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**THE LEGAL DEFINITION OF CHARITY AND  
CANADA CUSTOMS AND REVENUE AGENCY'S  
CHARITABLE REGISTRATION PROCESS**

by

Peter Broder  
Policy Analyst

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**Note: The views expressed in this paper do not necessarily represent those of the Canadian Centre for Philanthropy Board members or staff. The reform proposals found in the paper are drawn from numerous sources, and are presented as sources, and are presented as an inventory of options. No endorsement or promotion of specific alternatives is implied or intended.**

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**ã Canadian Centre for Philanthropy**  
425 University Avenue, Suite 700, Toronto, ON M5G 1T6  
Tel: (416) 597-2293, Fax: (416) 597-2294, Email: [general@ccp.ca](mailto:general@ccp.ca), Web: [www.ccp.ca](http://www.ccp.ca)  
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## **Introduction**

Assessment of the eligibility of groups for charitable registration in Canada has drawn sharp and sustained criticism. This assessment, which is made by the Canada Customs and Revenue Agency (CCRA) based on the legal definition of charity as evolved through common law and modified by statute, is widely seen as both unfair and out-of-step with contemporary Canadian values. Much of this criticism is rooted in dissatisfaction with the current legal definition of charity, which is said to be antiquated, inconsistent and inflexible. The purpose of this paper is to highlight the inadequacies of the current definition, as applied through the registration assessment process, and suggest means to improve it.

The legal definition of charity can come into issue in several different circumstances. If an entity falls within the scope of the definition, even if it has not taken steps to be officially registered for tax purposes, it is subject to the Crown exercising its *parens patriae* prerogative power to ensure that it adheres to its purposes.<sup>1</sup> In Canadian jurisdictions this *parens patriae* power is exercised through the provincial ministries of the Attorney General, since under section 92(7) of the Constitution Act, 1867, regulation of charities is a provincial power.<sup>2</sup>

Oversight of charities has been statutorily enhanced in some provincial jurisdictions beyond the *parens patriae* power through creation of supervisory bodies or enactment of legislation governing charitable activity. The Office of the Public Guardian and Trustee

in Ontario is an example of one such supervisory body.<sup>3</sup> Alberta's *Charities Fundraising Act*<sup>4</sup> is an example of provincial legislation regulating activity.

As well, superior courts – i.e., in Canada, those in which judges are federally-appointed – have inherent jurisdiction to supervise entities that, at common law, qualify as charities.<sup>5</sup> Accordingly, a beneficiary or other party can bring an action against such an entity even where the Crown takes no interest in the matter.

A separate regime that enables certain entities to issue tax receipts to their donors is administered at the federal level. The authority for this regime is derived from section 91(3) of the *Constitution Act, 1867*<sup>6</sup>, which gives the federal government broad jurisdiction to establish taxation schemes. To be eligible to issue tax receipts, organizations must convince the Canada Customs and Revenue Agency (CCRA)<sup>7</sup> that they fall within the legal definition of charity, or within specifically enumerated classes of organizations set out in the *Income Tax Act*<sup>8</sup>, and become registered. Assessment of eligibility to register is initially evaluated by CCRA staff, though appeal lies to the Federal Court of Appeal if the application is rejected.<sup>9</sup> As this court is the second highest court in Canada, the time, expense and sophistication needed to mount such an appeal often presents an insurmountable barrier to applicant entities that have initially been turned down by CCRA.

The application of the legal definition of charity in the context of the registration assessment process will be the principal focus of this paper. In the view of some,

broadening or narrowing the definition used in this process may have significant fiscal implications for government. The contrary argument is that Canadians are willing to donate a finite amount of money to charitable causes, regardless of how many organizations are eligible to issue receipts for donations. If this argument is correct, the pie will not grow so much as be cut into an increasing number of pieces should the number of organization eligible for charitable registration increase.

It can even be argued that describing the treatment of charitable donations and the scope of eligibility of organizations to issue tax receipts in terms of 'tax expenditures' misstates the case. It is equally plausible to see donations as discretionary contributions to the public good.<sup>10</sup> Such contributions can be viewed as reducing the capacity of the individual to bear tax, rather than as tax expenditures. In this analysis, donors' motivation in making contributions is not seen as flowing from the tax consequences. (Data from the 1997 National Survey on Giving Volunteering and Participating (NSGVP) supports this assertion: only 11% of Canadians surveyed identified their reason for making financial donations as the income tax credit.<sup>11</sup>) In concrete terms, this argument holds that the taxable capacity of an individual who earns \$25,000 and contributes \$2,000 to charity is like that of an individual who has earned only \$23,000 and has given nothing to charity. The contribution to the public good of the first individual is \$2,000. Whether the individual receives a 29% or 17% credit against his \$2,000 contribution is irrelevant in this analysis.

Regardless of the merit of these various approaches, the question of eligibility for charitable registration undoubtedly deeply influences the ability of the voluntary sector to meet the needs of contemporary Canadian society. This paper offers an assessment of the potential tax implications of various broadenings of the definition – in all cases relatively minor in the context of a federal budget that now approaches \$175 billion per year – while acknowledging the debate over fiscal cost and how it should be calculated remains unsettled. In light of the arguments outlined above, our estimates – if anything – overstate probable costs.

Problems with the assessment process stem partly from the definition’s origin and partly from institutional dynamics that preclude development of a modern, consistent and flexible standard to decide the merit of supporting, through tax expenditure, particular public-spirited activities. The Mission Statement of CCRA mandates that organization to “promote compliance” with Canada’s tax system<sup>12</sup> – an understandable goal within the context of the Agency’s overall responsibilities. However, owing to the evolving nature of the legal definition of charity, this goal is, in practice, often at odds with fostering the ability of groups doing socially beneficial work to secure funds. The imprecision of the definition gives rise to an overly-prudent and conservative approach to assessing eligibility – promoting compliance leads, almost invariably, to erring on the side of caution.

The legal definition of charity currently used in Canada is rooted in the preamble to the British *Statute of Charitable Uses, 1601*.<sup>13</sup> This preamble set out a host of social

purposes that were deemed charitable. The preamble was illustrative and offered neither an exhaustive listing of qualifying purposes nor a litmus test to determine whether omitted purposes qualified. Over time, the judiciary grappled with how to use the *Statute's* wording to evaluate whether non-included purposes were charitable.<sup>14</sup> In the jurisprudence, the purposes set out in the statute were eventually organized into categories against which purposes not enumerated in the original preamble could be tested. The most famous rendering of these categories was by Lord Macnaghten in an 1891 House of Lords decision: *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*. The heads of charity outlined by Macnaghten cover four areas:

Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under one of the preceding heads.<sup>15</sup>

In the more than 110 years since this decision, there has been a broadening of what qualifies as charity through common law rulings. It is a strength of Macnaghten's rendering of the definition that it features an open-ended residual category into which there is considerable scope for various public purposes to be fitted.

Widespread acceptance of Lord Macnaghten's categories did not, however, oust continuing assessment of newly proposed charitable purposes against "the spirit and intendment"<sup>16</sup> of the original statute.

In some cases, the flexibility offered by Macnaghten's scheme has been used to good effect, and (albeit distant) contemporary parallels to purposes set out in the Statute have been brought within the definition. For example, in *Vancouver Regional FreeNet*

*Association v. Minister of National Revenue*<sup>17</sup>, the Federal Court of Appeal drew an analogy between the contemporary electronic ‘information highway’ and the more traditional ‘highways’ described in the preamble. However, the body of jurisprudence in this area is riddled with inconsistency, and is seemingly marked by a tendency for rulings to be driven as much by the personal preferences of judges as by a principled application of the law.<sup>18</sup> With the passage of time, the purposes brought before the courts have become more and more removed from those found in the statute, and consequently the analogies have become harder to draw.

Justice Iacobucci, writing for the majority in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*<sup>19</sup>, re-iterated the adoption of the *Pemsel* categories as a means of determining charity in Canadian jurisprudence. He was, however, more equivocal in his endorsement of the Preamble. Citing Lord Macnaghten’s holding that the Court’s jurisdiction over charitable trusts arose independently of the *Statute of Elizabeth* (as the *Statute of Charitable Uses* is otherwise known), and his further assertion that the enumerated objects of the preamble are merely examples of objects of charity, Justice Iacobucci commented that “the court has always had the jurisdiction to decide what is charitable and was never bound by the preamble”<sup>20</sup>. This characterization casts some doubt on the current status of the preamble in Canadian law.

## **Previous Attempts at Reform**

Attempts at wholesale reform of the common law definition, both in Canada and abroad, have foundered repeatedly on the argument that while such a definition is imperfect, the alternative of a more contemporary and statutorily-entrenched definition is even more unpalatable. Reform attempts – frequently, if not invariably – mingle the issues of legislating a definition and creating a new (whether broader or narrower) definition of charity. Resort to legislation is thus subject to attack either, depending on one’s perspective, as potentially opening the floodgates or closing the door. Consequently, the recurring debate over changing the definition has been marked as much by fear as by reason.

However, the sea change in the mandate of voluntary organizations seen in recent years makes the issue more pressing than ever. It has become increasingly difficult to remain sanguine about the slow evolution of the definition through the common law as charities and not-for-profit organizations face expanding demands on their services owing to government cutbacks and off-loading of services. The need for re-thinking the definition is redoubled by the growth in recent years of globalization – an economic doctrine that puts a premium on efficiency and is predicated on ‘levelling the playing field’. Operating the voluntary sector under a regulatory model that is outdated and cumbersome undermines both the capacity of the sector to fulfil its allotted role in Canadian society and the competitiveness of Canadian society against those countries that can deliver similar services to their citizenry in a more efficient manner.<sup>21</sup> Nonetheless, a brief history of reform attempts shows how powerful the arguments against change are.

The 1952 British Royal Commission on “Law and Practice Relating to Charitable Trusts” (the Nathan Committee), after hearing a number of witnesses, primarily non-lawyers, who favoured a new definition that enumerated acceptable objects, was persuaded to reject this option by the testimony of lawyers who argued that an entrenched definition would be both inflexible and inevitably incomplete.<sup>22</sup> Instead, the Nathan Committee opted for a compromise position that called for repeal of the Statute of Uses, legislation of a definition based on the Macnaghten classification scheme and in which the case law was preserved.<sup>23</sup> In the end, the government of the day was unwilling to go even that far.<sup>24</sup>

A suggestion that the legal definition of charity be entrenched in statute was again proposed at the time of the enactment in Britain of the 1960 *Charities Act*<sup>25</sup>, but was rejected on the grounds of the difficulty of drafting a satisfactory alternative definition. Uncertainty as to the likely effect of the new legislation was widespread, and helped to undermine support for the proposed change.<sup>26</sup>

In 1978, the issue was once more re-visited in Britain in the report of a committee established by the National Council on Social Welfare (the Goodman Report). The Goodman Report argued for a modernization of the definition of charity through restatement of the categories found in the *Statute of Charitable Uses* in simple and contemporary language, and extension of these categories to objects identified within the scope of charity by the case law.<sup>27</sup> It was thought this approach would allow courts more

flexibility in determining what constituted charity. Even this modest attempt at partial codification was criticized as merely “a recipe for further litigation.”<sup>28</sup> It was never implemented.

The Independent Commission on the Future of the Voluntary Sector was set up in the 1990’s by the National Council for Voluntary Organisations (NCVO) in Britain. The Commission’s 1996 report (the Deakin Report) again called for a single inclusive definition of charity based on the concept of public benefit.<sup>29</sup> Although work continues on this initiative through the NCVO it has yet to yield legislation.

In Canada, retention of the common law definition of charity was supported by the Royal Commission on Taxation (the Carter Commission) with the comment that, at least for tax purposes, “the definition in the Pemsel case appears to be generally satisfactory”.<sup>30</sup> (Given the broad thrust of the Carter Commission report favouring equitable tax treatment for all revenue sources, it is perhaps not surprising that the Commission would support a limited and incremental expansion of a potentially significant tax expenditure programme.<sup>31</sup>)

A 1983 research paper prepared by Professor Neil Brooks for the Policy Coordination Directorate of the federal Secretary of State Department, canvassed the arguments for and against codifying the definition in legislation but did not explicitly favour or reject codification.<sup>32</sup>

The Ontario Law Reform Commission conducted extensive research into the legal definition of charity in the 1990's and concluded that reform could be "better effected through further case law development than through statutory reform."<sup>33</sup> The Commission's 1996 Report discussed some of the policy implications of developing a definition of charity grounded in abstract concepts such as altruism. In the end though, it concluded that an attempt to pin down precisely what charity is

would just as likely hinder judicial decision-making as help it. Since the range of objects that can be charitable is so incredibly diverse, any statutory definition more specific than the Pemsel test would, in all probability, just confuse matters.<sup>34</sup>

This echoes the findings of the Nathan Report.

At the federal level, a paper prepared by one of the country's preeminent voluntary sector lawyers, Arthur Drache, called for an overhaul of charities legislation both to enhance the accessibility and flexibility of the regulatory regime and to bring the legal definition into line with contemporary Canadian values.<sup>35</sup>

Drache's proposals included: a statutory definition of charity encompassing 'public benefit organizations' and 'umbrella public benefit organizations' as well as those entities traditionally considered charitable; provision for the filing of an election to allow organizations within the scope of the revised definition to be treated as either non-profits or charities; and, a reformed appeals process that would simplify and reduce the cost of challenging a revocation or refusal to register.

The legislated definition of charity proposed by Drache was based to some extent on the statutory definition adopted by Barbados in its 1989 *Charities Act*<sup>36</sup>, which enumerated numerous categories of purposes qualifying as charitable. The Barbadian legislation is one of the few successful reforms of the definition ever effected. The present paper builds on the Drache proposals by reviewing refusals and revocations of organizations that would come within his expanded definition and by isolating some of the costs associated with the activities carried on by such organizations.

In a 1999 letter to the Minister of National Revenue, the Canadian Bar Association endorsed, in principle, Drache's list of the type of organizations to which the tax benefits of charitable status should be extended. The Bar Association also expressed agreement with Drache's assessment of the inadequacy of the existing appeals process.<sup>37</sup>

The 1999 Final Report of the Panel on Accountability and Governance in the Voluntary Sector (the Broadbent Report) called for a clear, consistent and contemporary definition of charity to promote transparency and improve the efficacy of the voluntary sector.<sup>38</sup> Again, this suggestion was answered with claims for the flexibility of the common law definition and the argument that a statutorily-entrenched definition would necessarily be flawed.<sup>39</sup>

Professor Patrick Monahan's assessment of reform proposals in charity law and regulation "Federal Regulation of Charities", published in September 2000, generally supported the OLRC's position against statutory reform of the definition, and attributed

the shortcomings of the current definition primarily to the paucity of case law in the area. It concluded that the lack of opportunity for the judiciary to develop the definition had meant that “the interpretation of the meaning of charitable purpose has been left largely to the discretion of government officials.”<sup>40</sup> It cited the large number of registrations approved annually as proof that the definition was not unduly vague.<sup>41</sup>

At the time of writing, a decision about including reform of the legal definition of charity in the mandate of the second round of the Joint Tables of the Voluntary Sector Initiative is pending. In the initial mandate proposed by the federal government it was not included. There is, however, scope within the mandate to examine the various aspects of CCRA’s registration assessment process, including the criteria it uses to determine eligibility.

