of mixed fact and law could be appealed only on the basis that those decisions were unreasonable (*Prescient Foundation v Canada (MNR),* 2013; *Credit Counselling Services v MNR* [*Credit Counselling*], 2016). The Federal Court of Appeal held that reasonableness was the appropriate standard of review when the question was whether activities were charitable (*Fuaran Foundation v Canada (Customs & Revenue Agency),* 2004: para. 10), whether a registered charity had made a gift to a non-qualified donee (*Opportunities for the Disabled Foundation v MNR,* 2016), and whether a registered charity had failed to devote its resources to its own charitable activities (*Public Television,* 2015).[12] Where an organization's charitable registration had been refused or revoked for multiple reasons, the appellant faced the difficult task of demonstrating that the minister had acted unreasonably or incorrectly in respect of each ground (*World Job and Food Bank Inc v R,* 2013: para. 5).

The recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [*Vavilov*], 2019, has changed the Canadian law on the standard of review. Courts are now required to apply (judicial) appellate standards of review to decisions that are subject to a statutory appeal to a court (*Vavilov*: para. 37). While the correctness standard will continue to apply to questions of law arising in charitable registration and revocation appeals post-*Vavilov*, decisions on questions of fact, and non-extricable questions of fact and law, will be reviewable only in cases of "palpable and overriding error" (para. 37). This change will make it even more difficult for parties to successfully appeal denials or revocations of registered charity status. Together with the prohibitive costs of a judicial appeal, the deferential principles of Canadian administrative law create a major disincentive for nonprofit organizations to appeal negative charitable registration or revocation decisions. By discouraging the initiation of statutory appeals, these principles also slow the judicial development of the legal meaning of charity.

A second explanation for the low rate of successful charitable registration appeals is that the federal courts have generally not applied equitable principles when deciding appeals under the registered charity regime. Historically, disputes over charity property were adjudicated in the English Chancery courts. These courts developed principles (later identified as "equitable principles") that oriented judges toward rescuing imperfect charitable gifts that might otherwise fail because of technicalities or ambiguous drafting.[13] The most general rule was that "the court leans in favour of charity" (Warburton, Morris, & Riddle, 2003: 175), and this generous rule provided a space in which courts could develop the legal definition of charity by reasonable extension and analogy. However, despite being constituted as a court of "law, equity and admiralty in and for Canada," the Federal Court of Appeal has generally declined to apply equitable principles in cases arising under the registered charity regime (Chan, 2016a). A number of unsuccessful charitable registration appeals have turned on minor drafting defects, or on the court's refusal to presume (contrary to the law of equity) that an organization's directors would carry out the objects of the organization in accordance with charity law (Chan, 2016a: 44–52). By declining to apply the curative principles of equity to applicants for registered charity status, the Federal Court of Appeal has further reduced the pool of cases in which the definition of charity might develop.

A third explanation for the very low rate of successful appeals addressing the legal definition of charity in Canada relates to the absence of provincial involvement in charitable registration appeals. Historically, in the English common law tradition, it was common for the attorney general to intervene in legal proceedings concerning the legal definition of charity. The Crown's chief legal officer did not advocate for either party to the dispute, but rather represented the interests of "charity in general" or the potential beneficiaries of the trust before the court. The Charities Act 2011 (UK) explicitly preserves this historic role, authorizing the Attorney General, acting as the protector of charity on behalf of the Crown, to apply for the review of any decision or order of the Charity Commission (s. 318).[14] The Charities Act also authorizes the Attorney General to refer questions of charity law to a newly constituted Charity Tribunal (Charities Act 2011: s. 326). As Lloyd (2007) points out, this provision was included "with the intention of ensuring that important questions may be resolved by the Tribunal without any particular charity needing to find the funds to bring a case."