## **Recent Developments**

Initiatives to reform the legal definition of charity are currently under way in several jurisdictions. In Scotland, an independent Charity Law Commission was established in 2000 by the government. Its mandate is “to put forward a new framework for charities with the aim of promoting and facilitating the role of the charitable sector in enhancing the social fabric of society.”<sup>42</sup> Its report, released in May 2001, contains 114 recommendations, ranging from a revised definition of charity to establishment of a Scottish counterpart to the British Charity Commission.<sup>43</sup>

In Australia, the federal government has established an Inquiry into Charitable and Related Organizations. The impetus for the Inquiry was in part dissatisfaction with a common law definition of charity dating back to 1601 that was seen as giving rise to legal disputes. More broadly, a need was seen to ensure that the legislative and administrative framework in which charities operate is appropriate to contemporary reality.<sup>44</sup> At the time of writing, the Inquiry’s report was pending.

In late 1999, South Africa’s Justice Minister mandated that country’s Law Reform Commission to examine “The Legal Position of Voluntary Associations”.<sup>45</sup>

New Zealand’s government is also studying the issue of definition of charity within the context of a larger review of tax treatment of charities. A discussion document was published in June 2001<sup>46</sup>, and the Tax Review team appointed to look into the issue is scheduled to submit its final report in September 2001.

In Britain, the National Council for Voluntary Organisations is spearheading a charity law reform consultation process that includes a proposal to codify charity law. This work flows out of the Deakin Commission's proposed reforms.

In Canada, as noted above, efforts have been made to include consideration of the legal definition of charity in the mandate of the second-round Joint Tables, which were struck under the auspices of the Voluntary Sector Initiative (VSI).

A common theme in many of the current reform attempts is the goal of properly equipping the voluntary sector for the social and economic environment of the coming century. Implicit in this goal is a recognition that the role of charities will and must change in keeping with the profound economic shifts seen by society-at-large with the restructuring of governments, growth of globalization and exponential expansion of information technology. In many jurisdictions, the voluntary sector has been hamstrung in its attempts to keep pace with the explosive pace of this change because it is saddled with outdated institutional structures.

For example, in Canada the growth of the technology sector has been a key catalyst for the sustained economic prosperity enjoyed by the country over the last decade. This sector's success has been at least partly attributable to innovative and substantial measures – such as Team Canada trade missions and labour-sponsored venture capital funds – taken to promote it and provide it with resources. In contrast, the funding model

for charitable agencies is dependent upon negotiating lengthy bureaucratic processes and adhering to labyrinthine regulation. Moreover, the general Canadian trend to lower tax rates has resulted in a decline in the after-tax value of the charitable tax credit over time.<sup>47</sup> This and other trends gives rise to concern about whether recent increases in overall charitable giving in Canada can be sustained over the long term.

The desire for limiting the scope of charities is understandable in light of the significant tax expenditure entailed in supporting their work. However, the regulatory regime that determines charitability ought to take into consideration the limitation of resources faced by small-scale, not-for-profit organizations. In other contexts, such as its treatment of technology start-ups, the government has structured its approach recognizing the limited capacity but immense potential of a key sector of the economy.

## Methodology

Professor Donovan Waters writes in *Law of Trusts in Canada*:

There is no legal definition of charity. Common law societies have always relied upon a judicial understanding as to which activities merit the description of charitable. Consequently, one can describe the attributes and the scope of charity; one cannot define it.<sup>48</sup>

This paper will not attempt to offer a comprehensive normative definition of charity.

Listed below, in the section entitled CCP Research Findings, are CCRA reasons given to applicants for their not qualifying, and some generic descriptions of the types of applicants refused and their work. The various reasons for CCRA refusals are discussed in the paper, and reform options are developed based on this analysis and a review of past proposals.

Unfortunately, it has not been possible to obtain a comprehensive listing of organizations that have had their application for registration refused or their registration revoked.

CCRA's position is that under the legislation governing the confidentiality of taxpayer information, it is not permitted to release material on specific applications. CCRA has released figures that show that the percentage of applicant organizations it determined qualified for registration has fallen significantly during the last decade. Figures released by the Agency show a percentage decline in approved registrations from 84.6% in 1992-93 to 67.0% in 1998-99.<sup>49</sup>

In the autumn of 2000, the CCP placed research queries seeking subject organizations, and contacted a number of voluntary sector umbrella organizations and lawyers with clients in the charitable and not-for-profit sector asking for assistance in identifying

appropriate examples of applications for registration that were denied or whose status had been revoked. Organizations were asked to provide background materials relating to their application, purposes and activities and copies of correspondence with CCRA. Representatives of the organizations were also interviewed.

Some organizations expressed reluctance to have their names or the particulars of their circumstances identified in the research, lest this compromise further or future dealings with CCRA. Consequently, organizations are not specifically identified. Copies of all research documentation are on file at the CCP.<sup>50</sup>

## **CCRA's Administrative Process and Agency Position**

To be recognized as a registered charity an entity must submit an application to CCRA. Although CCRA claims that changes implemented in recent years have resulted in quicker assessment of applications, our research indicates that processing of even normal applications can be very slow, and typically takes several months. If the application is unusual, or if the applicant has not submitted complete information, processing can take even longer. Having an application pending for more than a year is not unusual.

Organizations whose applications are disputed by CCRA are sent 'Administrative Fairness Letters' (AFLs). These letters set out the reason or reasons the application is problematic, and explain that the application in its current form is unlikely to be approved. They also set out how organizations should proceed if they do not agree with CCRA's assessment. AFLs give the applicant 60 days to respond in writing, giving reasons why the applicant's purposes and/or activities qualify as charitable at common law, to trigger a further CCRA review. If this review is unsuccessful, the letters indicate appeal then lies to the Federal Court of Appeal. Failure to respond within the required time can lead to the file being closed. Many applicants do not pursue charitable status once they receive their AFL owing to the lack of access to legal support or competing claims on staff or volunteer time and resources. Therefore, many applications fail without being formally rejected.<sup>51</sup>

Historical appeal figures released by CCRA in early 2001 give some indication of the range and frequency of dispositions of disputed applications and revocations over the last

twenty years. The 126 matters that precipitated legal action resulted in the following outcomes<sup>52</sup>:

Still pending	7
Went to trial, won by appellant	6
Discontinued; organization registered	25
Went to trial, won by CCRA	19
Appeal withdrawn, dismissed; organization not registered	69

This breakdown appears to show good judgement by CCRA in matters that were litigated, appellants enjoying less than a 27% success rate in achieving registration. However, a couple of observations put a different gloss on the numbers. First, in comparison to its opponents, CCRA frequently enjoys access to considerably more legal resources. Second, and more importantly, by settling cases that were presumably headed toward an unfavourable result before a decision was rendered, CCRA avoids having the court set binding precedents in these cases. So, even though an applicant has managed to successfully dispute CCRA's interpretation, similar groups in the voluntary sector are unlikely to benefit from this effort or expenditure of resources. Both financial barriers to court access and tactical concessions skew the results of charitable registration litigation unfairly in CCRA's favour, and reinforce the Agency's predilection for over-cautious interpretation of the law.

In a November 1998 presentation, a senior CCRA official set out some of the department's interpretations of the law. In "Defining Charitable Limits"<sup>53</sup>, Carl Juneau noted some of the criticism charity law has drawn, and acknowledged that the uncertainty around the law might be partly responsible for a perception of regulatory decisions as arbitrary.

Part of the uncertainty in this area stems from CCRA's practice of not disclosing the details of applications that have been refused. Under the *ITA*, taxpayer information is typically treated as confidential.<sup>54</sup> CCRA's position is that non-qualified entities are taxpayers and thus information about them is protected. However, the Agency's employee handbook and training materials are publicly available. CCRA's internal decisions and opinions are generically referenced in the materials, but specific documents dealing with particular applicants are not available to non-CCRA employees. However, the materials set out the principles upon which the Agency bases its application of the law.

An October 27, 1997 staff memorandum entitled "What is a Registered Charity" is particularly noteworthy. It states:

The standard charities – those which are clearly charitable – have long since been registered. While the Division continues to receive applications from new congregations of established churches and other well-recognized groups, an increasing number of applicants are at or near the line of acceptability.<sup>55</sup>

This comment is particularly informative in light of the fall in the percentage of approved applications seen in recent years and discloses a skepticism, or bias, against current applicants.

Elsewhere in the training materials, a “Hierarchy of References” is set out.<sup>56</sup> This hierarchy determines the weight given to various precedents and examples in assessing the eligibility of a particular entity for registration. Employees are advised that the Agency is “only bound by case law coming out of the Canadian federal court system”, though it is permissible to rely on case law from other Canadian jurisdictions “in the absence of direction from the federal courts”. They are also told that they are “not bound by past decisions of examiners, only by those of superior jurisdictions”.<sup>57</sup>

An uncredited CCRA background paper entitled “Who’s Out”<sup>58</sup> listed the types of organizations that are not considered by the Agency as qualifying for registration. It also described the types of organizations that fall within ‘grey areas’ and are assessed as qualifying or not qualifying based on their representations of their purposes and/or activities. The paper cautions against relying on categorization of organizations according to type, arguing that this can be misleading. This is because determinations of qualification for charitable registration are based on examination of what an organization does or proposes to do, rather than what type of organization it is. Nonetheless, the paper provides an Agency perspective on how the assessment process applies to groups in specific segments of the voluntary sector. Groups in the first category – i.e., non-qualifying – included:

- member-based clubs and societies;
- organizations promoting a particular sport;
- mutual assistance organizations and co-operatives;

- groups representing their members' interests;
- organizations benefiting named individuals or families or employees of a particular company;
- groups narrowly defining their membership by ethnicity, language, gender, etc. and providing benefits not logically connected to membership criteria (e.g.: a men's only refugee group);
- organizations promoting members' business interests or work in exclusive partnership with the private sector;
- entities involved in revenue-generating business activity not connected to a charitable purpose;
- fundraising organizations providing unrestricted monies to overseas partners;
- organizations pursuing political agendas;
- organizations seeking to change people's opinions on a specific issue or specific issues;
- organizations that pursue education only by disseminating information;
- mainstream or popular arts organizations that emphasize entertainment value rather than artistic merit;
- festivals focussing on popular culture rather than the arts;
- organizations offering unproven health services; and,
- intermediary organizations facilitating and co-ordinating work of groups that are not necessarily registered charities.

The second category – i.e., ambiguous or grey area groups– included multicultural organizations, race relations organizations, groups promoting international understanding, religious groups, organizations that cannot show they provide the community at large with a direct and tangible benefit, and organizations serving a limited segment of the community.

The paper sets out common reasons each type of organization in the second category fail to qualify. Multicultural organizations are often considered by the Agency to be primarily advancing the interests of their members or operating a social group under the guise of promoting multiculturalism. Race relations organizations are frequently disqualified because their purposes and/or their activities are deemed to have a political aspect. Organizations that purport to promote international understanding can also be characterized as political if their activities foster good relations between particular states, as this is considered to be a foreign policy matter and inherently political in nature.

Religious organizations can run afoul of the requirements for registration because they are not deemed to be legitimate, because they are considered overly member-oriented, or because there is a political aspect to their activities. Citizen-based interest groups, whose work focusses on informing or sensitizing the public on particular issues, can be disqualified because it is felt that the impact of their activity cannot be reliably measured. Finally, where registration is denied because the organization is not considered to reach an adequate segment of the public, the Agency usually deems there to have been an insufficient connection between selecting the beneficiaries and the proposed charitable purpose.

## CCP Research Findings

The cases of refused or revoked registrations disclosed by the CCP research come from a wide range of contexts. As many applications fail for multiple reasons, categorization or grouping of applicants is necessarily somewhat arbitrary. The organization of applicants in the analysis below is designed chiefly to ensure that the most common issues arising from the application process are highlighted and addressed. The issues most frequently faced by applicants include:

1. not falling within the four heads of charity as determined under the common law;
2. being constituted in a way that permits use of resources that are not exclusively for charitable purposes;
3. failing to meet the public benefit requirement because of the narrow scope of the community served, because the benefit accrues primarily to members, because the applicant's work also gives rise to a private benefit, or because the benefit is provided indirectly;
4. engaging in political or advocacy activity;
5. being an umbrella organization that serves non-qualified donees or facilitates achievement of a charitable purpose or purposes indirectly;
6. being a community or umbrella sports, recreation or arts organization that does not meet the statutory definition of a qualifying sports or arts organization contained in the *Income Tax Act*.

Our research disclosed refusal to register or revocation of the registration of groups mandated to foster:

- cultural pluralism;
- tolerance of diversity;
- economic and social participation by disadvantaged groups;
- internationalism;
- environmental protection;
- human rights and civil liberties.

Specifically, unicultural and multicultural assistance groups, culturally-focussed community and resource centres, organizations promoting local or sustainable trade, international co-operation groups, grassroots and umbrella environmental organizations, refugee support groups, and community or umbrella sports, arts and recreation groups were assessed as failing to qualify. Again, as with the “Who Out” paper categorizations discussed above, dividing rejected applicant by type of group is potentially misleading as assessment of eligibility is made on the facts in the circumstances. Nonetheless, this kind of analysis does provide a useful guide to problem areas.

## Defining Charity

The starting point for defining what is charitable is public benefit. To meet the legal definition of charity it is a necessary, though not sufficient, requirement that there be a public benefit conferred. Assessment of whether a public benefit exists is determined by reference to two tests. Public benefit must be tangible and must extend to either the public-at-large or to a sufficiently sizeable portion of the community.

As well as conferring public benefit, entities must satisfy the requirement that their purposes fall within the *Pemsel* categories of charitableness. (The strictness in assessing an entity's public benefit requirement turns on where it fits within the *Pemsel* classification. For example, an organization applying under the fourth head of *Pemsel* typically faces a more arduous requirement to show public benefit than an organization fitting within the relief of poverty category.<sup>59</sup>) To bring a novel purpose within the ambit of the definition an analogy must be found between it and a purpose previously established as charitable. Prior to *Vancouver Society*, where the purpose was asserted to fall under the fourth *Pemsel* head as a purpose beneficial to the community, reference was routinely made to 'the spirit and intendment' of the preamble to the *Statute of Elizabeth* to see if the purpose qualified as within the preamble or as akin to purposes previously decided to be within it. Given Justice Iacobucci's comments regarding the preamble in *Vancouver Society*, it is not clear that this continues to be a test against which charitableness is measured in Canadian law.<sup>60</sup> It is well-established that entities outside the *Pemsel* scheme do not meet the definition regardless of their intrinsic merit, unless they can be brought within one of the historical anomalies in the case law.<sup>61</sup>

Certain factors exclude an entity or purpose as being charitable, even where it would otherwise meet the legal definition. Purposes or activities that are contrary to public policy cannot be charitable. Entities based primarily or disproportionately on personal gain or pursuit of the mutual interests of the membership are not charitable. Entities that contemplate generating or distributing profit are also excluded. As well, entities with defining political purposes or whose activities contain a substantial political element are commonly held not to be charitable. Any degree of partisan political activity will mean an entity cannot be charitable.