The broad public mandate of the English Attorney General in matters affecting the definition of charity can be contrasted with the roles played by his Canadian counterparts under the registered charity regime. Because the management of charities is a matter of exclusive provincial jurisdiction under the Constitution of Canada, the Crown in right of Canada (or simply the Crown) does not enjoy the English Crown's prerogative powers with respect to charities. The Crowns in right of the provinces *do* enjoy the prerogative powers associated with the law of charitable trusts but have not adopted the practice of instructing their chief legal officers to appear in charity proceedings (*Bonanza Creek Gold Mining Co Ltd v R,* 1916). In practice, therefore, the Attorney General of Canada acts as advocate for the Minister of National Revenue in appeals of her charitable registration decisions, while the provincial Attorneys General do not appear at all. The result is that no public official acts as a protector of charity in general, or a representative of the public interest in charity property, in any federal proceeding affecting the scope of the legal definition of charity, making it even more difficult for the interests of charity to prevail.

How Has the CRA Charities Directorate Contributed to the Evolution of the Legal Meaning of Charity in Canada?

For the reasons discussed above, it has become increasingly rare for parties to appeal the Minister of National Revenue's charitable registration and revocation decisions. The lack of willing appellants means that little case law is being produced to guide the minister in registration decisions. The Charities Directorate fills some of the gaps left by this judicial inactivity by publishing extra-statutory guidance on the purposes and activities it considers charitable.[15] Over the last decade, these policies have arguably become the principal source of guidance for the nonprofit sector and the general public on what the term "charitable" means.

CRA's published guidance on arts activities provides a good example of the "gap-filling" role that CRA policy plays in setting the outer bounds of the Canadian charitable sector. There is no Canadian case law addressing whether, and in what circumstances, the advancement of the arts

is a charitable purpose. The leading common law cases are English cases from the mid-20th century.[16] Arts organizations seeking charitable status in Canada therefore rely on *CRA Guidance CG-018*, specifically the section concerning arts activities and charitable registration, which states that, under the Income Tax Act, arts organizations may qualify for registered charity status as either educational or "fourth head" charities. *Guidance CG-018* cites the aforementioned English cases for the proposition that "activities that further the fourth category charitable purpose of advancing the public's appreciation of the arts must satisfy two criteria: *art form and style* and *artistic merit*" (*CRA Guidance CG-018*, 2012; emphasis in original). However, the 9,000-word guidance goes further than the case law, asserting without specific authority that in order to achieve registered charity status, "an organization must establish a common or widespread acceptance of both the form and style of art within the Canadian arts community" (*CRA Guidance CG-018*, 2012: para. 29). Appendix C to *CRA Guidance CG-018* lists "the art forms and styles that the CRA has consistently recognized to meet the art form and style criterion." Chamber music, short stories, and puppet work are all included on this list. However, applicants wishing to advance the public's appreciation of art forms that are *not* on the list, such as electronic dance music or blogging, face the uncertain task of demonstrating to CRA that those art forms have "common and widespread acceptance" within the Canadian arts community.

Much of CRA's extra-statutory guidance on charitable purposes and activities is relatively uncontroversial. However, it has proven challenging for CRA to develop satisfactory guidance on "hot button" issues such as the advancement of religion and the limits on political advocacy by charities. The CRA's approach to the advancement-of-religion category has so far been to provide as little public guidance as possible. The Charities Directorate has only one summary policy directed toward the scope of the third head of charity: it was published in 2002 and is only two sentences long. The Charities Directorate has apparently been developing a longer guidance on the advancement of religion as a charitable purpose since 2005 (Carter & Leddy, 2009). However, even though the "draft guidance" has been obtained under a Freedom of Information request and published online (Blumberg, 2017), it has not yet been confirmed as an official policy.