Although the defining purposes of registrant or applicant organizations cannot be political, there is scope within the current provisions of the *Income Tax Act* for them to undertake limited and closely-circumscribed political activity. Specifically, under current Canadian law, the courts – and CCRA as the administrative body charged with granting charitable registration – must assess whether organizations or foundations applying for charitable registration under the *Income Tax Act (ITA)* qualify based on the following criteria: 1) a determination that the purposes of the applicant are charitable pursuant to the common law or are deemed charitable in the *ITA* and that these purposes define the scope of the activity of the applicant; and 2) a determination that, taking into account the deemed charitable purposes and activity set out in *ITA* s. 149.1(6.1) and s. 149.1(6.2), the applicant devotes all its resources to charitable activity. It is noteworthy that non-partisan political activities devoted to fulfilling an enunciated charitable purpose of the

organization or foundation are acceptable even if outside the scope of *ITA* sections 149.1(6.1) and 149.1(6.2).<sup>62</sup>

In *Vancouver Society*, the Supreme Court of Canada went even further than this, holding that stating political activity as a purpose would not disqualify an organization as charitable, so long as that particular purpose was ancillary and incidental to another stated purpose that qualified as charitable. Justice Iacobucci noted that the Society had explicitly characterized two of its purposes as to carry out political activities and to raise funds. But, he found:

it is significant to note that paragraphs (b) and (c) of the Society's purposes clause make clear that the activities to be carried out in furtherance of those purposes are to be "ancillary and incidental" to purpose (a), which I have found to be a valid educational purpose.<sup>63</sup>

Thus, he holds:

the sole purpose of carrying out political activities and raising funds is to facilitate a valid educational purpose. Thus, in my view, purposes (b) and (c) can be taken as means to the fulfillment of purpose (a), not ends in themselves, and thus do not disqualify the Society from obtaining registration as a charity under the *ITA*.<sup>64</sup>

As noted above, legislative provisions also govern the limits on charitable activity carried on abroad and on some business activities of charities. Section 118.1(1) of the *ITA* contemplates permitted transfer of resources to 'qualified donees' outside Canada. CCRA also has guidelines on conducting overseas charitable activities through agents, contractors or jointly with another organization. *ITA* section 149.1(2), (3) and (4) permit revocation of registration where a charitable organization, public foundation or private foundation carries on a business unrelated to the objects of the charity. Charitable private

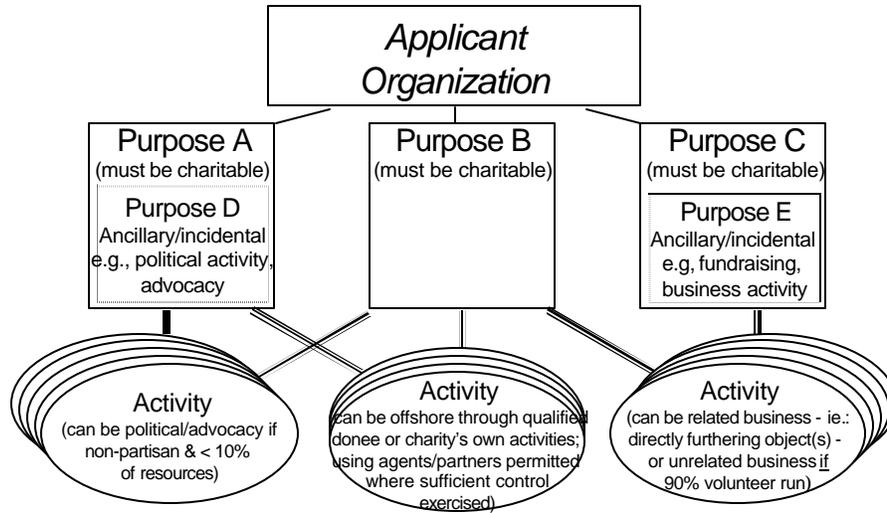
foundations may not carry on any business; however, charitable organizations or public foundations may carry on related businesses. Under *ITA* section 149.1(1) a related business is defined to include business unrelated to a charity's objects if it is carried out substantially by individuals who are not remunerated – i.e., volunteers. CCRA's practice is to treat substantially as meaning 90% or more.<sup>65</sup>

Registrant organizations are compelled by s. 149.1(1) to devote all their resources to charitable activities, as defined by the common law. A similar provision precludes the use of resources for non-charitable purposes or activities by foundations.

Figure 1 illustrates the various statutory and common law considerations in determining whether an organization falls within the legal definition of charity. In this example, purposes A-C must be charitable according to the common law tests; purposes D or E need not be charitable according to those tests but must be ancillary or incidental to other charitable purposes; and, political/advocacy, overseas, and unrelated business activities must fall within their respective *ITA* exemption or deeming provisions.

Figure 1:

## Determining Exclusive Charitability



### Reform proposal:

- a. **Entrench in legislation a comprehensive new definition of charity based on contemporary values incorporating various legislative or common law elements of the existing definition**

## Reasoning by Analogy

*Vancouver Society* provided a compelling contemporary example of the imprecision of using analogy to determine charitability. Justice Iacobucci took a narrow view of a line of cases dealing with purposes related to immigrants, and thus decided that the immigrant women's society's work was not analogous to these cases. Judicial deference to the legislature in tax matters is not mentioned in Justice Iacobucci's analogical analysis, but it is revealed in his rejection of a radical new approach to determining charitability, when he states:

the new approach would constitute a radical change to the common law and, consequently, to tax law. In my view the fact that the *ITA* does not define "charitable", leaving it instead to tests enunciated by the common law, indicates the desire of Parliament to limit the class of charitable organizations to the relatively restrictive categories available under *Pemsel* and the subsequent case law. This can be seen as reflecting the preferred tax policy: given the tremendous tax advantages available to charitable organizations, and the consequent loss of revenue to the public treasury, it is not unreasonable to limit the number of taxpayers who are entitled to this status.<sup>66</sup>

While this is offered as a compelling reason for the judiciary not to adopt a wholesale change in how charitability is determined, it also discloses a pre-occupation with tax consequences that is apt to result in a narrower scope for the judiciary extending the definition of charity by analogy. Analogy should be assessed on the basis of the intrinsic characteristics of the purpose or purposes under consideration, not on external factors, such as tax policy.

Justice Gonthier, writing for the minority in *Vancouver Society*, attempted to set out some of these intrinsic factors. He analyzed the case law on the legal definition of charity as focussing on two principles. These are "voluntariness" and "public welfare or benefit in

an objectively measurable sense.”<sup>67</sup> He argued that assessment of whether purposes are analogous to those of the *Statute of Elizabeth* should be guided by reference to these two principles.<sup>68</sup> This contrasts with the piecemeal approach to drawing analogies often found in cases about the definition of charity.

It is noteworthy that the *Native Communications* decision was greeted by commentators as a potential breakthrough in the legal definition of charity.<sup>69</sup> However, this enthusiasm was soon dispelled as other decisions narrowed the *Native Communications* holding to situations dealing with natives and limited its impact. Rather than analogizing based on the principles of *Native Communications* the judiciary analogized based on its facts. Accordingly the law developed much more incrementally than it otherwise might have.

Another approach, which is raised and dismissed by Monahan<sup>70</sup>, would be for courts to undertake a factual analysis of the merit and public benefit of the proposed work of applicants. *Charter* cases have given Canadian courts some experience in making such fact-based enquiries weighing competing societal values. These cases have, of course, drawn mixed reaction. Response to such an approach in the context of charitable registration would likely turn on the criteria used by the courts to determine merit and public benefit. It is not clear such an approach would create more certainty in the anticipated tax expenditure arising from charitable registration or among applicants as to the likelihood of being registered.

A final approach would be to give CCRA explicit power to register applicants by drawing its own analogies with case law, rather than relying on only on the judiciary to find analogies. Currently it refrains from drawing all but the most obvious analogies.<sup>71</sup> Given the Agency's mandate and history of cautious approaches, it is unlikely that such a move would result in a marked increase in the number of applicants approved. It might, however, serve to foster increased receptivity at CCRA to non-conventional applications.

Reform proposals :

- a. Adopt Gonthier's test of altruism for the public benefit as the basis for analogizing new charitable purposes**
- b. Have courts make a factual enquiry into the merit and public benefit of the activities of applicants**
- c. Give CCRA explicit power to qualify using analogy**

## **Exclusive Charitability**

The requirement that to qualify for registration applicants must – subject to statutory and common law exceptions – devote all their resources to charitable activity is increasingly contested as unduly restrictive. CCRA relies extensively on this requirement as a bar to registration of contentious applicants. Among the most common comments in the Administrative Fairness Letters disclosed by CCP research is the statement that a purpose or activity is so broadly-worded ‘as to permit the pursuit of non-charitable purposes or activity’ or words to that effect.

The Charities Directorate’s mandate is “to administer fairly and equitably and to enforce responsibly the provisions of the *Income Tax Act* relative to charities...”<sup>72</sup> From this it is clear CCRA has no brief to develop or expand the law of charity. In practice, responsible enforcement seems to invariably trump fair and equitable administration in the Directorate’s decision-making. Where ambiguity exists, the Agency errs on the side of caution. The impact of this conservative approach to the law is magnified by other features of the current regulatory regime.

A review of the materials disclosed by the research indicates considerably more creativity in drawing distinctions than in finding similarities between the purposes of applicants and those of previously approved registrants or objects that have been found to be charitable by the courts. Moreover, CCRA’s stated position is that it is not bound by its own precedents.<sup>73</sup> Finally, the Agency does not release names of applicants that have been refused registration or the reasons individual applicants were refused. These practices

make it difficult for applicants to determine exactly what the law is, and how it will be interpreted.

Owing to concerns over abetting tax fraud, CCRA does not provide specific direction to applicants on how to structure their operations or word their applications so as to meet the exclusive charitability requirement. As well, frequently there is no allusion made in CCRA correspondence with applicants to the statutory or common law exemptions that allow limited and circumscribed non-charitable work by qualifying organizations.<sup>74</sup> This makes the Agency decidedly unhelpful to marginal applicants willing to adapt their mandates somewhat to bring them within the scope of what is acceptable.

Leaving aside, for the moment, systemic issues, there is a practical concern with the stringent limitation of registrants to exclusively charitable work. It is the nature of organizations that they evolve over time. Accordingly, it is common when drafting the objects of a corporation, whether the intention is to create a for-profit, not-for-profit or charitable entity, to include a residual clause which will catch those elements of the organization's activity that are not apparent at its inception.

Among phrases describing their objects used in the past by organizations seeking registration are 'and such other purposes recognized by the law as charitable' and 'to do all such things that are incidental and conducive to the attainment of the aforementioned objects'. The first phrase draws criticism as tautological, and devolving the authority for

determining what activities qualify to the organization's management, rather than leaving this assessment with the courts or the registration authority. This makes it unacceptable.

The second phase is now precluded owing to Justice Iacobucci's finding in *Vancouver Society*<sup>75</sup> that non-charitable activities of the applicant organization in that case were carried on under the auspices of being 'conducive' to the applicant's other purposes. CCRA apparently uses this finding as a rationale for disallowing registration where applicants use the word 'conducive' in their objects – arguing that it opens the door to the applicant engaging in non-charitable activities. This leaves applicants little room to provide for future organizational development that is not contemplated at incorporation.

In contrast, under most contemporary incorporation legislation, it is entirely up to the incorporators to determine whether or not they wish to impose any restrictions on the business that the corporation may carry on. Industry Canada's *Small Business Guide to Federal Incorporation* advises those initiating a for-profit business that: “[m]ost companies do not provide any restriction”<sup>76</sup> on activities in their incorporation documents. As well, it is common practice when incorporating a for-profit concern to include a clause in the objects that permits pursuit of objects not foreseen at the time of incorporation. This recognizes that the orientation of a business may evolve over time in response to the needs of the market. The exclusive charity required by the registration regime precludes qualifying organizations from enjoying this same flexibility.

An effective regulatory regime inevitably necessitates some control over the scope of the activities of qualifying organizations. However, in contemporary society it is important to acknowledge the rapidity of change and create adaptable structures capable of responding effectively to that change. The tightness of the current regulatory regime discourages organizational innovation and evolution to meet changing needs. Put simply, it handicaps the ability of the sector to respond to the demands of the market.

Even accepting the need for an exclusive charitability requirement, as currently applied it places an indefensible hardship on applicants and the voluntary sector. The Broadbent Report identified the lack of resources and the capacity-building needs of the sector.<sup>77</sup> Registration applicants are typically, if not universally, under-resourced. For many applicants funding for legal advice on what qualifies as charitable work and how to structure themselves in a way that precludes even the remote possibility that resources might be used for non-charitable activity is simply not available.

### *Regulating by Audits Rather Than Registration*

Often applicants simply do not pursue applications or devote their limited energies and resources to pursuing them unsuccessfully. Applications are frequently abandoned after issuance of the Administrative Fairness Letter, with CCRA not even required to formally reject them. In a typical year, only about 75% of AFLs generate a response. Effectively, this means that some areas of public benefit activity are presumptively not supported by the tax benefits to which charities are entitled under the *ITA*. Once an AFL is issued, an

applicant's chances for approval fall dramatically.<sup>78</sup> The opportunity costs to the voluntary sector and to Canadian society from this regulatory inefficiency are impossible to measure, but are clearly more significant than they would be were the registration process more transparent, consistent, supportive, open to the consideration of analogy, and accessible.

The business community has, often successfully, argued the need for deregulation to promote efficacy. Such arguments have demonstrated the importance of weighing the benefits of regulation of a particular sector against its costs.

This raises the question of whether the current procedure, where CCRA assesses exclusive charitability at first instance is appropriate. The Agency's institutional biases may just be too great for it to do so fairly. A better alternative to the current procedure – given the annual filing requirement for registered charities and that under *ITA* sections 149.1(6.1) and 149.1(6.2) some ostensibly non-qualifying activities can be considered charitable – might be for CCRA to allow marginal organizations more latitude when the initial application is filed and to identify problem activities through auditing. Much of the orientation of CCRA's work in other contexts is through controlling inappropriate activity through auditing. Currently, the Charities Directorate audits only about 600 registrants per year,<sup>79</sup> with most of those audits triggered by complaints rather than based on any risk assessment criteria.

For example, some foreign jurisdictions allow severance of non-charitable purposes from charitable purposes.<sup>80</sup> It is conceivable that CCRA could offer the option of registering the charitable aspects of the organization, with a requirement that the non-charitable work be dropped or transferred to another organization. To some extent CCRA already does this by countenancing the establishment of parallel foundations in cases where applicants themselves may not qualify as charitable.

The contemplated change would involve CCRA doing so much more actively. Where an organization was on the borderline, it would be given contingent registration with a requirement that the non-charitable purpose or activity be addressed within a specified timeframe. At the end of the specified period, CCRA would verify that the non-charitable work of the applicant had been discontinued and determine whether it had brought itself fully within the scope of requirements to be considered charitable.