CRA has historically taken a more proactive approach to the issue of political advocacy. Until 2018, the details of where CRA drew the line between the "charitable" and the "political" were set out in Policy Statement CPS-022, "political activities," 2003. CPS-022 interpreted and fleshed out subsections 149.1(6.1) and (6.2) of the Income Tax Act, which permitted registered charities to engage in non-partisan political activities that were "ancillary and incidental" to their charitable activities and purposes, provided that "substantially all" of the charity's resources were not devoted to such activities (Parachin, 2017). The policy statement began by lauding the experience and expertise housed within charities and by affirming the "essential role" charities play in Canadian public policy debates. However, the policy went on to detail various "constraints" on the ability of registered charities to participate in such debates (CPS-022: para. 2). CPS-022 divided the activities of registered charities into three separate categories: (a) prohibited, (b) political, and (c) charitable (CPS-022: para. 6). Supporting, or opposing, any political party or candidate for public office was a "prohibited" activity. Communicating directly to a public official that a law or policy should be retained, opposed, or changed was a "charitable" activity. However, communicating *to the public* that a law or policy government should be retained, opposed, or changed was characterized as a "political" activity, which was subject to the well-known 10% expenditure limits.[17]

CPS-022 roughly tracked the common law authorities on charities and political purposes. However, it was evident from the policy statement that CRA took a stricter view than other charity regulators of the advocacy that the common law prohibits. For example, CPS-022 required registered charities, if publishing voting records, to publish voting records of *all* members of Parliament or a legislature and prohibited registered charities from "[singling] out the voting pattern on an issue of any one elected representative or political party" (CPS-022: s. 6.1). By contrast, CC9, the comparable policy produced by the Charity Commission for England and Wales, explicitly allows charities to provide information on how politicians voted on an issue "in order to influence them to change their position."[18] The English policy also allows charities to use emotive material in their campaigns, provided it is factually accurate (Charity Commission, 2008: s. 6.3, p. 23), while CPS-022 (s. 7.1) stated that it was "unacceptable for a charity to undertake an activity using primarily emotive material." It seems likely that the stringency of the constraints set out in CPS-022 contributed to a prominent registered charity's decision to challenge the constitutional validity of the limits on non-partisan political advocacy in a provincial superior court. In the resultant decision, the Ontario Superior Court of Justice held that parts of subsection 149.1(6.2) and CPS-022 unjustifiably violated the freedom of expression of the organization before the court, and declared them immediately of no force and effect (*Canada Without Poverty v Canada (AG),* 2018).

The complexity of the nonprofit sector and the open-ended language of the registered charity provisions drive nonprofit organizations, the Minister of National Revenue, and, ultimately, the federal courts to rely heavily on CRA policy in deciphering the bounds of the registered charity regime. There are merits to having extra-statutory guidance on the legal meaning of charity. Online policy documents on what it means to "advance the arts" or carry out "incidental advocacy" are far more accessible to the public than the 19th- and 20th-century English cases on which those policy documents are often based. Extra-statutory guidance can improve the predictability of the registered charity regime, encourage equality of treatment among the regulated, and reduce costly communications between charities and the CRA (Freedman & Vella, 2012: 197). In a sector where the legislature and the courts are so often silent, the development of extra-statutory guidance by officials with information, time, and expertise to focus on registered charities is arguably crucial (Green, 2018: 312).

On the other hand, it is problematic to rely too heavily on CRA policy to set the outer bounds of the Canadian charitable sector. "Soft law" always raises issues of democratic legitimacy, creating a risk that the regulatory body making the guidance may go beyond, or act inconsistently with, the intention of the legislature that authorized it to act (Green, 2018: 313). Relying on a regulator's extra-statutory guidance to develop the meaning of charity is especially problematic in a tax-based regulatory regime like the registered charity regime. First, the CRA Charities Directorate has a general tax administration mandate, which orients it, in the creation of registered charity policy, toward the protection of the fisc (the public treasury) and the maintenance of the status quo (Chan, 2016b: 109). Second, the CRA is not independent of the executive branch of the Canadian federal government. This makes it subject to political influence in the development of extra-statutory guidance affecting charities (Chan, 2016b: 140–142). Third, the Canadian courts have so far shown little appetite for submitting extra-statutory guidance to substantive review (Green, 2018: 337).[19] This makes it difficult for charities to challenge CRA policy documents on the basis that they are inconsistent with the Income Tax Act or with the case law on the legal meaning of charity.

How Does the Current Canadian Approach to the Legal Meaning of Charity Differ from That of Other Common Law Jurisdictions?

Historically, the Anglo-Commonwealth world shared a common law understanding of how the concept of a charitable purpose should develop. Over the last two decades, however, many Anglo-Commonwealth jurisdictions have undertaken wide-ranging projects of charity law reform. Jurisdictions such as England and Wales, Scotland, and Australia have created new regulatory bodies, specified the functions and objectives of their regulatory regimes, and enacted statutory definitions of charity (Charities Act 2011 (UK); Charities and Trustee Investment (Scotland) Act 2005; Charities Act 2013, (Australia)). These statutory definitions have tended to expand and make more specific the legal meaning of charity. Legislatures have added purposes such as the advancement of culture, the prevention of poverty, and the advancement of amateur sport to the traditional common law list of charitable purposes. Many modern charity law statutes also define key terms such as "religion" and "sport" and clarify the operation of the public benefit rule (UK Charities Act 2006: s. 1–3).

The fact that major Anglo-Commonwealth jurisdictions have enacted statutory definitions of charity, while Canada has not, has created a further impediment to the judicial development of the definition of charity in Canada. The reason is that foreign courts, and particularly the English courts, have historically produced much of the common law jurisprudence on which Canadian courts have relied in interpreting the meaning of the term "charitable/*de bienfaisance*" under the Income Tax Act. Up until 2006, the published registration decisions of the Charity Commission for England and Wales on topics such as internet rating software and the protection of the environment were also a source of argument and analogy for Canadian registered charity applicants. However, most Anglo-Commonwealth decisions on the meaning of charity are now based on judicial interpretations of a statutory definition of charity, rather than on judicial elaborations of the common law. Given the significant ways in which these statutory definitions of charity diverge from the traditional common law definition,[20] it is now much harder to argue that decisions emanating from the English or Australian courts are relevant to the interpretation of the Canadian Income Tax Act. This dramatically narrows the pool of cases that Canadian courts can draw upon in developing the meaning of charity through reasonable extension and analogy.

A recent decision of Canada's Federal Court of Appeal illustrates the impact that foreign codification of the meaning of charity has had on Canada's registered charity jurisprudence (*Credit Counselling Services of Atlantic Canada Inc v MNR* [*Credit Counselling*], 2016). Credit Counselling Services of Atlantic Canada Incorporated was a nonprofit corporation that had enjoyed registered charity status in Canada since 1993. In 2013, the Minister of National Revenue annulled the corporation's registration on the basis that its principal object, the prevention of poverty, was not charitable. Credit Counselling appealed the annulment to the Federal Court of Appeal, arguing that, in line with society's expectations, the court should incrementally adjust the common law "relief of poverty" category to include the prevention of poverty (*Credit*

Counselling, Factum of the Appellant: para. 28). The Federal Court of Appeal accepted that the question of whether the prevention of poverty was charitable was an "extricable question of law" that was reviewable on a standard of correctness. However, the court rejected the appellant's invitation to expand the first head of charity, relying in large part on the fact that England and Wales had achieved a similar expansion through the enactment of the Charities Act 2011:

> In the United Kingdom, Parliament adopted the *Charities Act 2011*, 2011, c. 25 and in so doing included the prevention of poverty (in addition to the relief of poverty) as a charitable purpose. In effect, the Appellant is asking this Court to do that which required an act of the UK Parliament to do. In my view, just as in the United Kingdom, it will require an act of Parliament to add the prevention of poverty as a charitable purpose (*Credit Counselling,* 2016: para. 18).

Credit Counselling is further evidence of the Federal Court of Appeal's view that the legal definition of charitable purpose should evolve principally through legislation. However, the decision also paints a bleak picture of how Canadian common law is likely to evolve now that Canadian litigants have a dwindling pool of foreign common law precedents upon which to draw. For in the absence of a case directly on point, the court was not prepared to contemplate that the common law methodology of developing the meaning of charity by extension and analogy to recognized charitable purposes might accomplish the same thing as the UK's legislative change.