Even if an organization is deemed not to be a charity by CCRA when it applies, it is still subject to a finding at common law that it is a charity. That is, it could still be subject to a trust application or action. In *Re Laidlaw Foundation*<sup>81</sup>, for example, Southey, J. accepted that certain recipients of amateur sports funding were organizations that were charitable at law. It is telling that *Re Laidlaw* arose from an action by the Ontario Public Guardian against a foundation, which it argued had improperly transferred trust assets to non-qualifying entities. Thus, it was decided in a context free of the consideration of the impact on tax revenue such as may prejudice CCRA's assessment in like cases.

CCRA does not recognize *Re Laidlaw* as a precedent for its decisions on the charitability of sports organizations, on the basis of Federal Court Justice Stone's comment about the case in *Toronto Volgograd Committee v. Minister of National Revenue*. CCRA Training Materials state: "The Federal Court has indicated it will not follow the Ontario lead in the *Laidlaw* case which found sporting organizations to be charitable."<sup>82</sup> Justice Stone found that the Ontario courts, both at first instance and on appeal, rightly took a more liberal interpretation of Lord Macnaghten's definition on the basis that it had been adopted in the *Charities Accounting Act* statutory definition.<sup>83</sup> This is as distinct from common law definitions that are subject to stricter interpretation. However, it would still be possible to reconcile *Re Laidlaw* with a finding that the subject organizations qualified as registered charities. It is argued here that Justice Stone's finding merely implies that there was scope for broader interpretation under the *Charities Accounting Act* than under the *ITA*, which does not define the meaning of charity.

CCRA's training material and registration process place quite limited importance on cases dealing with the legal definition of charity outside the context of the federal registration process. This allows CCRA to use the narrowest possible criteria for its assessment. If CCRA were obliged to take provincial court decisions regarding definition of charity into account, the criteria for acceptable purposes and activities would be broadened. It would also give applicants a larger body of case law to consider and rely on in arguing that their work was within the parameters of the common law definition.

Reform proposals:

- a. Create an administrative mechanism to ensure CCRA applies statutory (and common law) exclusivity exceptions**
- b. Apply test re: exclusive charitability during auditing rather than at registration**
  - b.i Allow contingent registration of marginal applicants for charitable status, with subsequent verification to ensure unacceptable work has been severed from the applicant's purposes or activities**
- c. Oblige CCRA to take into account provincial court decisions on the legal definition of charity when determining exclusive charitability**

## **Political Activity & Advocacy**

An appropriate starting point for understanding CCRA's evaluation of applicant organizations engaged in advocacy or political activity is perhaps Carl Juneau's comments on this topic in his paper "Defining Charitable Limits". Mr. Juneau states that political purposes are, generally, those either directly or indirectly intended to influence public officials or legislators. Lobbying is given as an example of a direct influence and attempting to sway public opinion is given as an example of an indirect influence. Three reasons are given for political purposes not being considered charitable at law: a) the inappropriateness of the courts as a forum for determining whether a proposed change in the law would be desirable for the country; b) the courts not wanting to impinge on the power of legislators to determine what the law should be; and, c) the inappropriateness of governments supporting through a tax subsidy organizations whose purposes are to oppose laws that the governments are seeking to implement.<sup>84</sup> These reasons can be characterized as the assessment argument, the jurisdictional argument, and the cross-purposes argument. Each of these arguments is at odds with the current reality of democracy in Canada.

The assessment argument holds that the courts (and by extension CCRA) are not the proper venue to determine the advisability of changes in the law. This argument has been shown to be of dubious historical origin<sup>85</sup> and inconsistently applied over time.

Moreover, working to sway public attitudes, promote policies, or influence legislators ought not to be taken as wholly synonymous with changing the law. This overstates the case. The complex problems and competing political interests of contemporary society

argue against a straight-forward correlation between advocacy activity and a desired regulatory or legislative outcome. Certainly, it is not predictable that public awareness campaigns will result in legislative or policy change as envisaged by the organization mounting the campaign. This supports allowing greater scope for such activity.

Further, registering an entity as a charity does not entail endorsing positions espoused by that entity. Rather, it recognizes the validity of the means used by that entity to build its case and make its representations. For example, in order to determine whether Public Policy Institutes qualify for charitable registration, CCRA has developed a classification and indicator system to provide an analytical framework for assessing their activities.<sup>86</sup>

One commentator has argued persuasively for legislative reform of the definition of charity to permit unambiguous inclusion of Public Policy Institutes.<sup>87</sup> Clearly, Public Policy Institutes can and do have an impact both on public attitudes and on government legislation and policy. Some would even argue that they play a vital role in introducing new or controversial ideas into the public discourse. There is no sound reason that organizations not constituted as Public Policy Institutes, but also engaged in policy development and promotion, ought not to be evaluated against the same benchmarks currently in place to assess the institutes.

Grassroots organizations, which seek to effect social change through influencing public opinion and fostering pressure for legislative change, have never enjoyed the intellectual cachet of Public Policy Institutes. Institutes are often described as akin to academic institutions, and can arguably be considered as qualifying for registration as charities

under the Pemsel educational head.<sup>88</sup> However, analyzed on the basis of their purposes and activities they can as easily be characterized as engaging in the same type of advocacy work as some community-based groups.

It is of course necessary to make a distinction between those community groups that seek to create change through appeal to emotion and rhetoric and those that wish to make a contribution to public policy debate through reasoned argument. Justice Iacobucci's broadening of the definition of education in *Vancouver Society*<sup>89</sup>, if followed in CCRA administrative decision-making, should offer more scope for these types of organizations to be recognized as charitable.

Justice Iacobucci held:

In my view, there is much to be gained by adopting a more inclusive approach to education for the purposes of the law of charity. Indeed, compared to the English approach, the limited Canadian definition of education as the "formal training of the mind" or the "improvement of a useful branch of human knowledge" seems unduly restrictive. There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view.<sup>90</sup>

This endorsement of a broader concept of education can be buttressed by a compelling policy argument, in the context of globalization, for providing a solid resource base for organizations that seek to enfranchise civil society through reasoned activism rather than rhetorical appeals. At the very least, the work of such organizations deserves to be evaluated against the same standard as that of other entities conducting similar activities.

As for the jurisdictional argument, as Canadian charity lawyer Blake Bromley<sup>91</sup> has pointed out, the deference afforded by the British courts to parliament arose in a unitary state without a written constitution or an equivalent to the *Canadian Charter of Rights and Freedoms*. In a federal system, either national or provincial laws can be determined by the courts to be *ultra vires* the constitutional powers of the government enacting them. Accordingly, they cannot be presumed valid. The existence of the *Charter* further supports this, providing another means by which legislation can be challenged. Canadian courts regularly determine whether legislation accords with the constitution in the same way that they determine whether actions or claims accord with the law. Thus the concern that by recognizing advocacy activity as beneficial to the public they are usurping the legislature's function is much less compelling in the Canadian context.

Finally, the argument against providing an indirect tax subsidy to organizations whose purposes are at odds with the government is a mischaracterization of what is more properly described as a reluctance of the courts to compel government to change an existing fiscal policy. Reference is frequently made in jurisprudence dealing with the legal definition of charity to the increased cost to the government of recognizing this or that type of organization, trust or foundation as charitable. However, the predominant funding model in Canada (certainly at the federal level) for civics, arts, educational, multicultural, health, social service and sports undertakings – many of which are currently denied charitable registration – is to provide arms-length grants.

Arms-length funding is predicated on assessing organizations and activities on the basis of their intrinsic merit and not on the basis of their politics. Given this, it is at least somewhat ironic that within the context of charitable registration, organizations are subject to an evaluation of their politics. It is notable that in the case of other tax expenditures there is no test as to political acceptability. Business claims for expenses incurred in advancing broad political or policy objectives are not disallowed because they are not in keeping with the government's agenda.<sup>92</sup>

This issue can also be joined from another angle. For-profit companies routinely deduct the cost of advocacy and lobbying expenses from their revenue in calculating their income; this is a tax expenditure by the government. As directors of for-profit companies are bound to act in the best interests of their corporation, it is apparent that the lobbying and advocacy activities of an individual business will not necessarily be undertaken for their public benefit. However, they can be justified on the grounds of broadly enhancing business efficacy and so promoting public welfare (the 'if it's good for General Motors it's good for Canada' argument) or on the grounds that they promote business profitability and so will result in greater tax revenues over the long term (the 'give now, get later' argument).

Similarly, advocacy and lobbying by charities can be justified by the general public benefit that accrues from them. The supposition that enhancing the efficacy of the charitable sector will necessarily result in a general public benefit does not enjoy the same currency among opinion leaders as the 'if it's good for General Motors it's good for

Canada' argument. However, a survey of public opinion about charities by the Canadian Centre for Philanthropy and the Muttart Foundation found that over three quarters of those interviewed thought that charities understand the needs of the average Canadian better than government<sup>93</sup>, and more than two-thirds of respondents thought that charitable organizations do a better job than government of meeting those needs.<sup>94</sup> This would argue that what amounts to a tax expenditure on charitable advocacy and lobbying (i.e.: the tax credit for charitable donations) is justifiable.

The 'give now, get later' argument is much less compelling given the generally successful campaign of business in recent years for lower taxes. It can be seen from this that business advocacy and lobbying activities can result in a net loss of revenue to government rather than a net gain.

An argument can be made that permitting unregulated charitable lobbying and advocacy activities results in non-consensual subsidization of such activities by individual taxpayers. Because contributors to charities receive tax credits for their donations, other taxpayers would effectively support this activity through an after-tax tax expenditure.

This subsidization is arguably more egregious than that of business lobbying and advocacy activities because in the case of charities the cost of the expenditure is calculated in after-tax dollars rather than in pre-tax dollars. However, receipted donations only account for about 10% of registered charities' total revenues, so there is justification for permitting this greater tax advantage to charities.<sup>95</sup> Effectively the

subsidization, though greater in kind, actually accrues against a much smaller (in actual dollar and percentage terms) revenue pool than is the case with business.

A further argument against precluding advocacy or political activities as an aspect of charitable work can be made on the basis of developments in human rights law. The public benefit of freedom of speech is compellingly argued by Justice G.F.K. Santow, of the Supreme Court of New South Wales, in his paper “Charity in its Political Voice – a tinkling cymbal or a sounding brass”. Justice Santow examines the issue of political objects as treated in English and Australian case law. He suggests that proportionate political activity, when directed to indubitably charitable ends, may be mandated by recent British human rights legislation that incorporated freedom of expression provisions of the European Convention.<sup>96</sup> Justice Santow argues that adoption of this legislation means that freedom of expression, with certain necessary qualifications, now represents the “established policy of law” in England.<sup>97</sup>

He suggests that if proportionality between ends and means is maintained, this change in the law

should not open the floodgates to projects of acknowledged debatability in the community. Rather they properly recognize that charities may not need to remain politically mute, nor so constrained that they cannot safely exercise their rights to freedom of expression in political debate, when all other members of society may do so.<sup>98</sup>

Such an argument obviously resonates in Canada with its constitutionally-entrenched right to freedom of expression.

There is case law to support the proposition that, in Canada, organizations or trusts seeking to promote enforcement of the existing law can be considered charitable.<sup>99</sup>

Australian jurisprudence has even upheld that trusts supporting a purpose toward which the law was tending can be charitable.<sup>100</sup> English Charity Commission materials advise that charities can engage in activities directed at securing or opposing changes in law or government policy, but only as an ancillary undertaking that can be shown to have a reasonable expectation of fulfilling the charity's main purposes in proportion to the expended resources.<sup>101</sup>

A close reading of CCRA Information Circular 87-1, which deals with registered charities' ancillary and incidental political activities, shows that CCRA's definition of political activities focusses on measures to change law or policy as political.<sup>102</sup> This leads to the inference that activities in furtherance or support of current law or policy are not caught by the provisions, and – provided they are not disqualified for other reasons – are permissible. This would be in keeping with the case law, but is never explicitly stated. At the least, a clear statement asserting the exclusion of this type of activity from scrutiny as political would give applicants more certainty about what the law is.

The arguments above suggest there should be at least some scope for liberal interpretation of political and advocacy work by charities. However, with the notable exception of Public Policy Institutes, where registration applicants may or do engage in advocacy or political activity CCRA's assessment frequently is markedly

uncompromising. Justice Stone illustrated this in *Native Communications* when he remarked:

...I do not share [CCRA's] concern. The record before us does not contain even the slightest hint that the appellant engages in or intends to engage in political activities. [The reference to political in the Society's objects] merely authorizes the procurement and delivery of information on a number of issues including political issues facing the native people of British Columbia. It does not authorize [the Society] to engage in political activities as such.<sup>103</sup>

It is apparent from a review of the applications disclosed by the CCP's research that CCRA's practice in regard to applicants that it sees as potentially political has not evolved significantly since Justice Stone's ruling.

In CCRA's assessments, the distinction between advocacy on behalf of clients and policy advocacy is frequently lost; non-partisan advocacy or political activity that is only a minor part of an entity's work is characterized as a bar to registration; activity deemed acceptable historically or in parallel organizations is routinely objected to; and, promotion of specific policies (even where such policies receive government sanction through funding or endorsement by other federal departments) is out-of-hand considered unacceptable.

A review of refused applications indicates that there is little nuanced understanding of the term 'advocacy' among CCRA assessors. In a number of cases brought to light by the research for this paper, applicant organizations identified themselves or were characterized by CCRA as carrying on advocacy activities. Although CCRA routinely interprets the stated purposes of registration applicants in the context of activities pursued by the applicant, it appears that where advocacy was determined to be a bar to

registration little or no attempt was made to explore the nature of the applicant's work in this area. Thus, an organization that alluded to advocacy activity in its constitution and statement of activities but which characterized itself as involved in 'reactive' rather than 'proactive' advocacy, and focussing its lobbying efforts on obtaining benefits and services for individuals, rather than on systemic change, was denied registration.

Other organizations whose advocacy focussed on influencing consumers or the public were deemed to be engaged in political activity. This is on the basis that "attempting to persuade the public to adopt a particular attitude of mind toward *some broad social issue of a controversial nature* can be political."<sup>104</sup> CCRA's interpretation of what constitutes a broad social issue of a controversial nature appears to be much less liberal than that of the British Charity Commission.<sup>105</sup>

A review of the applications generated by the research, and of CCRA's current database of registered charities, also reveals striking inconsistency over time in what is acceptable conduct. In several instances, applicants were able to point to comparable or sister organizations pursuing the same mandate who had earlier qualified for registration. In some cases, applicants even used the application of a parallel qualified organization as a model for their application, and were nonetheless refused. As well, a number of organizations that had had their charitable registration revoked – typically owing to their failure to file their annual return on a timely basis – reapplied with the same purposes and activities stated in their initial application only to see their new application fail.