Conclusion

The project of this chapter has been to explore the evolution of the legal meaning of charity within Canada's registered charity regime. We have identified various instances where the Federal Court of Appeal has *advanced* or *expanded* the concept of a charitable purpose, using the common law methodologies of analogy and reasonable extension to keep charity law moving in accordance with new social needs.[21] However, we have argued that the court has more often refused to draw analogies with the existing case law or to advance the concept of a charitable purpose. The cumulative effect of these refusals has been to *freeze* or *stultify* the Canadian common law of charity. Recent legislative developments, including the extension of charity-like privileges to nonprofit journalism and the amendment of the political activities rules, have reinvigorated debate over the proper bounds of the Canadian charitable sector. However, it remains the case that the principal way in which the legal conception of charity evolves in Canada is through the CRA's publication of extra-statutory guidance on the purposes and activities that it considers charitable.

This is not an ideal state of affairs. Soft law has an important role to play in a regime of charity regulation. However, it is problematic to rely upon a charity regulator's extra-statutory guidance as the primary mechanism for the concept of charity's development. It is for this reason that we have sought in this chapter to address the "structural" obstacles that have contributed to the Federal Court of Appeal's failure to meaningfully develop the concept of charity in accordance with the traditional common law methodology. If we can address some of these structural obstacles, or at least prompt Parliament, the provincial legislatures, and the courts to acknowledge their existence, perhaps the frozen Canadian law of charities will continue to thaw.

References

Action by Christians for the Abolition of Torture v Canada, 2002 FCA 499.

Australian Charities and Not-for-profits Commission Act 2012, (Cth) (Austl.).

AYSA Amateur Youth Soccer Association v Canada (Revenue Agency), 2007 SCC 42.

Blumberg, M. (2017, October 24) CRA's draft guidance advancement of religion and charitable registration is released through ATIP. globalphilanthropy.ca.
Retrieved from https://perma.cc/A4JE-55TF

Bonanza Creek Gold Mining Co Ltd v R, 1916 1 AC 566 (HL) 579.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Canada Revenue Agency. (2012, December 14) *Guidance CG-018*: Arts activities and charitable registration. Retrieved from www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance

Canada Revenue Agency. (2003, September 2) Policy Statement CPS-022: Political activities. Retrieved from https://perma.cc/LLE2-BCMT

Canada Without Poverty v AG Canada, 2018 ONSC 4147.

Carter, T. & Leddy, J. (2009, September 29) CRA's proposed new guidance on advancement of religion as a charitable purpose [Conference presentation]. Canadian Council of Christian Charities 2009 Conference. Retrieved from http://www.carters.ca/pub/seminar/church/2009/tscjl0929.pdf

Chan, K. (2007) Taxing charities. *Canadian Tax Journal,* 55, 481–556.
Retrieved from https://www.ctf.ca/ctfweb/Documents/PDF/2007ctj/2007ctj3-chan.pdf

Chan, K. (2016a) The function (or malfunction) of equity in the charity law of Canada's federal courts. *Canadian Journal of Comparative and Contemporary Law,* 2(1), 33–63.

Chan, K. (2016b) *The public-private nature of charity law.* Oxford: Hart Bloomsbury.

Charities Act 2006, c. 50 (UK).

Charities Act 2011, c. 25 (UK).

Charities Act 2013, (Cth) (Austl.).

Charities and Trustee Investment (Scotland) Act 2005, (asp 10).

Charity Commission for England and Wales. (2008, March) CC9: Campaigning and political activity guidance for charities. Retrieved from https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities

Credit Counselling Services of Atlantic Canada Inc v MNR, 2016 FCA 193.

Dunsmuir v New Brunswick, 2008 SCC 9.

Edmonton (City) v Edmonton East (Capilano), 2016 SCC 47.

Ellis, R. (2018) View from the bench [Conference presentation]. Perspectives on Charity Law, Accounting and Regulation in New Zealand Conference (Wellington). Retrieved from http://www.claanz.org.au/images/NZ%20event%202018/Presentations/Justice%20Ellis%20Speech.pdf

Everywoman's Health Centre Society (1988) v MNR, 1992 2 FC 52.

Freedman, J. & Vella, J. (2012) Revenue guidance: The limits of discretion and legitimate expectations. *Law Quarterly Review,* 128, 192–197.

Fuaran Foundation v Canada (Customs & Revenue Agency), 2004 FCA 181.

Green, A. (2018) Regulations and rule-making: The dilemma of delegation. In C. Flood & L. Sossin (Eds.), *Administrative Law in Context* (3rd ed.). Toronto: Emond Montgomery.

Housen v Nikolaisen, 2002 SCC 33.

In re Shakespeare Memorial Trust, Lytton (Earl) v Attorney General, 1923 2 Ch 389.

Income Tax Act, RSC 1985, c.1.

Income Tax Special Commissioners v Pemsel, 1891 UKHL 1. Retrieved from http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912668a6ae5511fce7ec38e48257df8003568fc/$file/2668.pdf

Jaamiah Al Uloom Al Islamiyyah Ontario v MNR, 2016 FCA 49.

Jones, G. (1969) *History of the law of charity, 1532–1827.* London: Cambridge University Press.

Jones v T Eaton Co, 1973 SCR 635.

Lloyd, S. (2007) *Charities: The new law 2006*. Bristol: Jordan Publishing Ltd.

Maurice, S.G. & Parker, D.P. (1984) *Tudor on charities* (7th ed.). London: Sweet & Maxwell.

Morneau, W.F., P.C., M.P. (2019, March 19) Investing in the middle class: Budget 2019. Retrieved from https://www.budget.gc.ca/2019/docs/plan/toc-tdm-en.html

Mouvement laïque québécois *v* Saguenay (City), 2015 SCC 16.

Native Communications Society of BC v MNR, 1986 2 CTC 170.

News to You Canada v MNR, 2011 FCA 192.

Opportunities for the Disabled Foundation v MNR, 2016 FCA 94.

Parachin, A. (2017) How and why to legislate the charity-politics distinction under the Income Tax Act. *Canadian Tax Journal*, 65(2), 391.

Picarda, H. (2010) *The law and practice relating to charities* (4th ed.). Haywards Heath, West Sussex: Bloomsbury Professional.

Positive Action Against Pornography v MNR, 1988 2 FC 340.

Prescient Foundation v Canada (MNR), 2013 FCA 120.

Public Television Association of Quebec v MNR, 2015 FCA 170.

R v Salituro, 1991 3 SCR 654.

Re Litchfield, 1961 ALR 750 (SC of Northern Territory of Australia).

Re Nottage, 1895 2 Ch 649 (CA).

Royal Choral Society v Inland Revenue Commissioner, 1943 2 All ER 101, [1943] 25 TC 263.

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

Sharlow, K. (2011, May 6) *Bringing charity cases before the courts: Perspectives from the bench – What does it take to win in the federal court or the Federal Court of Appeal?* Speaking notes prepared for the 2011 National Charity Law Symposium, Canadian Bar Association. Retrieved from www.cba.org

Shaw's Will Trusts, Re, 1952 Ch163, [1952] 1 All ER 49.

Toronto Volgograd Committee v MNR, 1988 1 CTC 365.

Travel Just v MNR, 2006 FCA 343.

Vancouver Regional FreeNet Assn v MNR, 1996 3 FC 880.

Vancouver Society of Immigrant and Visible Minority Women v MNR, 1999 1 SCR 10.

Warburton, J., Morris, D., & Riddle, N.F. (2003) *Tudor on charities* (9th ed.). London: Sweet & Maxwell.

World Job and Food Bank Inc v R, 2013 FCA 65.

Notes

[1] For full list of qualified donees see Canada Revenue Agency, Guidance CG-010, "Qualified donees." Available online: https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/qualified-donees.html. Registered charities are subject to onerous reporting requirements.

[2] See s. 149.1(1) ("charitable organization/*oeuvre de bienfaisance*"; "charitable foundation/*fondation de bienfaisance*").