Where an application is refused on grounds of advocacy or political activity, the Administrative Fairness Letter sent to the applicant will invariably describe the common law holdings that support the view that political activity or advocacy is not charitable. The letters, however, frequently do not mention the provisions in the *ITA* that contemplate a degree of ancillary and incidental activity by charities being permissible. CCRA's position appears to be that these provisions only apply after registration. The CCRA training manual states "The Income Tax Act was amended in 1986 to permit registered charities to carry on a limited amount of non-partisan political activity."<sup>106</sup> The inference appears to be that this activity is only permissible with respect to currently registered charities. This inference is decidedly out-of-step with Justice Iacobucci's holding in *Vancouver Society* that limited non-partisan activity was not only permissible by a registration applicant, but that such activity could even be characterized in the application as an incidental and ancillary organizational purpose.<sup>107</sup> Thus, there is some scope for political/advocacy activity under the current legislation and case law. Notwithstanding the strong argument for increasing the scope for such activity through legislation or regulation (e.g., by increasing the permissible percentage resource use on advocacy/political activity), applicants' opportunity for registration could be enhanced considerably merely by CCRA's recognizing and applying the existing law.

Promotion of a specific policy or goal is also apt to result in an organization being refused registration by CCRA. As with advocacy, the Agency's analysis of applications that use terms like promote, promoting or promotion does not appear to be particularly sophisticated. There is little indication that the nature of what is being promoted is

considered; alternatively, the Agency sets a very low threshold in determining whether what is being promoted has political or policy implications. Again, this can be contrasted with the practice of the Charity Commission.<sup>108</sup>

Several applicants who were interviewed characterized their promotion of specific policies as secondary organizational activities that they saw as falling within a broader educational mandate. However, in its assessment of applicants, CCRA does not appear to focus on the relative importance of the activity; rather, any promotion of a specific policy is apt to be a bar to registration.

One commentator has proposed that the issue of advocacy and political activity by not-for-profit organizations be dealt with through the creation a new category of tax exempt organization. “Registered Interest Organizations” (RIOs) would be tax exempt and would be able to offer tax receipts, but with a different rate of deduction than charities.<sup>109</sup> It is argued that this rate could be set to reflect the deduction available to corporations for lobbying expenses at the average effective tax rate. RIOs might also be subject to slightly different reporting requirements than charities or not-for-profit entities. This proposal has the virtue of putting political activity/advocacy on a much different footing than the present regime; however, CCRA’s past approach to ‘deemed charity’ categories, as illustrated by the small number of Registered Canadian Amateur Athletics Associations (RCAAAs) and National Arts Service Organizations (NASOs) that it has registered, does not instill confidence that such a scheme would be liberally administered.

1997 NSGVP figures show donations to organizations identified as civic and advocacy organizations of around \$19 million<sup>110</sup>. Self-help groups, some of which qualify under the current definition, were given another \$22 million.<sup>111</sup> Environmental groups, some of which would also qualify under the current definition, were given about \$10 million in donations.<sup>112</sup> International organizations, focussing either on exchange programmes, peace or human rights work drew another approximately \$7 million.<sup>113</sup> Research indicates the average federal tax benefit on charitable donations is about 27%.<sup>114</sup> Even if none of this \$58 million in donations is currently eligible for tax credits, the cost to the federal treasury would be only 27% of the entire \$58 million amount. So the actual total cost to the treasury would be approximately \$15 million.

Reform proposals:

- a. **Evaluate the advocacy/political activity of all registration applicants using the standards under which Public Policy Institutes are assessed**
- b. **Allow registration where an applicant engages in public awareness campaigns that don't explicitly advocate legislative, regulatory or administrative change**
- c. **Explicitly state that working to procure support, furtherance or development of law/policy is not a bar to registration**
- d. **Allow registration where an applicant works to procure law/policy change or reversal**
- e. **Systematically apply current or enhanced exemptions when considering applications**
- f. **Allow registration where an applicant engages in promotion of specific policies or practices**
- g. **Create a separate "Registered Interest Organization" category and tax benefit for entities engaging in political/advocacy activities**

## **Public Benefit, and the Fourth *Pemsel* Head**

Michael Chesterman is quoted, in CCRA training materials dealing with evaluation of applications falling under the fourth *Pemsel* head, as follows:

it must be appreciated that if one could somehow manage to identify all those purposes which were “beneficial to the community” and did not fall into any one of the preceding categories, one would not, despite appearances, have determined the boundaries of the fourth category.<sup>115</sup>

The scope between the common perception of what constitutes public benefit and what qualifies at law as public benefit gives rise to a considerable part of the controversy around who qualifies as a registered charity. Beyond being merely altruistic and of measurable contribution to the public welfare, the additional requirement that purposes be fitted into the existing definition – by analogizing to previously decided cases or by finding their purposes concur with the objects of the accepted anomalies in the definition – leaves room for much ambiguity.

Judges and commentators have frequently remarked on the imprecision of the definition of charity, particularly as regards the fourth *Pemsel* head. As long ago as the middle of the last century, one commentator was moved to remark that the concept of public benefit was “intangible and nebulous”, and had lead to “illogical and capricious decisions, sometimes impossible to reconcile.”<sup>116</sup> Justice Iacobucci acknowledges in *Vancouver Society* that “it is difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgement may be founded.”<sup>117</sup> In *Human Life International (Canada)*, Justice Strayer of the Federal Court of Appeal specifically noted the need to provide clearer direction to those administering the law. He called the legal

definition of charity “an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators and the courts.”<sup>118</sup>

Aside from the need for clarity and certainty in the law, a more fundamental argument for reform can be made on the basis of what actually constitutes charity as broadly understood by the public and of where the soundest policy argument can be made for supporting benevolent activities. For example, the Ontario Law Reform Commission drew a distinction between charity as a term referring to acts of kindness and consideration focussed on the needy and poor, and philanthropy as a concept for acts of generosity intended to provide support for human achievement, such as promotion of the arts.<sup>119</sup>

In keeping with this distinction, one British commentator who worked on the Goodman Report has argued “although the ideal criterion for charitable status would be any purpose beneficial to the community, since tax relief and the public’s ability to give are limited, the first priority was to concentrate on the disadvantaged.”<sup>120</sup> The analysis by which the current definition evolves does not take such abstract factors into consideration.

CCRA’s position, as expressed in correspondence with applicants, is that it is not its mandate to expand the definition. Rather its role is to follow the law as determined in the jurisprudence. Based on this role, the Agency can – ostensibly – take a conservative approach to approvals and not be affected by the imprecision of the law. However, given that in recent years the Agency has approved more than 2500 applications per year, it is

hard to credit that each one is on point with case law or follows unequivocally from previous decisions. Moreover, the marked change in the percentage of applications approved over the course of the 1990's, which is not justified by the number of cases litigated over the period and the consequent evolution of the definition, argues that CCRA's practices are not influenced solely by court decisions. Clearly, CCRA enjoys some room to decide the eligibility of applicants.

The Agency's assertion – that changes in the common law and differences in the amount and presentation of information provided with various applications preclude it from being bound by precedent – gives it even more scope in its decision making. Effectively, refusal to be bound by precedent, together with the ambiguity described above, provides a licence for what one Executive Director of an applicant called a “value-based interpretation of the law”<sup>121</sup> by CCRA.

### *Multicultural/Minority Groups*

Without a systematic analysis of the Agency's decision making on charitable registration it is impossible to state with certainty that the Agency regularly discriminates against applicants from outside mainstream Canadian society. However the CCP's research findings provide examples of at least some instances of apparent discrimination.

Views differ on the impetus behind CCRA's apparently skewed interpretation of the law. The refusal to register some applicants from cultural minority groups may stem partly

from the existing legal definition of charity, which reflects a Judeo-Christian and Western European conception of charity.<sup>122</sup> The discrepancies between the philanthropic traditions of some visible minority cultures and those of more mainstream cultures have been documented. One trend that has been noted is that immigrant donors appear to emphasize donating within their cultural communities, prior to beginning to donate to broader society.<sup>123</sup> Given that one of the criteria of public benefit is a requirement that applicants serve a sufficiently sizeable portion of the community, this culturally-based practice could result in disqualification of some organizations.

Applicants that target or restrict their activities to beneficiaries of a specific group, defined by criteria such as ethnicity, are considered by CCRA not to meet the public benefit requirement under the fourth head.<sup>124</sup> Organizations that provide the same services but focus on a larger group can be considered charitable.

Disallowing charitable registration because an organization's mandate is limited to a particular cultural minority is somewhat at odds with current Canadian immigration policy. Large numbers of immigrants and refugee claimants are often admitted to Canada from areas that are wartorn or have suffered from environmental disasters, or for humanitarian reasons. As well, with immigrants increasingly being of non-European origin, the likelihood of their sharing cultural characteristics, such as a language or religion, with broader segments of Canadian society becomes more remote. Denying organizations seeking to serve these communities registration is both culturally

insensitive and bad policy, if not simply discriminatory. Ironically, it may have the effect of discouraging self-sufficiency among these groups.

Anecdotal evidence also suggests that CCRA is less receptive to accepting activities carried on under the auspice of a cultural minority group as charitable than similar activities carried on by mainstream groups. For example, community-building social activities of a non-Western religious denomination, which parallel the social events of mainstream church groups, have been identified as a potentially non-charitable use of the applicant's resources.<sup>125</sup> This is perhaps in part because of the long-standing charitable registration of many 'mainstream' church groups; as is evident from an analysis of charitable registrations approvals over time, the standards applied to applicants appear to have generally tightened up in recent years. Regardless, this has still resulted in like activities being treated differently for registration purposes.

This leaves the CCRA open to charges of discrimination or even racism, or at very least leaves the applicant with the impression that the process is less than fair. Entrenching clear criteria for determining what constitutes a sizeable portion of the community would provide greater certainty and limit CCRA's opportunity for discriminatory application of the law.

A more sweeping solution would be creating a *prima facie* presumption of the charity of particular activities (e.g: employment counselling or community outreach), perhaps also linked to particular applicant characteristics (e.g.: enumerated

groups in s. 15 of the *Charter*) to ensure greater consistency in the application of the law. Such a scheme could go as far as recognizing all empirically demonstrable public benefit activities – a suggestion that was made in the CCP intervention in *Vancouver Society*, and which was well-received (though not adopted) by Justice Iacobucci<sup>126</sup> – or could involve a narrower test. This presumption would be rebuttable by showing the subject work should not be recognized as charitable because it is, or would be, contrary to public policy or is unacceptable for other specified reasons. A *prima facie* presumption based on transparent criteria would create greater certainty for applicants and bring the determination of what constitutes charitable work into line with the values of contemporary society. Depending on the scope of the criteria giving rise to the presumption, it might also lead to greater certainty in assessing the potential fiscal impact of changes to the definition.

Applications from community and resource centres serving specific segments of the population seem to be one area where there is a marked inconsistency in CCRA's treatment. Groups limiting their purposes and activities to women are sometimes challenged on why this is an appropriate restriction. In a number of instances disclosed by CCP research, CCRA has registered the group after the rationale for this restriction has been explained.<sup>127</sup> Our research indicates community or resource centres serving other minority populations do not enjoy the same success.

Under Canadian law, where an agency or individual is mandated by statute to exercise a power, the power must be exercised in accordance with *Charter* values.<sup>128</sup> It is submitted,

therefore, that if the definition of charity encompasses community or resource centres whose target population is limited to women, applicants having like purposes and engaging in like activities cannot be disqualified owing to their serving a target population other than women, where the target population constitutes an enumerated group under the equality provisions of the *Charter*.

*Charter* arguments claiming discrimination have been put in a number of cases where denial of charitable registration has been appealed to the courts. The response of the courts to the discrimination argument is typified by Justice Iacobucci's comments in addressing the s. 15 *Charter* challenge in *Vancouver Society*. In that case, it was submitted that the regulatory scheme as a whole resulted in discrimination against immigrant and visible minority women on the basis of the analogous ground of immigrant status. Justice Iacobucci dismissed this argument by finding that the requirement that qualifying organizations restrict themselves to charitable purposes and activities

applies uniformly to every organization that seeks to be registered as charitable. The rejection of the Society's application for registration was a consequence of the nature of its purposes and activities, not of the characteristics of its intended beneficiaries.<sup>129</sup>

While this speaks to the nature of the registration requirements, it does not address how CCRA applies these requirements.

It is telling that the CCRA training materials obtained by the CCP do not contain instruction on assessment of applications in accordance with the provisions of the *Charter*.<sup>130</sup> Indeed, most of the charitable registration examiners apparently have no

legal training. Given the amount of discretion that is available to the Agency under the law and because of its policies, this opens the door to real or perceived discriminatory application of the law. This could be addressed by improved *Charter* training for CCRA assessors. Alternatively or additionally, it could be addressed by entrenching elements of the definition in legislation or regulation so that they would be more easily subject to *Charter* scrutiny.

### *Member Benefit*

An applicant's being considered to focus on member benefit, rather than general public benefit can also preclude qualification for registration. This is a grey area because many organizations that are member-based do qualify for status, and determining eligibility requires weighing the relative value of the work to members and to the broader community. A distinction is made in the CCRA training material between self-promotion and self-help groups.<sup>131</sup> While self-promotion groups are disqualified from being charitable because their fundamental mandate is to serve the interests of their members, in some cases self-help organizations do qualify.

The training materials state that "organizations whose purposes seek to help individuals by conducting 'self-help' on a therapeutic, educational or rehabilitative environment can be viewed as charitable."<sup>132</sup> Qualification is limited, however, by consideration of the openness of the group to the general public and to the amount of external advocacy done by the group. As well, whether this work is the direct purpose or general orientation of

the applicant group is to be taken into account. Examples given of charitable ‘self-help’ groups are “support groups for alcoholics, prisoners, single parents, paraplegics, victims of crime, blind persons, etc.”<sup>133</sup>

In light of Justice Iacobucci’s broadening of the definition of education in *Vancouver Society*, there is scope within the criteria above for some previously disqualified or self-help organizations to be fitted within the definition. It is apparent from the breadth of the examples cited that CCRA is willing to recognize groups that address a wide-range of disadvantage.

Here again, however, there appears to be opportunity for CCRA to be somewhat arbitrary in what groups it chooses to recognize as disadvantaged. Accordingly, the distinction between self-promotion and self-help, and the criteria for determining disadvantage, would be clarified if included in legislation or regulation. This would both create more certainty in application of the law and act as a bar to discriminatory assessment of applicants by CCRA.

#### *Other Public Benefit Issues*

Although many commentators have remarked on the discrepancy in determining public benefit for the various *Pemsel* heads<sup>134</sup>, the nature of the present research did not highlight this issue. Accordingly, most of the recommendations below focus on enhancing the clarity, and consistency of application, of the current definition with

respect to fourth head charities. Once this definition becomes more certain, it is a separate question as to whether the fixed elements of the definition should be applied universally across the *Pemsel* categories. In general, it may be said that the research revealed much greater concern with ensuring a level playing field within the various *Pemsel* heads than with consistent application of the public benefit test across different categories.

Other issues relating to public benefit disclosed by the research include private benefit arising from the applicant's work and the benefit being conferred indirectly. These topics are dealt with, respectively, in the Community Economic Development and Umbrella Organization portions of the paper.