[3] Citing *Positive Action Against Pornography v MNR*, 1988, at para. 8, for both the "definition of 'charity' in its legal sense as well as for the principles that should guide us in applying that definition."

[4] See "registered charity" (*organisme de bienfaisance enregistré*).

[5] The Income Tax Act specifies, for example, that the carrying on of a related business, the disbursement of income to a qualified donee, and public policy dialogue carried on in furtherance of charitable purposes are all charitable activities: Income Tax Act, 1985, ss. 149.1(1) ("charitable activities"), 149.1(6).

[6] For a criticism of this position, see Chan, 2007.

[7] Citing with authority *R v Salituro*, 1991, at p. 670.

[8] This paragraph from *Vancouver Society* is also cited with authority at para. 28 of *AYSA*, 2007.

[9] Such approach is set out in *Scottish Burial Reform*, 1968.

[10] Other notable unsuccessful attempts include: anti-nuclear war education in *Toronto Volgograd Committee v MNR*, 1988; anti-torture advocacy in *Action by Christians for the Abolition of Torture v Canada*, 2002; and ecological education through travel in *Travel Just v MNR*, leave to appeal to SCC refused, 31804 (May 3, 2007).

[11] Compare cases to *Housen v Nikolaisen*, 2002.

[12] But see *Action by Christians for the Abolition of Torture v Canada*, 2002 FCA 499, at paras. 23–24, where the FCA held that the characterization of a registered charity's activities as "political" was a conclusion of law that was subject to a correctness standard.

[13] See, for example, *Jones v T Eaton Co*, 1973, at p. 645.

[14] Neither the Australian Charities and Not-for-profits Commission Act 2012, nor the Charities Act 2013, have parallel provisions, but the New Zealand courts have adopted a practice of directing service on the Attorney General of appeals under the 2005 act: see Ellis (2018).

[15] The Canada Revenue Agency has developed an extensive collection of policy and guidance documents, which articulate its views on whether and in what circumstances specific purposes are charitable. See CRA, "Index of guidance products and policies," online: https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/alphabetical-index-policies-guidance.html.

[16] For example, cited by CRA, *Guidance CG-018*, 2012: *Royal Choral Society v Inland Revenue Commissioner*, 1943; *Shaw's Will Trusts, Re*, 1952; *In re Shakespeare Memorial Trust, Lytton (Earl) v Attorney General*, 1923; and *Re Litchfield*, 1961 at p. 754 (SC of Northern Territory of Australia).

[17] CPS-022 interpreted the statutory requirement that "substantially all" of a charity's resources be devoted to charitable – non-political – activities in the Income Tax Act, to mean 10% of the annual resources of most registered charities: see para. 6.

[18] Compare *Charity Commission* (2008: s. 4.3, 17). The issue in question must be linked to the charity's purposes.

[19] But see *Canada Without Poverty v Canada (AG)*, 2018, where the court considered CPS-022 in conjunction with ss. 149.1(6.2).

[20] For example, the UK Charities Act 2006, s. 2(3)(a)(ii) provides that the advancement of religion encompasses "religions that do not involve belief in a god."

[21] Such approach is set out in *Scottish Burial Reform*, 1968.

Biography

Kathryn Chan, University of Victoria

Dr. Kathryn Chan is an associate professor at the University of Victoria Faculty of Law, where she teaches and researches in the areas of nonprofit law, public law, and law and religion. She previously practised law at a boutique charity law firm in Vancouver and completed her doctoral research on comparative charity regulation at the University of Oxford as a Trudeau Foundation and SSHRC-funded scholar. Her first book, *The Public-Private Nature of Charity Law*, was published by Hart Bloomsbury in 2016.

Josh Vander Vies, Versus Law Corporation

Josh Vander Vies is a Vancouver lawyer focused on creating and defending Canadian not-for-profit organizations, charitable status, and charitable gifts. A retired Paralympian, his research and practice at Versus Law Corporation engages how best to protect the integrity of international sport. In Canada, Josh is interested in how factors such as the law, principles of business governance, and practical realities can advance initiatives that are not-for-profit.