Trying to determine either the budgets of, or donations to, excluded public benefit organizations is very difficult, because the organizations excluded differ so much in kind. The 1997 NSGVP figures set out below indicate the relative size of donations made to some categories of organizations that commonly are refused charitable status owing to their failure to meet the public benefit test. Self-help and like organizations drew about \$22 million in donations.<sup>135</sup> Environmental groups received about another \$7 million.<sup>136</sup> Canadian community economic development groups got about \$8.5 million.<sup>137</sup> Advocacy groups drew about \$19 million.<sup>138</sup> International organizations working on human rights, promoting peace and cultural exchanges received about \$7 million.<sup>139</sup> Employment training agencies, many of whom would already qualify, received just over one million.<sup>140</sup> Organizations focussing on promotion and support of volunteering got

just over one hundred thousand.<sup>141</sup> There is some overlap of the groups included above with excluded organizations identified in other categories elsewhere in this paper.

Taking the \$62.6 million found by totalling the amount above, and applying the average federal refund rate of 27%, the resulting tax expenditure is about \$18 million.

Reform proposals:

- a. **Entrench a definition of ‘sizeable portion of the community’ in legislation or regulations for purposes of assessing fourth head charities**
- b. **Create a *prima facie* assumption of fourth head charitability for particular activities generally or for particular activities as carried on by particular identifiable groups, rebuttable by CCRA on public policy or other specified grounds**
- c. **Entrench clear criteria for distinguishing between self-help and self-promotion groups in legislation or regulations**
- d. **Provide better training in *Charter* application for CCRA assessors**
- e. **Apply the elements of the definition that are fixed in legislation or regulations universally across *Pemsel* categories**

## **Umbrella Organizations**

CCP research disclosed that organizations whose mandate was to support or coordinate groups within a segment of the voluntary sector were often precluded from obtaining charitable status either because their mandate did not fall within the definition of charity or because they provided some of their services to non-qualified donees. As well, some of these organizations were disqualified because their work only indirectly furthered purposes, which if they had been accomplished directly would have been charitable.

The importance of funding umbrella organizations has grown markedly both with the rise of globalization and the exponential increase in the availability of information through the Internet and other sources. To effect meaningful change, voluntary organizations often must now address issues across jurisdictions. Given the scarce resources of many groups in the sector, the only feasible way to do so is through coordinated actions with similar organizations.

Charitable organizations must now also bring a degree of sophistication in management and analysis of information, never required in the past, to their work. In an environment featuring ready access to often contradictory data, simplistic solutions that are not founded on sound and full analysis of the relevant issues have a short shelf-life. One of the principal benefits of umbrella organizations is that they can facilitate – through collation of information, sharing of experience, and training programmes – more informed and effective responses to multi-faceted problems.

Financial stresses on umbrella organizations have increased – ironically, concurrently with the growth of globalization and the mushrooming of information – with moves by many governments to reduce their grants or other funding as a result of the adoption of more conservative fiscal policies. In the face of these tighter restraints on government spending, funding of umbrella organizations is subject to threat both as part of overall government efforts to reduce expenditures and also as a result of efforts to shift scarce public sector resources to frontline and service delivery activities.<sup>142</sup> This has increased the dependence of such organizations on funding from other sources.

The importance of the work done by these organizations and the funding stresses they face argue for a more nuanced approach in the determination of whether they qualify for registration as charities.<sup>143</sup> A better balance can be struck between facilitating the work of such organizations and protecting the public's interest in not having charitable dollars used for non-charitable purposes or activities.

Some statutory reform of this aspect of the definition of charity occurred with the introduction of *ITA* provisions allowing for registration of national amateur sports associations and national arts organizations. The question of Registered Canadian Amateur Athletic Associations (RCAAAs) is dealt with in the Sports and Recreation section of this paper. Registered National Arts Service Organizations (NASOs) are bodies that are designated by Heritage Canada as national arts service organizations, whose only purpose and function is the promotion of arts in Canada on a nation-wide

basis, that reside and were formed or created in Canada, and that have applied for and been granted CCRA registration.

Although this provision was added to the *ITA* to provide scope for qualification of umbrella arts groups, anecdotal evidence suggests that the category has been narrowly interpreted by CCRA and that far fewer NASOs than were originally anticipated have actually been registered.<sup>144</sup> Particularly noteworthy is the fact that some Quebec-based francophone umbrella arts organizations have not been registered.<sup>145</sup> It is also worth noting that national arts organizations mandated to serve a particular ethnic community have historically had difficulty being registered.<sup>146</sup> As is apparent with interpretation of other aspects of the definition, whether common law or statutory, a focus on strict compliance routinely trumps efforts to enhance the efficacy of the voluntary sector.

Three possible changes are suggested that would allow more opportunity for umbrella organizations to qualify for registration as a charity. Firstly, CCRA ought to apply – specifically, but not exclusively, in its assessment of umbrella organizations – the broader definition of education set out by Justice Iacobucci in *Vancouver Society*. This would render much of the training and facilitation work done by umbrella organizations within the definition. Coupled with adoption of a more nuanced approach to advocacy/political activity as discussed elsewhere in this paper, this would allow much more scope for umbrella organizations to qualify without radically altering the definition. It is reiterated that, even without change as to the nature of acceptable advocacy/political activity: 1) more open-minded and consistent application of common law as articulated in *Vancouver*

*Society*, and/or 2) tolerance of such work as an ancillary and incidental organizational purpose or as coming within the *ITA* exemption provisions, would allow many umbrella organizations to qualify.

Second, Arthur Drache has suggested that the restriction that requires umbrella organizations to use all their resources to benefit qualified donees be eased somewhat. He suggests that where a few of the umbrella organization's members are not so qualified, but where substantially all – i.e., more than ninety percent – are qualified, the umbrella organization be eligible for registration.<sup>147</sup> Again, this would allow some currently non-qualifying organizations to register. This rule was eventually applied in the late 1990s to a volunteer centre that filed a challenge to CCRA's initial refusal to register them. CCRA relented and registered the volunteer centre, rather than risk losing the case and creating a binding precedent.<sup>148</sup> A broader exemption allowing more non-qualified donee members would, of course, allow more umbrella organizations to qualify.

Finally, some of the refused applicants disclosed by CCP research were denied registration because they were assisting in accomplishing an otherwise charitable purpose, but at one remove. Typically, such groups would address themselves to the conditions or environment in which charitable work was carried out or would support the needs of those providing the charitable service.

Owing to scarce funding, particularly as a result of government cutbacks in the last decade, the infrastructure for delivery of some charitable activity has deteriorated

considerably. Community groups have begun to be formed to deal with or respond to particular instances of this. The activities of such groups typically involve research and providing the public and government with information about the situation. In some cases, the organizations may be involved in providing services or support to individuals who are employed or who volunteer for a charity.

As to research and information provision, it is submitted that such work should be permissible as fostering public awareness – for the reasons discussed in the advocacy/political activity section of the paper. Where these public awareness campaigns are undertaken to bring attention to the issues arising in the delivery of charitable work, there is even further reason to permit them. Indeed, even if public awareness work is generally considered unacceptable, it is consistent with Justice Iacobucci's finding in *Vancouver Society* that such work should be considered charitable where it indirectly supports purposes or activities that fall within the common law definition of charity. It need only be characterized as an incidental and ancillary purpose supporting an overarching charitable purpose.

As to the question of indirectly supporting charitable work through assisting or facilitating the people who actually deliver the work, it is suggested that such support should be considered charitable provided that it meet the professional and not the personal needs of the workers. Thus, it would not be possible to sponsor, for example, social activities – i.e., mutual benefit activities – under the guise of indirectly supporting a particular charitable work. It would, however, be possible to enhance the capacity or

ability of the frontline workers to do their jobs. Again, this work can be characterized as an incidental and ancillary purpose in the service of a broader charitable purpose.

Reform proposals:

- a. Create more ‘deemed charity’ categories**
- b. Foster more consistent and open-minded application of the existing common law and statutory regime with respect to umbrella organizations**
- c. Allow scope for some assistance to non-qualified donees by providing for registration of organizations that directly support or assist other organizations, substantially all (i.e., 90% or more) of which are qualified donees**
- d. Allow registration where the applicant assists indirectly in the fulfillment of a charitable purpose**

## **Community Economic Development**

CCRA published guidelines for charitable registration applicants seeking to qualify as community development organizations in 1999.<sup>149</sup> These guidelines set out a reasonably comprehensive framework that provides insight for applicants into the principles and rationale behind CCRA decisions dealing with community economic development entities. However, refused applicants disclosed by CCP research and anecdotal evidence suggest that CCRA's interpretation of applications is sometimes at odds with these guidelines, or – in the most generous reading – construes them very narrowly.

For example, the guidelines state that CCRA does not recognize stores selling goods produced by the poor as charitable. There is scope for them to be approved “as ancillary and incidental to a charitable program”<sup>150</sup>, but within the limitation that this mechanism is available only to charities working to alleviate the extreme poverty found in certain third-world countries. “Extreme poverty” is not defined and which certain “third-world countries” are not specified.

Our research disclosed a community-based organization that sought to create a market for products from the developing world through certification and promotion of these products. CCRA's response was to characterize the certification as giving rise to a private benefit for the retailers that precluded charitable qualification for the organization. The guidelines state that CCRA's policy is to consider community economic development activities non-charitable where “the private benefit to the businesses concerned outweighs the public benefit”.<sup>151</sup> However, this test is not alluded to in the

Administrative Fairness Letter sent to the organization. Rather, it was presumed that the private benefit in this case will be more than incidental.

CCRA further argued that the certification activity constituted an unrelated business, which was non-charitable. This seems at odds with CCRA's policy only to recognize alleviation of poverty through sale of goods produced by the poor through a broader charitable program, rather than by considering the retailing itself charitable. It is worth noting that in both the United Kingdom and the United States the sister organizations of this applicant are recognized as charities.

CCRA's interpretations in the above case accord with its approach to an applicant that focussed on alleviating poverty within a Canadian community. Again, a minor part of the organization's work was characterized as creating a private benefit for commercial retailers. While the letter acknowledged that promotion of a type of industry was permissible if there was a benefit to the general public, it stated that any private benefit to individual retailers precluded qualification as a charity.

This is a different test from weighing the private benefit that occurs against the public benefit of the work. Using the test applied in this case would argue that a large hospital or university conducting research which gives rise to an incidental or tangential benefit to an individual corporation rather than to an industry as a whole places its charitable status at risk, regardless of how marginal the research is within the institution's mandate and regardless of how significant the benefit is that accrues to the particular company. This is

not the way CCRA administers the law with respect to such large institutions. In fact, guidelines on related businesses contained in the Agency's training materials state:

It is the responsibility of universities and other charitable institutions performing commercially sponsored research and development work to ensure that their resources are being devoted to public, charitable purposes and not private benefit. Whether public or private interests predominate in a collaborative arrangement must be weighed on the basis of the facts in a particular circumstance.<sup>152</sup>

It is inconsistent and unfair to hold small applicant organizations to a different standard than that applied to large institutions.

In determining whether commercial activity constitutes a business related to an applicant's charitable purposes, CCRA examines the nexus between the business activity and the charitable purpose upon which the registration was, or is to be, founded; and, whether the business activity remains a means to an end rather than an end in itself.

Although several tests are set out in the training materials, qualification for charitable registration appears to turn more on whether the subject activity fits within the examples enumerated under each test than upon application of the tests.<sup>153</sup> Again, it seems the case that if any degree of creativity is required to bring an applicant within the guidelines, it is easier to refuse the application.

A better approach would be to first determine that any private benefit accruing from the activity is proportionate to the public benefit achieved, and then evaluate whether there is sufficient nexus between the charitable purpose and the business activity and whether the activity has become an end rather than a means based on its scope and outcome.

Businesses operated under the auspices of charities are criticized as competing against

for-profit enterprises at an unfair advantage. This unfair advantage can be justified either because the scope of the business activity is small, because it serves the needs of a disadvantaged group, or because it arises incidentally from the primary charitable activity of the applicant. Whatever the justification, the merit of this advantage being available is best determined by looking at the proposed scope and outcome of the activity, rather than by trying to fit it into preconceived categories. If this approach were used, it would also become easier to quantify the tests to ensure more consistent assessment.

The 1997 NSGVP figures indicate donations to Canadian economic, social and community development work of approximately 8.5 million dollars.<sup>154</sup> Additionally, programmes focussing on social and economic development abroad raise about 70 million dollars annually.<sup>155</sup> Research indicates that donations currently make up a small portion of the budget of many Canadian community economic development groups, with most funding coming from other sources.

Taking the total of \$78.5 million identified above, and applying the 27% average federal tax benefit, the approximate federal tax expenditure associated with recognizing these groups would be \$21 million.

Reform proposals:

- a. **Entrench in legislation or regulations a definition for “extreme poverty”, and specify the method of determining which countries meet this definition**

- b. Entrench in legislation or regulations a test for weighing public benefit against private benefit, and/or provide an exemption to allow a degree of incidental or tangential private benefit where significant public benefit can be demonstrated from the undertaking**
- c. Explicitly allow incidental/ancillary private benefit or benefit to non-charitable beneficiaries if work is primarily in aid of a disadvantaged group (e.g., incidental/ancillary benefit to non-poor)**
- d. Determine whether commercial activities constitute a related business of an applicant based on the scope and outcome of the activity**

## **Community Broadcasting**

CCP Research disclosed striking inconsistency in the CCRA's assessment of community broadcasting applicants for registration. Qualification for registration of such organizations appears to turn more on when the application was made than on substantive differences in the purposes or activities of the applicant. Among the more frequent grounds for refusing applicants are that the organization's purposes and activities do not fall of within the four heads of charity, and that the organization is focussed on serving the needs of its members rather than those of the public-at-large.

CCRA does not acknowledge the application of *Native Communication Society* to non-commercial broadcasting to non-native communities. This is a striking example of the Agency's narrow interpretation of case law. The validity of this interpretation has never been litigated. Accordingly, the validity of the view that non-profit community broadcasting does not fall within the four heads of charity is at very least suspect.

As well, the concern with member focus again raises the issue of potentially discriminatory application of the law. The need for clarification of this aspect of the definition has been dealt with in the Public Benefit section of the paper; reform options related to discriminatory practice are set out there.

Non-commercial broadcasting in Canada is regulated under the Canadian Radio Television and Telecommunications Commission (CRTC). The CRTC has established various categories for licensing types of broadcasters. In radio, non-commercial radio

categories include campus, community, non-profit, as well as native stations. Some of these categories are sub-divided according to whether the licensed station is the sole broadcaster in the community.<sup>156</sup>

The licence category determines the programme guidelines that the licensee must meet and the amount of advertising that is permitted on the station. There is some convergence between the categories. For example, a CRTC press release states:

The Commission believes campus radio plays an important role in the various communities it serves, and that it adds diversity to the broadcast system by providing alternative programming. Campus stations broadcast specialized music shows featuring different styles of music and spoken word programmes on topics not generally addressed by mainstream media.<sup>157</sup>

Whether this distinctive mandate should afford them charitable status in the same way that some fine arts groups, which contribute to non-mainstream culture, are considered charitable is arguable. No submission is made here either for or against such bodies qualifying for registration.

It is suggested, however, that as these entities are all subject to the same CRTC guidelines, charitability should be determined on the basis of the guidelines. This would prevent stations which are mandated to do the same thing being able to treat their donors differently. Currently, a station that has qualified as charitable is able to mount on-air fundraising campaigns for which donors can receive tax receipts; it is also able to offer tax receipts to any foundation funders it can identify. Another station, which has been denied registration even though it has a parallel mandate, is not able to compete for donors on the same basis.

CRTC figures show 1997 total revenues for campus radio stations of around 3.5 million dollars.<sup>158</sup> Of this, around \$500,000 was generated through advertising. Taking the net \$3 million and applying the average federal refund rate of 27% yields a potential tax expenditure of just over .75 million dollars.

Reform proposal:

- a. Determine the charitability of non-commercial broadcasters based on the CRTC programming and advertising criteria that applicants must meet in order to be licensed**

## **Sports & Recreation**

Historically, sport was only recognized as charitable as an adjunct to otherwise charitable purposes. So, while amateur or professional sports organizations operating independently did not typically qualify, there was scope for recognition of the same type of activities carried on under the auspices, for example, of an educational institution. As independent organizations, sports groups were apt to fall afoul of either or both of two criteria for charity. First, it is arguable whether they can be brought within the ambit of the common law definition – though the case law in this area is mixed, and in cases such as organizations focussing on disabled athletes they may qualify owing to characteristics that are not specific to their sports mandate. Secondly, sports organizations are often member-focussed, rather than concerned with serving a broader public purpose.

In Canada, this traditional approach has been altered by legislation. The *ITA* now includes provisions that contemplate recognition of national amateur athletic associations (RCAAs) as charitable.<sup>159</sup> To qualify, an organization must have “as its primary purpose and its primary function, the promotion of amateur athletics in Canada on a nation-wide basis.”<sup>160</sup> For tax purposes, organizations qualifying under these provisions are treated the same as entities meeting the common law definition.

The scope of provisions covering RCAAs was clarified in 1998 with the Federal Court of Appeal holding in *Maccabi v. MNR*<sup>161</sup> that an entity operating on a nation-wide basis, but restricting its focus to members of a particular ethnic or religious group, met the definition.

A further evolution of the common-law definition of charity with respect to sport was, arguably, wrought by the case of *Re Laidlaw Foundation*.<sup>162</sup> This case arose in the context of a challenge mounted by the Public Trustee of Ontario to foundation payments made to several organizations mandated to promote amateur sport. As a charitable foundation, Laidlaw was bound to fund only groups that qualified as charitable, and it was the Trustee's submission that the recipient organizations did not meet the common law definition. Dymond, Surr. Ct. J. found the organizations to fall within the definition. Since the litigation was initiated under Ontario's provincial legislation governing charities, it was not within the jurisdiction of the Federal Court, and the case was originally heard in the Surrogate Court. However, the holding was upheld on appeal to the Divisional Court. The OLRC Report on the Law of Charities termed this "a salutary development of the Law."<sup>163</sup>

In his decision in *Volgograd Committee v. Minister of National Revenue*, Justice Stone characterized *Re Laidlaw* as having turned on a more liberal interpretation of the definition of charity stemming from Lord MacNaghten's definition having been adopted in the *Charities Accounting Act*.<sup>164</sup> As a statutory provision it was not subject to the stricter interpretation of a common law definition. This distinction creates scope for the organizations to be charitable under the *Charities Accounting Act* without necessarily being charitable under the *ITA*. However, it is argued here that as the matter was not litigated before the Federal Court of Appeal it remains open to that court to find the

subject organization or like organization eligible for charitable registration within the narrower definition used for *ITA* purposes.

CCRA does not recognize this case as a precedent<sup>165</sup> on the basis of Justice Stone's comment. CCP research disclosed amateur sports bodies that had unsuccessfully sought registration.

The Agency does, however, recognize the charitability of certain recreational organizations. CCRA's training materials reference British legislation in this area, stating:

In England and Wales, recreational organizations are charitable by virtue of the Recreational Charities Act 1958. Organizations which provide community recreational facilities are viewed by the Department [now Agency] as being charitable under Lord Macnaghten's fourth head. Thus organizations providing community halls, arenas, swimming pools and playing fields for use by all inhabitants of a locality are registered as charities.<sup>166</sup>

This reading is somewhat narrower than the British *Act*, which explicitly provides charitable registration of such bodies, notwithstanding provisions for potential limitation of the use of such facilities to disadvantaged groups or females.<sup>167</sup> Although the genesis of CCRA's recognition of recreational organizations was apparently not related to the British legislation, the Agency's practice again reveals a more conservative approach.

CCP research disclosed a number of instances where applicant organizations in Canada were denied registration or had their registration disputed because they were mandated to serve specific cultural communities.

The narrowness of CCRA's interpretation of qualifying sports and recreation groups is also shown by the Agency's refusal to register some bodies that are indirectly related to the promotion of sport, multi-sport groups and grassroots organizations. (Note: the question of recognition of organizations fulfilling charitable purposes indirectly is dealt with in the discussion in the Umbrella Organizations section of the paper.) A 1999 keyword search of CCRA's registration tracking database reveals a ratio of approvals to applications for organizations with specific sports in their name well below the overall approval rate for that year. For example, of organizations with the word hockey in their names only 28 of 419 were classified registered, with 354 pending, 7 revoked, 9 reinstated, and 6 annulled. Of organizations with the word soccer in their name only 4 of 143 were classified as registered, 127 as pending, 2 as revoked, 4 reinstated and none annulled.<sup>168</sup> (Note: Under the search protocol, figures in listed categories did not necessarily equal exactly the number of the word match count.)

The economic and cultural importance of amateur and professional sport and the merit of federal government promotion and funding of amateur athletics were thoroughly detailed in the 1998 Parliamentary Committee report *Sport in Canada: Leadership, Partnership and Accountability; Everybody's Business*. It cited statistics showing more than 78% of Canadians participate in sport as coaches, players or spectators including 9.6 million Canadians who regularly play some kind of organized sports.<sup>169</sup> It also noted that sports and recreation account for 18% of all volunteers in Canada.<sup>170</sup>

The report reviewed the financing of amateur athletics in Canada, and made specific recommendations on improving funding of high calibre athletes and core funding for amateur sports organizations. It suggested examining the creation of a non-refundable child sport tax credit as well as a credit targetted at amateur sport coaching, officiating and first aid courses.<sup>171</sup> It also called for enhanced deductability for business sponsorship of amateur sport for a limited time period.<sup>172</sup>

The Committee recommended that eligibility to issue charitable tax receipts be extended to provincial and territorial level organizations.<sup>173</sup> It estimated that the cost of this measure would match the cost of charitable tax deductions by national sports organizations. In 1995-96, the 99 RCAAAs issued official receipts for approximately \$14.6 million.<sup>174</sup> This figure compares to approximately \$75 million in donations to sports and recreation organizations identified in the 1997 NSGVP survey.<sup>175</sup> Even if the entire \$60 million of non-charitable donations to sports and recreational organizations were to be ‘deemed’ charitable, the cost of the federal tax expenditure – based on the average federal tax benefit rate of 27% – would be only about \$16 million.

The Committee did not specifically address the question of broadening the definition of charity to increase the number of local eligible organizations. It did, however, cite a general need to enhance federal funding. A recommendation was made to improve funding of local sports facilities.<sup>176</sup> More generally, it also recommended: “the federal government should provide a substantial federal commitment to and support for the

future of sport in Canada over the long term, in keeping with its current and potential benefits to Canada.”<sup>177</sup>

In Great Britain, the Goodman Report supported the recognition of sports as charitable as well, if a sufficient segment of the population was served and if it had the requisite altruistic character.<sup>178</sup>

Reform proposals :

- a. Create new, or widen existing, deemed charity categories permitting registration of provincial and local sports organizations**
- b. Entrench amateur sports related activity as charitable**
- c. Entrench community recreation activity as charitable, allowing scope for restricting facilities to disadvantaged groups**

## Endnotes

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- <sup>1</sup> D. Waters, *Law of Trusts in Canada*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1985) p. 633.
- <sup>2</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92 (7), reprinted in R.S.C. 1985, App. II, No. 5, s. 92(7).
- <sup>3</sup> Established under the *Public Guardian and Trustee Act*, R.S.O., 1990, c. P.51.
- <sup>4</sup> *Charitable Fund-raising Act*, S.A. 2000, c. C.4-5.
- <sup>5</sup> H. Picarda, *The Law and Practice Relating to Charities*, 3<sup>rd</sup> ed. (London: Butterworths, 1999) p. 553.
- <sup>6</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92 (7), reprinted in R.S.C. 1985, App. II, No. 5, s. 91(3).
- <sup>7</sup> Formerly Revenue Canada.
- <sup>8</sup> R.S.C. 1985, c.1, as amended [hereinafter *ITA*].
- <sup>9</sup> *Ibid.*, ss. 172(3), 180.
- <sup>10</sup> This analysis was brought to the attention of the author in a July 27, 2001 letter from Wolfe Goodman, Q.C.
- <sup>11</sup> Hall, M., *et al*, *Caring Canadians, Involved Canadians: Highlights from the 1997 National Survey of Giving, Volunteering and Participating*, (Ottawa: Statistics Canada, 1998) p. 23.
- <sup>12</sup> CCRA Mission Statement as published, December 2000, at [www.ccradrc.gc.ca](http://www.ccradrc.gc.ca).
- <sup>13</sup> 43 Eliz. I, c. 4, often referred to as the *Statute of Elizabeth*.
- <sup>14</sup> See N. Brooks, *Charities: The Legal Framework*, (Ottawa: Policy Coordination Directorate, 1983) [hereinafter Brooks] pp. 15-16 for a discussion of the origin of the four categories.
- <sup>15</sup> *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*, [1891] A.C. 531 (H.L.) 583.
- <sup>16</sup> See, for example, *Native Communications Society of B.C. v. Canada (M.N.R.)*, [1986] 3 F.C. 471 (F.C.A.) at pp. 479-480.
- <sup>17</sup> [1996] 3 F.C. 880.
- <sup>18</sup> This was noted as least as far back as 1953, G. Fridman, “Charities and Public Benefit”, 31 Can. Bar Rev. 537, at 541, remarking that:
- Much has depended upon the outlook of the judges and the mental atmosphere of the time. Consequently the decisions are not only perplexing by their multitude but involve unwelcome implications.
- And later, at 541:
- Any rule or principle of law that makes the destination, control or taxation of large sums of money depend on the whims and personalities of judges with a wide discretion as to interpretation, scarcely affected by authority or principle, seems to run counter to the whole idea of law and jurisprudence.
- <sup>19</sup> [1999] 1 S.C.R. 10 [hereinafter *Vancouver Society*].
- <sup>20</sup> *Ibid.* para. 146.
- <sup>21</sup> See Report of the Joint Tables, *Working Together – A Government of Canada/Voluntary Sector Initiative*, (Ottawa, August 1999) p. 19 for a brief history of the evolution of the voluntary sector in Canada society over the past 100 or so years. See also the comments on the need for reform of laws dealing with voluntary organizations in Final Report of the Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector*, (Ottawa, February 1999) [hereinafter *Broadbent Report*] pp. 73-76.
- <sup>22</sup> *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, (London: HMSO, 1952) [hereinafter *Nathan Committee Report*] p. 34.
- <sup>23</sup> *Ibid.* p. 36.
- <sup>24</sup> Brooks, *supra* note 14, p. 29.
- <sup>25</sup> 8 and 9 Eliz., c. 58.
- <sup>26</sup> *Ibid.* pp. 31-32.
- <sup>27</sup> *Charity Law and Voluntary Organizations: Report of the Goodman Committee*, (London: Bedford Square Press, 1976) [hereinafter *Goodman Report*].

- <sup>28</sup> P.H. Pettit, *Equity and the Law of Trusts*, 4<sup>th</sup> ed. (London: Butterworths, 1979), p. 172 cited in Brooks, p. 38.
- <sup>29</sup> Report of the Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action into the 21<sup>st</sup> Century*, (London: NCVO, 1996) p. 82.
- <sup>30</sup> Canada, *Royal Commission on Taxation*, (Ottawa: Queen's Printer, 1966), v. 4, p. 132.
- <sup>31</sup> *Ibid.*, "Summary of Recommendations"
- <sup>32</sup> Brooks, *supra* note 14.
- <sup>33</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, (Toronto: OLRC, 1996) [hereinafter *OLRC Report*] v. 1, p. 145.
- <sup>34</sup> *Ibid.*, p. 165.
- <sup>35</sup> A. Drache, with K. Boyle, *Charities, Public Benefit and the Canadian Income Tax System: A Proposal for Reform*, (Ottawa, 1998) [hereinafter Drache].
- <sup>36</sup> L.R.O. 1989, c. 243.
- <sup>37</sup> A copy of this letter is on file at the Canadian Centre for Philanthropy.
- <sup>38</sup> *Broadbent Report*, pp. 53-54.
- <sup>39</sup> E.B. Bromley, "Answering the Broadbent Question: The Case for a Common Law Definition of Charity", (Calgary, 1999).
- <sup>40</sup> P. Monahan with E. Roth, *Federal Regulation of Charities*, (Toronto: York University, 2000) [hereinafter Monahan], p. 63.
- <sup>41</sup> *Ibid.*, p. 62.
- <sup>42</sup> As published on the Scottish Charity Law Review Commission website, at [www.charityreview.com](http://www.charityreview.com), at December 2000.
- <sup>43</sup> The full report and an executive summary are available, as of May 2001, on the website.
- <sup>44</sup> Press Release "Inquiry into Charitable and Related Organizations" as published on the Prime Minister of Australia's website, at [www.pm.gov.au](http://www.pm.gov.au), November 2000.
- <sup>45</sup> News story "Shake up for Charities" as published on the *Independent* Newspaper website, at [www.iol.co.za/html/frame\\_search.php](http://www.iol.co.za/html/frame_search.php), December 2000.
- <sup>46</sup> The discussion paper "Tax and Charities" is available, as of June 2001, on the New Zealand government's tax department website at [www.taxpolicy.ird.govt.nz](http://www.taxpolicy.ird.govt.nz).
- <sup>47</sup> Canadian Centre for Philanthropy "Federal Budget 2001 Submission to the House of Commons Standing Committee on Finance", (August 2000). On file at the Centre.
- <sup>48</sup> Waters, *supra* note 1, p. 550.
- <sup>49</sup> CCRA figures for Disposition of Charitable Status Applications between 1992-99, as cited in Monahan, *supra* note 40, p. 12, are as follows:

<u>Year</u>	<u>Applications</u>	<u>Approvals</u>	<u>Percentage Approved</u>
1992-1993	3,900	3,300	84.6
1993-1994	4,400	3,350	79.5
1994-1995	3,900	3,300	84.6
1995-1996	5,000	4,500	90.0
1996-1997	4,300	2,800	65.0
1997-1998	4,800	3,000	62.5
1998-1999	4,100	2,750	67.0
<u>Totals</u>			
1992-1999	30,400	23,000	75.6

<sup>50</sup> Readers seeking further information on details of any of the examples set out in this paper should contact the Public Affairs staff of the Canadian Centre for Philanthropy. Absent permission of the subject, the Centre will not disclose the identity of participants or organizations involved in the research, but will endeavour to provide clarifications or supplementary information if it is possible to do so without compromising identities.

<sup>51</sup> 1999 CCRA statistics show that only 75% of AFL generate a response, and another 5% of organizations requiring further research or not having fully completed their form do not follow up. Thus approximately 30% of the non-approvals are attributable to organizations not being able to deal with the registration process.

<sup>52</sup> Information provided to the Centre by CCRA in June 2001. On file at the Centre.

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<sup>53</sup> Paper presented as part of a Law Society of Upper Canada Continuing Legal Education Program, November 1998.

<sup>54</sup> S. 241 (1). *ITA* section 241 (3.2) sets out certain exceptions relating to public information contained in filings provided by charities to CCRA.

<sup>55</sup> CCRA Training Materials, “What is a Registered Charity?”, (Ottawa, 1997), p. 32.

<sup>56</sup> CCRA Training Materials, “Research/Reference Material Course”, (Ottawa: October 1998), pp. 55-61

<sup>57</sup> *Ibid.*, p. 56.

<sup>58</sup> Prepared for the Joint Table on Improving the Regulatory Framework in 1999. On file at the Centre.

<sup>59</sup> See *Waters*, *supra* note 1, pp. 557-562 for a detailed discussion of the public benefit requirement where an applicant's purpose falls under the Relief of Poverty head.

<sup>60</sup> *Supra*, note 19, para 146.

<sup>61</sup> *D'Aguiar v. Guyana Commissioner of Inland Revenue*, [1970] T.R. 31 affirmed by Justice Iacobucci at para. 177 of *Vancouver Society*, *supra* note 19.

<sup>62</sup> Though not stated explicitly in CCRA documentation, this inference can be drawn from a close reading of CCRA Information Circular 87-1, *Registered Charities – Ancillary and Incidental Political Activities*, para. 9. See also K. Webb, *Cinderella's Slippers? The Role of Charitable Tax Status in Financing Canadian Interest Groups*, (Vancouver: SFU-UBC Centre for Study of Government and Business, 2000) [hereinafter Webb], pp. 37-41.

<sup>63</sup> *Vancouver Society*, *supra* note 19, para. 191.

<sup>64</sup> *Ibid.*, para. 192.

<sup>65</sup> CCRA Brochure RC 4108(E) 1204 “Registered Charities and the *Income Tax Act*”, p. 18.

<sup>66</sup> *Ibid.*, para. 200.

<sup>67</sup> *Ibid.*, para. 37.

<sup>68</sup> *Ibid.*, para. 49.

<sup>69</sup> E. Zweibel, “A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes: A Comment on *Native Communications of B.C. V. M.N.R.*” (1987), 26 E.T.R. 41 cited in Phillips, J., “The Federal Court of Appeal and the Legal Meaning of Charity: A Review and a Critique” (Toronto, 1999), p. 15.

<sup>70</sup> Pp. 34-35.

<sup>71</sup> This is reflected in CCRA’s Training Materials, “What is a Registered Charity?”, *supra* note 55, pp. 26-33, which deal with “Systematic Complexities and Difficulties” and “Complexities Associated with the Actual Work”. One particularly noteworthy quotation reads:  
 Reliance on the common law inevitably produces circumstances where the courts have not yet pronounced or where there are conflicting decisions. Grey areas are inevitable, but yet *the Department has no way of obtaining judicial guidance short of turning an organization down and hoping the group has the determination and resources to pursue an appeal.* [Emphasis added]

<sup>72</sup> CCRA Training Materials, “Research/Reference Material Course”, *supra* note 56, p. 11.

<sup>73</sup> *Ibid.*, p. 58, the materials state that examiners are bound by decisions of either the Agency’s Administrative Policy Review Committee or decisions found in the Agency’s Denial Logs.

<sup>74</sup> A review of AFL letters forwarded to the Centre shows that less than 50% reference the statutory provisions dealing with political/advocacy activity by charities.

<sup>75</sup> *Vancouver Society*, *supra* note 19, para. 193, Justice Iacobucci held that use of the word ‘conducive’ in an applicant’s objects or purposes was so broad as to potentially render it not exclusively charitable.

<sup>76</sup> Industry Canada, *Small Business Guide to Federal Incorporation*, (Ottawa, 2001), para. 2.7.

<sup>77</sup> *Broadbent Report*, *supra* note 21, pp. 14-15.

<sup>78</sup> *Supra* note 51.

<sup>79</sup> Approximate annual figure in the late 1990s. Documentation released by CCRA, on file at the Centre.

<sup>80</sup> See *Waters*, *supra* note 1, pp. 603-610.

<sup>81</sup> (1985) 13 D.L.R. 4<sup>th</sup> 491 (Ont. H.C.J.).

<sup>82</sup> CCRA Training Materials, “What is a Registered Charity?”, *supra* note 55, p. 27.

<sup>83</sup> [1988] 3 F.C.R. 251 at 269-270.

<sup>84</sup> *OLRC Report*, *supra* note 33, pp. 4-5.

<sup>85</sup> See Webb, *supra* note 62, p. 27. He writes that in the nineteenth century there were “charities devoted to legislation against slavery, observance of the Lord’s Day, penal reform, promotion of anti-poverty laws, temperance, and animal welfare.”

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- <sup>86</sup> Revenue Canada “Guidelines for Registration of Public Policy Research Institutes (PPRIs) as Charities”, (Ottawa, March 1999), pp. 6-14. On file at the Centre.
- <sup>87</sup> B. April, “Public Policy Institutes as Charities – A Submission to the Department of National Revenue by The Fraser Institute”, (Vancouver, April 1999).
- <sup>88</sup> *Ibid.*, pp. 6-13.
- <sup>89</sup> *Vancouver Society*, *supra* note 19, paras. 166-172.
- <sup>90</sup> *Ibid.*, para. 168.
- <sup>91</sup> E.B. Bromley, “Contemporary Philanthropy – Is the Legal Concept of ‘Charity’ Any Longer Adequate”, in D. Waters, ed., *Equity, Fiduciaries and Trusts 1993*, (Scarborough: Carswell, 1993), p. 59.
- <sup>92</sup> See Webb, *supra* note 62, pp. 89-90. Webb states that there are restrictions on the deductibility of business expenses, and argues that such expenditures are subject to “market discipline” that can act to keep them in check. He states that charities are, in theory, able to issue an unlimited number of donations, whereas business are limited – at least over the long term – to deducting against their total revenues. (In the short term, they can run a loss.) These are valid observations; however, as was noted above there is a qualitative difference between considering a transaction valid and auditing for compliance versus placing prior regulatory restraint on the transaction. It is argued here that many questionable business deductions go unchallenged. In light of this, it is not unreasonable to suggest that charitable deductions could be treated with more equanimity.
- <sup>93</sup> Muttart Foundation & Canadian Centre for Philanthropy, *Talking About Charities*, (Edmonton, 2000), p. 5.
- <sup>94</sup> *Ibid.*
- <sup>95</sup> D. Sharpe, *A Portrait of Canada’s Charities*, (Toronto: CCP, 1998), p. 20.
- <sup>96</sup> G.F.K. Santow, “Charity in its Political Voice – a tinkling cymbal or a sounding brass” (1999) CLP 255 at 261. On file at the Centre.
- <sup>97</sup> *Ibid.*, p. 18.
- <sup>98</sup> *Ibid.*
- <sup>99</sup> See Waters, *supra* note 1, p. 589 for a discussion of *Lewis v. Doerle* (1898) 25 O.A.R. 206.
- <sup>100</sup> Picarda, *supra* note 5, p. 179.
- <sup>101</sup> *Ibid.* pp. 1168-1171.
- <sup>102</sup> CCRA Information Circular IC 87-1, *supra* note 62.
- <sup>103</sup> *Native Communications Society of B.C. v. Canada (M.N.R.)*, [1986] 3 F.C. 471 at 484.
- <sup>104</sup> CCRA Training Materials, “Fundamentals of Charity Law”, (Ottawa, 1997), p. 14 [emphasis added].
- <sup>105</sup> See Drache, *supra* note 35, p. 47.
- <sup>106</sup> CCRA Training Materials, “Fundamentals of Charity Law”, *supra* note 104.
- <sup>107</sup> *Vancouver Society*, *supra* note 19, para. 192.
- <sup>108</sup> See Drache, *supra* note 35, p. 61.
- <sup>109</sup> Webb, *supra* note 62, pp. 117-120.
- <sup>110</sup> Custom tabulation for Centre. For information on the National Survey of Giving, Volunteering and Participating see the website at [www.nsgvp.org](http://www.nsgvp.org).
- <sup>111</sup> *Ibid.*
- <sup>112</sup> *Ibid.*
- <sup>113</sup> *Ibid.*
- <sup>114</sup> On file at the Centre.
- <sup>115</sup> Cited in CCRA Training Materials, “Other Purposes Beneficial to the Community as a Whole”, (Ottawa, undated), p. 2 from M. Chesterman, *Charities, Trusts and Social Welfare*, (London: Weidenfeld and Nicolson, 1979), pp. 163-170. Note that the title of this section of CCRA’s Training Materials seemingly gives short shrift to the ‘sufficiently large (or sizeable) portion of the community’ aspect of the public benefit test.
- <sup>116</sup> Fridman, *supra* note 18, p. 539.
- <sup>117</sup> *Vancouver Society*, *supra* note 19, para. 201.
- <sup>118</sup> *Human Life International in Canada Inc. v. M.N.R.* [1998] 3 F.C. 202 at p. 214.
- <sup>119</sup> *OLRC Report*, *supra* note 33, v. 1, pp. 145-146.
- <sup>120</sup> B. Whitaker, cited in Brooks, *supra* note 14, p. 37.
- <sup>121</sup> Interview with author.

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- <sup>122</sup> This view was expressed by Don McRae, Senior Policy Analyst in the Department of Canadian Heritage, in a letter to the author.
- <sup>123</sup> See D. McRae & F. Mata, “Charitable Giving Among the Foreign-Board in Canada”, (Ottawa, 1999).
- <sup>124</sup> See CCRA Training materials, “What is a Registered Charity?”, *supra* note 55, p. 18.
- <sup>125</sup> CCRA’s argument was that these activities were too culturally specific and were potentially disqualified from being charitable as overly political.
- <sup>126</sup> See *Vancouver Society*, *supra* note 19, paras. 201-203.
- <sup>127</sup> Documentation on file at the Centre.
- <sup>128</sup> *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038.
- <sup>129</sup> *Vancouver Society*, *supra* note 19, para. 208.
- <sup>130</sup> It should be noted that the training materials do note the availability of a half day course for Public Service Managers on the *Canadian Charter of Rights and Freedoms*, CCRA Training Materials, “Employee Handbook” (Ottawa, 1997), p. 66.
- <sup>131</sup> CCRA Training Materials, “Fundamentals of Charity Law”, *supra* note 104, pp. 8-10.
- <sup>132</sup> *Ibid.*, p. 9.
- <sup>133</sup> *Ibid.*
- <sup>134</sup> See, for example, Waters, *supra* note 1, pp. 550-601.
- <sup>135</sup> *Supra* note 110.
- <sup>136</sup> *Ibid.*
- <sup>137</sup> *Ibid.*
- <sup>138</sup> *Ibid.*
- <sup>139</sup> *Ibid.*
- <sup>140</sup> *Ibid.*
- <sup>141</sup> *Ibid.*
- <sup>142</sup> For example, in its April 19<sup>th</sup>, 2001 *Speech from the Throne*, the Ontario Provincial Government stated its intention to “ensure that taxpayers’ dollars intended for programs to help people are not diverted to lobbying and advocacy” (p.5).
- <sup>143</sup> This was acknowledged in the *Broadbent Report*, *supra* note 21, p. 86.
- <sup>144</sup> *Supra* note 122.
- <sup>145</sup> Presumably it is the ‘national’ scope of such organizations that is at issue.
- <sup>146</sup> Author interview with Canadian Conference for the Arts.
- <sup>147</sup> Drache, *supra* note 35, p. 78.
- <sup>148</sup> *Supra* note 122.
- <sup>149</sup> CCRA, *Community Economic Development Programs*, RC4143(E).
- <sup>150</sup> *Ibid.*, pp. 9-10.
- <sup>151</sup> *Ibid.*, p. 15.
- <sup>152</sup> CCRA Training materials, “Related Business Guidelines for Registered Charities”, (Ottawa, 1997), p. 9.
- <sup>153</sup> *Ibid.*, pp. 7-11.
- <sup>154</sup> *Supra* note 110.
- <sup>155</sup> *Ibid.*
- <sup>156</sup> Canadian Radio Television and Telecommunication Commission, “Originating Radio Stations” tabulation obtained by the Centre in 2000. On file at the Centre.
- <sup>157</sup> Canadian Radio Television and Telecommunications Commission Press Release, “CRTC Proposes New Policy and Simpler Rules for Campus Radio”, (Ottawa: February, 1999), p. 1.
- <sup>158</sup> Canadian Radio Television and Telecommunications Commission, “Financial Summary – Campus Radio” (Ottawa, 1999). On file at the Centre.
- <sup>159</sup> S. 248 (1).
- <sup>160</sup> *Ibid.*
- <sup>161</sup> *Maccabi v. M.N.R.*, (30 June 1998), Canada A-587-96 (F.C.A.).
- <sup>162</sup> 13 D.L.R. (4<sup>th</sup>) 491.
- <sup>163</sup> *OLRC Report*, *supra* note 33, v. 1, p. 224.
- <sup>164</sup> [1988] 3 F.C.R. 251 at 269-270.
- <sup>165</sup> CCRA Training Materials, “What is a Registered Charity”, *supra* note 55, p. 27.
- <sup>166</sup> CCRA Training Materials, “Other Purposes Beneficial to the Community as a Whole”, *supra* note 115, p. 3.

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<sup>167</sup> Picarda, *supra* note 5, pp. 138-139.

<sup>168</sup> On file at the Centre.

<sup>169</sup> Parliamentary Committee on Canadian Heritage, *Sport in Canada: Everybody's Business – Leadership, Partnership and Accountability*, (Ottawa, 1998) [hereinafter *Sport in Canada*], p. 1.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*, pp. 40-41.

<sup>172</sup> *Ibid.*, p. 37.

<sup>173</sup> *Ibid.*, pp. 40-41.

<sup>174</sup> *Ibid.*, pp. 33,41

<sup>175</sup> *Supra* note 110.

<sup>176</sup> *Sport in Canada*, *supra* note 169, pp. 37-38.

<sup>177</sup> *Ibid.*, p. 34.

<sup>178</sup> See chapter 3 of *Goodman Report*, *supra* note 27.